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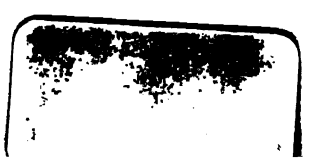

CASES

DECIDED IN

THE COURT OF SESSION,

FROM

NOV. 12. 1830 TO JULY 9. 1831.

REPORTED BY

PATRICK SHAW, ALEX. DUNLOP, MARK NAPIER,
AND J. M. BELL, ESQUIRES, ADVOCATES.

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OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

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Lord Balgray.
Lord Gillies.

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———	Beveridge,	485
——— or Tait and Husband,	Wilson,	680
———	Leith Walk Trustees,	725
Winton,	Gibson and Winton,	662
Wood,	Thomson,	351
Wright and Others,	Logan and Others,	323
———	Gardner's Trustees &c.	721
Wyllie,	Paton's Representatives,	84
Young,	Roberton and Others,	59
———	Cuddie,	500
———'s Trustees,	Scott (for Paisley Bank),	574
——— and Macfarlane,	Marshall,	638
——— and Co.	Thomsons and Others,	920

Defenders.	*Pursuers.*	Page.
A. B.	Christie,	169
——'s Creditors,	A. B.	441
Aberdeen, Ministers of	Gordon's Hospital, Governors of	909
Adam,	Clerk and Others,	705
Adams and Co.	Learmonth and Others,	787
Adamson and Watson,	Darling and Others,	22
———	———	570
Agnew,	Wilson,	357

Defenders.	*Pursuers.*	Page.
Aikman,	Hamilton, Duke of	594
Ainslie's Creditors,	Ainslie,	901
Aitchison and Co.	Calder,	777
Aitken,	Jeffrey,	423
Alexander,	Dunmore, Countess of, &c.	190
———	Cloup and Pellissie,	448
——— and Others,	Brown,	830
Alison and Others,	Grahame,	130
Allan,	Allan or Aitchison,	454
——— and Co.	Blincow's Trustees,	317
———	Lang,	337
———	Allan,	519
———	Blincow's Trustees,	599
Allardyce and Boswell,	Robertson,	580
Allsopp,	Allsopp,	48
Anderson,	Scott,	12
———	——— and Others,	65
———	Hunter,	289
——— Glen, and Easton,	Moir and Mandatories,	744
Andrew,	Fraser,	345
———	———	636
Argyll, Duke of	Macalester and Tutor,	763
Arnot,	Dudgeon,	36
Atkinson,	Mitchelson,	741
Auld and Spouse,	Gibson and Others,	685
Aytoun and Patten,	Linton,	683
B.	A.	398
—	—	760
—	—	805
Balfour,	Lyle and Bow,	22
Bannatyne and Others,	Donaldson and Trustees,	333
Barbour,	Johnstone,	742
Barclay and Others,	Gemmels,	33
Beattie,	Atkinson &c.	534
Bedwell and Yates,	Brown or Smith and Husband,	136
Bell and Cautioners,	Barbour (Underwood's Trustee),	334
———	Black,	486
———	M'Crone,	692
———	Cadell,	873
Berry,	Dundee, Magistrates of, &c.	860
Beveridge,	Wilson,	485
Birtwhistle's Trustees,	M'Ra,	582
Black &c.	Steel,	105
——— and Son,	Harvey, Hall, and Co.	785
Blair,	Blair,	514
Blyth and Co.	Blakemore and Co.	468
Boosies,	Graham,	516
———	———	566
Booth or Black and Husband,	Booths,	406
———	Pentland,	510
Boswell,	Graham's Trustees,	121
Briggs,	Ramage and Co.	281

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——— and Son,	Campbell and Husband,	258
———	Edinburgh, Magistrates of	796
Bruce and Others,	Bruce and Others,	695
Burman,	Lawson,	478
Bute, Marquis of	Campbell and Curator,	848
Caddall's Trustees,	Duguid,	844
Cairns,	Scot,	246
Cameron's Trustees,	Cheyne,	302
Campbell,	Pentland,	164
———	Girdwood and Co.	170
———	Rollo,	260
——— and Arnot,	Forrester or Glass,	350
———	Cowan,	486
———	Sassen,	533
———	———	562
——— and Others,	M'Millan and Others,	551
——— Lord John	Campbell and Tutor ad Litem,	624
——— or Grant,	Renny,	837
Carmichael,	Fraser and Tait,	46
Cassells,	Cadell,	447
Chalmers' Trustees,	Marjoribanks' Trustees,	595
Charles,	Robison,	627
Cheyne and M'Kean,	Brown and Mandatory,	573
Chisholm's Creditors,	Chisholm,	578
Clapperton and Others,	Selkirk, Magistrates of	9
Clark's Trustees,	Ferrie and Fairley,	854
———	Johnston,	308
Clyne,	Manson,	853
———	Sclater and Others,	248
———	Jeffrey,	350
———	Stewart,	383
———	Sclater and Others,	558
Cochrane and Others,	Russel and Ramsay,	304
———'s Trustees,	Richard,	262
———	Hunter,	477
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Colvin and Others,	Stove,	633
Commercial Bank,	Fowlers and Fitzmaurice,	705
Commercial Insurance Co.	Paul (Inglis's Trustee),	842
Cousin &c.	Shand,	126
——— and Others,	———	157
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Crawfurd,	Gavin,	213
Cuddie,	Young,	500
Cumming,	Fife's Trustees, Earl of	336
Cuthbert and Dickson,	Waldie and Lord Corehouse,	122
Cuthbert and Husband,	Turner,	774
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Cuthill and Trustees,	Hamilton,	926
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Defenders.	*Pursuers.*	Page.
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———	Kinniburgh,	153
———	Johnstone,	452
Dingwall, Magistrates of, &c.	Mackenzie and Munro,	761
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Donaldson,	Sanderson and Edington,	74
———'s Trustees,	Donaldsons,	565
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———	Balfour,	676
Drysdale and Campbell,	Henderson,	536
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Dunbar, Magistrates and Town Council of	Roxburghe, Duchess Dowager of, and Others,	669
Dundee Commercial Society,	Batchelor,	549
——— Masters and Seamen of	Dempster,	313
——— Shipping Co.	Flowerdew,	873
Dunlop,	Laidlaw,	579
——— and Spouse,	Ferrier,	837
Dunn,	Stirling and Commissioners,	276
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——— and Others,	Smith,	474
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——— and Others,	Speirs and Others,	659
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——— and Others,	Cook,	429
———	Duncan and Others,	549
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———	Andrew,	595
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———	Fraser,	849
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——— (Gordon's Trustee),	Nisbet,	68
——— &c.	Maitland and Others,	448
——— and Others,	M'Gregor,	483
———	Kirkland and Sharpe,	596
——— and Winton,	Winton,	662
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——— and Waddell,	Jaffray,	416
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——— Lady, and Husband,	Buie,	923
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Grahame,	Spence,	476
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———	——— (for Fife Bank),	693
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———	Gillies and Miller,	257
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——— and Others,	Brown,	578
———	Melrose or Dickson,	902
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——	Flockhart,	873
Learmonth and Others,	Calder and Others,	343
——	Munro and Others,	343
—— and Walker,	Cuninghame and Others,	902
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—— Banking Co.	Armstrong's Assignees,	839
—— Walk Trustees,	Wilson,	725
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——	Kerr,	610
Loch,	Loch's Trustees,	180
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——	Baird,	755
Mackie and Others,	Cameron (for G. F. Cameron),	601
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M'Clymont's Trustee,	M'Lachlan,	57
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—— and Others,	Macdonald, Lord	460
—— and M'Nab,	Muir and Co.	535
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——'s Creditors,	M'Dougall,	926
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—— and Others,	Napier,	655
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———'s Trustees,	Sprot's Trustees,	120
——— or Cullen,	Ewing,	289
———'s Trustees,	M'Rae,	392
———'s Trustee,	M'Tavish,	431
———	Forrester,	465
———'s Trustees,	Mackenzie,	730
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M'Lachlan,	M'Donald,	269
M'Lean,	Binny,	200
——— or Elder,	Elder,	393
———	Miller,	923
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M'Ra,	Stewart,	261
———	Birtwhistle's Trustees,	265
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——— and Others,	Paisley Union Bank,	488
———	Young and Macfarlane,	638
Martinson & Stevenson's Trustee,	M'Dougall's Executor,	12
Maule,	Maule,	876
Maxwell,	M'Intyre and Others,	284
Mein,	Mitchell,	115
———	———	588
Menzies and Others,	Dalzell and Others,	434
Merry,	Mason,	187
———	———	722
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——— junior,	Brownlee,	384
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———	Glasgow, Earl of, and Others,	370
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———	Campbell,	875
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———	Boyd,	260
——— Lord, and Others,	Beattie,	639
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——— and Others,	———	748
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Sclater and Others,	Clyne,	729
———	Ewing,	853
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———	Irving,	645
Scott,	Milne,	308
——— and Others,	Morrice (for Aberdeen Bank),	480
———	Hutcheon,	511
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———	Mansfield, Earl of	780
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———	Brodie,	36
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———	Milligan,	728
Sloane,	Farquhar,	112
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———	Smith,	68
———	Steel,	371
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———	Henderson,	180
———	Govan or Smith and Others,	180
———	Perth, Magistrates of	225
———	Gibson and Mandatory,	525
——— and Others,	Graham and Mandatory,	543
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———	Read,	925
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————	Paterson,	520
———— and Others,	Walker,	516
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———	Watson and Others,	687
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———	Muckarsie,	804
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———	Lockhart and Sons,	134
Williamson and Others,	Taylor,	265
———	Gordon's Trustees,	387
Willison and Others,	Bell and Others,	266
Wilson,	Reid,	84
——— and Son's Trustee,	Kirkland and Sharpe,	596
———	Wilson or Tait and Husband,	680
Wood,	Cheyne,	302
Woodward &c.	Ferrie and Fairley,	854
Young and Lauder,	Ross,	275
Yuille,	Buchanan,	843

ERRATA.

No. 82, p. 153, for "Lord Medwyn," Ordinary, read "Lord Mackenzie."
Page 233, 9th line of report, for "disponees" read "disponers."
Page 498, 15th line from foot, for "Rosebery" read "Roxburghe."
Page 561, 2d line from foot, for "bill" read "note."

*** In the Appendix will be found the Judgments of the HOUSE of LORDS, from February to October 1831, with Notes of the Opinions.

James Macdonald's Decisions.

CASES

DECIDED IN

THE COURT OF SESSION,

WINTER 1830-31.

J. and J. CARRUTHERS, Pursuers.—*D. F. Jeffrey—Henderson.*
JOHN DICKSON, W. S., &c., Defenders.—*Sol.-Gen. Hope—Gillies.*

No. 1.

Nov. 12. 1830.
Carruthers v. Dickson &c.

Ranking and Sale—Right in Security.—Circumstances in which it was held that, in a ranking and sale, a creditor who has obtained a warrant to sell, may proceed with its execution, so long as any part of his debt covered by the warrant remains unpaid.

Nov. 12. 1830.

1st DIVISION.
Lords Meadowbank&Newton.

A ranking and sale of the estate of Hardriggs, Longdyke, and others, was raised in 1770; and John Dickson, W. S., was chosen common agent. An interim decree of sale was pronounced in 1792 as to Hardriggs &c., but the roup was adjourned indefinitely as to Longdyke. The common agent withdrew in 1805, and Mr. William Johnstone, S. S. C., acted in his place without any special appointment. In 1806, a petition was presented, in name of the common agent and others, for a renewal of the warrant of sale of Longdyke; to which objections were lodged by James Carruthers, a creditor on the estate, and heir entitled to take it up, if he could set aside the claims of the petitioners. His objections were repelled by an interlocutor against which he lodged an unsuccessful representation. After the usual preliminary procedure, the judicial roup took place in 1811. At the roup, Carruthers protested that the articles of roup were not conform to the deeds by which he had right to the estate, as they implied that he was an heir of entail, whilst in truth he was entitled to take it up in fee-simple; and he reserved liberty to apply to the Court to have the articles rectified. He then purchased the estates as highest bidder; and having lodged a bond, with caution for the price, decree of sale was pronounced in his favour in 1812, which was extracted, and he entered into possession.

A variety of procedure subsequently occurred, including a remit to a Lord Ordinary, and afterwards to an accountant, for the purpose of

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auditing the common agent's accounts, authorizing a scheme of division, &c. To these measures James Carruthers was a party. They were not brought to a final issue in 1823, when Carruthers, along with his eldest son, brought an action of reduction of the decree of sale of Longdyke pronounced in his favour in 1812. It was directed against John Dickson, W. S.,—the late W. Johnstone, S. S. C.,—and against the others who had petitioned for the renewed warrant of sale in 1806. This action was conjoined with the previous ranking and sale. It did not conclude for reduction of the act and warrant by which Longdyke was ordained to be exposed to sale, nor of the articles of roup, nor of the minute of preference of the purchaser, nor of the recorded bond for the price. Both parties founded on numerous pleas arising from specialties. Besides these, the pursuers maintained that no debts remained due under the ranking and sale in 1806, except that of the pursuer James Carruthers, who opposed the sale, and therefore the proceedings were illegal,—the persons who pursued them being neither true parties to the ranking and sale, nor true creditors; and that at any rate the debts due did not exceed £17, and could not justify the sale of the last lot of an estate as bankrupt which produced £2700. Messrs. Dickson and Johnstone alone appeared; and on the death of the latter, the judicial factor on his estate sisted himself. They pleaded—

1. That the pursuer James Carruthers was barred from this and all his other pleas, on the ground that they were either competent and omitted, or proponed and repelled, as he had been a party to the process of sale.

2. That a large amount of debts remained due, both at 1806, when the petition was presented, and also in 1811, when the estate was sold; that if there were even but a small debt remaining due, it was enough to support the decree of sale; and that all questions regarding the amount of their claims would remain for adjustment under the process of ranking and sale, after they had obtained absolvitor in the reduction; and,

3. That the summons was ineptly laid, as no reductive conclusions were directed against the warrant to sell, the articles of roup, the minute of preference, or the bond for the price; but only against the decree of sale, which could not be cut down while all its grounds and warrants remained entire.

The Lord Ordinary reported the case to the Court, who remitted to an accountant "to report what debts, if any, were due, and affecting this bankrupt estate, at the date of the petition to the Court in 1806, and at the date of the sale in 1811." The accountant having reported the existence of considerable debts at both periods, the Court, by a majority, assoilzied in the reduction, and remitted to the Lord Ordinary to proceed in the ranking and sale, and to hear parties hinc inde, reserving all questions of expenses.

Lords President and Balgray observed, that so long as a single shilling remained due under the original warrant to sell, the creditor could proceed

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with the sale. The warrant here covered the whole universitas of the debtor's heritage, and nothing but full payment could stop its complete execution. The objections to the debts claimed by the defenders were open to discussion in the subsisting process of ranking and sale.

Lord Balgray was understood to add, that the form of the action was inept, as the rescissory conclusions did not strike at the warrant authorizing the sale, nor at the other grounds of the decree, but only against the decree itself.

Lord Craigie admitted the general principle of law as stated by their Lordships, but doubted its application to the facts of this case.

Lord Gillies.—Although the heir, whose estate was sold, happens also to be the purchaser here, we must deal with this reduction precisely as if a stranger had bought under the decree of sale, and the heir were now attempting, after a lapse of years, to reduce his title. If he could not set aside the title of a bonâ fide purchaser, he cannot succeed in this reduction; but if he could do so under the circumstances of this case, I think a decree of sale would be one of the weakest titles. The pleas of the pursuers are barred by the rule of competent and omitted, or proponed and repelled. I am for assoilzieing from the reduction.—His Lordship was also understood to say that James Carruthers had homologated the decree of sale, and to concur in the opinions expressed by the majority of their Lordships.

Pursuers' Authorities.—A. S. July 11. 1794, (3tio.); 2. Bell, p. 268.

Defenders' Authorities.—4. Ersk. 1. 18, and 46; 4. Stair, 1. 46, 47, and 50; Dundas, March 9. 1810, (F. C.); Grahame, May 29. 1821; Rose, June 11. 1828, (ante, VI. 945); Inglis, Jan. 25. 1775, (13336); 1. Bell, 48.

Thomas Ranken, S. S. C.—John Forrester, W. S.—Agents.

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H. C. Rutherfurd, Pursuer.—*Sol.-Gen. Hope—H. J. Robertson.*
Sir John Nisbet's Trustees, Defenders.—*Keay—Cockburn.*

Title to Pursue—Service—Adjudication.—1.—An apparent heir, whose propinquity and apparency are admitted, entitled, in virtue of his apparency alone, without any service, to pursue a reduction of the service and infeftment of a party whom he averred to have been illegally served, in respect of alleged illegitimacy.—2.—Where a party has, on apparency, raised up a tentative title by adjudication on a trust-bond, but on which no charter or infeftment has followed, it is no objection to the title of a subsequent heir apparent to pursue, that he has not obtained a transmission of the adjudication.

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2d Division. Ld. Moncreiff.

The estate of Dean was, in 1749, settled by Sir Alexander Nisbet on the heirs-male of his own body, and of the bodies of his daughters; whom failing, upon Henry Rutherfurd, eldest son of the marriage between his sister Sarah Nisbet and Sir John Rutherfurd of that ilk, and the heirs-male of his body. Sir Alexander left issue two sons,—Sir Henry, who made up titles to his father, but died without issue,—and Sir John, who, on his brother's death, served heir of provision under the investiture

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of the estate of Dean, and was infeft accordingly. Sir John died in 1776, and, in the event of his being held to have left no lawful issue male, the succession opened to the heir-male of the body of Henry Rutherfurd. In 1781, the late Sir John Nisbet, son of the preceding Sir John, (but who, the pursuer of this action alleged, was not a legitimate son,) obtained a special service as heir-male of provision to his father in the estate of Dean, and as such made up titles. In 1790, John Rutherfurd, grandfather of the pursuer, and son and heir of Henry Rutherfurd, granted a trust-bond for £10,000 to John Edgar, his father-in-law, who charged him to enter heir-male of provision in special to the deceased Sir John Nisbet, and thereupon took a decree in an action of adjudication. Having extracted this decree, he raised an action of reduction and declarator against Sir John for setting aside his special service and infeftment on the ground of his alleged illegitimacy, and for having it declared that he had no right to the estate of Dean. In this action a proof was allowed; but the Court ultimately (July 11. 1797) repelled the reasons of reduction, and assoilzied. No further steps were taken during the lifetime of Sir John, who died in 1827, having previously conveyed the estate of Dean to trustees, for purposes to which it is unnecessary to advert. After Sir John's death, the present pursuer, (who was the grandson and nearest heir-male of line of John Rutherfurd already mentioned, and as such, heir of provision under the investiture of the estate of Dean,) presented an appeal to the House of Lords against the judgment in the action at Edgar's instance, praying to be allowed to sist himself as pursuer in that action. This appeal, having been dismissed as incompetent, he raised the present action, setting forth his propinquity, and that he was heir of provision entitled to succeed on the failure of Sir John Nisbet, son of Sir Alexander, without lawful issue male, and concluding for reduction of the service and infeftment of the last Sir John, and of the deeds granted by him in favour of the trustees, on the ground that he was not a legitimate son of his father. The trustees admitted the propinquity as alleged by the pursuer, and that he would have been entitled to succeed as heir of provision to the estate of Dean, had Sir John Nisbet, son of Sir Alexander, died without lawful issue male; but, besides a plea of res judicata founded on the decision in the action with Mr. Edgar, and not yet decided, they pleaded as preliminary defences—

1. The object of this action is to set aside the infeftment of the late Sir John Nisbet, and this is equally true with reference to the service as to the infeftment itself, because the service being the warrant of the infeftment, if it be cut down, the other necessarily falls. Now the strict rule of law is, that, in order to challenge the infeftment of another, the party challenging must himself be infeft. A relaxation of this rule has no doubt been admitted, so as to receive a general service as a sufficient title to pursue reduction of an infeftment; but this was allowed merely

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as a relaxation of the strict rule,[1] and no instance has occurred where a party has been allowed to pursue such action on apparency merely. On the contrary, it has been repeatedly decided that a service is necessary;[2] even in cases like the present, where the jus actionis had never existed in the person of the ancestor to whom it was necessary to serve, but had arisen to the party challenging himself.[3]

2. The intermediate title made up in the person of Mr. Edgar by adjudication on the trust-bond granted by the pursuer's grandfather, and proceeding on a charge to him to enter heir of provision in the estate of Dean, is a complete bar to any title in the person of the pursuer, whether of apparency or by service, so long as the right thus vested in Mr. Edgar remains untransferred. An adjudication on a trust-bond is not only a means of constituting a tentative title in order to pursue, but it is a mode of succession;[4] and a subsequent apparent heir is liable to the plea of res judicata, in respect of a judgment in a question with an adjudger on a trust-bond.[5] Until, therefore, the right vested in Mr. Edgar be in some way transferred to the pursuer, he can have no title to insist in this action.

To this it was answered—

1. A general service may be used either to transmit a right, or as evidence of a certain propinquity and character. Where it is not required to transmit a right, it is not essential, because other proof may answer the purpose, in so far as it is to be used merely in evidence of propinquity. In the present case, the propinquity of the pursuer, and his character of heir-apparent of provision under the investiture of the estate of Dean, is admitted; so that the whole question is, whether a service be necessary to vest him with the right to challenge the last Sir John's service to his father, and his infeftment thereon? Now the true purport of the action is to remove Sir John's service out of the way, so as to leave room for a service by the pursuer. His right, however, to pursue an action for this purpose is personal to himself; and it arises immediately from his character of heir-apparent, and his consequent right to be served in the event of his being able to establish that Sir John was an illegitimate son. It does not depend on a right to be transmitted from any of the former proprietors of the estate, but arises simply from his character of apparency; and this being admitted, there can be no necessity whatever for a service; and indeed to insist on a service in such cases would totally exclude all title to pursue reduction of a previous erroneous service, because a second service cannot be obtained till that which excludes it, and

[1] Kilk. p. 579. [2] Tweedie v. Bell, Jan. 12. 1581, (16079); Laird of Dowhill v. Kinfauns, July 1592, (16081); Mure, Feb. 11. 1635, (16088); Edmonstone, March 16. 1637, (16089.) [3] M'Callum v. Campbell, Feb. 21. 1793, (16135); Cunningham v. Glen, Feb. 27. 1812, (F. C.); Carmichael, Nov. 15. 1810, (F. C.) [4] 3. Stair, 6. 11; 3. Ersk. 8. 172; Hepburn v. Scott, July 25. 1781, (14487.) [5] Crawfurd v. Randall, July 15. 1760, (14066); Gordon v. Ogilvie, Feb. 17. 1780, (14070.)

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is to be the subject of reduction, is set aside. The rule here contended for has always been recognised in reductions on the head of deathbed; and although it is true that some of the decisions quoted for the defenders would seem to throw doubt on it as a general rule, even these recognise a distinction between the case where the right of action was competent to the predecessor to be served to, and where it only emerged to the party challenging, as in the present instance, in which latter case a service has been held not to be necessary.[1] The question may, however, be considered to have been settled by the late decision of the House of Lords in the case of Cochrane v. Ramsay, April 1830, finding that a general service is incompetent where there has been a previous general service in the same character to the common predecessor. In this judgment it was necessarily assumed that a general service is not requisite as a title to pursue, since otherwise no title could in most instances ever be made up. In the present case no service could be expede, because the last Sir John's special service, sought to be reduced, included a general service in the same character; and consequently, while unreduced, it excludes a general service by the pursuer; and, therefore, it seems clear that the pursuer is entitled to insist in this action for setting aside Sir John's service, to the effect that he himself may serve without being first required to do that which in reality it is impossible for him to do.

2. An adjudication on a trust-bond does not preclude the heir himself, who has granted it, from making up titles in the ordinary way;[2] and much less can it affect the right of a subsequent heir apparent.

The Lord Ordinary, on advising Cases, pronounced this interlocutor, adding the subjoined note:*—"In respect it is not denied that the

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[1] Hunter v. Lady Forbes, July 8. 1812, (F. C.) [2] Bellenden v. Ker's Trustees, June 6. 1823, (ante, II. 369, and June 17. 1825, in H. of L., 1. Wilson and Shaw, 381.)

* "It has been held in practice, that before a party can be allowed to insist in a reduction of infeftments, proceeding on the deeds of a former proprietor in the fee, in respect of a title of succession as heir of provision under previous investitures, he must produce at least a general service as heir of provision to the ancestor upon whose death he claims to be heir. But this rule is not of universal operation. In most of the cases in the books, though not in all of them, the grounds of reduction were of the nature mentioned in the pursuer's case, where the right of action was vested in the granters of the deeds themselves, and where the grounds of it, therefore, could only be insisted in by a party who had taken up that right, and assumed a representation of the deceased. The case of deathbed is not of this description, and is admitted to be an exception. The case of reduction by an heir of entail, on the ground of contravention of the tailzie, or by the heir of a marriage-contract, on the ground of the deed being contra fidem tabularum, may probably rest on the jus crediti held to exist in such cases, though the form of the title is merely apparency. In the case of Polmood, the reduction was laid partly on deathbed, but partly also on a clause of return; and while the only title produced was a general service as heir-male and of line (not of provision) to Robert Hunter, a remote ancestor, and not the last infeft under the deed of destination, to whom, it had been found, Adam Hunter could obtain no service on ac-

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pursuer possesses the title of propinquity set forth in the summons, and it is expressly admitted in the defences that, but for the evacuation of the destination libelled on by the trust-deeds called for, the pursuer would have been entitled to succeed to the estate as heir of provision under that destination, and in respect of the special nature of this action of reduction, repels the objection to the pursuer's title, founded on the want of service as heir of provision;—and further finds, that the title is sufficiently set forth in the summons, in so far as it is therein stated that the pursuer, by virtue of the propinquity deduced, is the

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count of a bastardy intervening, it appears to have been held that that general service was only useful as affording prima facie evidence of the pursuer's propinquity, and that he might have insisted in the reduction without any service. The present case is of a very peculiar nature. The last infeft under the procuratory was the granter of the trust-deeds. The reduction is not laid on any ground which ever was competent to him, but on the ground that his own title was funditus bad, in respect that, though served and infeft, he should not have been so, being no heir. It is plainly impossible for the pursuer to serve heir to him, consistently with the nature of his case; neither can he be served heir in special to the preceding heir, because the infeftment of the late Sir John stands in the way. It might, indeed, but for a very late decision, be thought not to be incompetent (though the necessity is much more doubtful) for him to expede a general service to that ancestor, notwithstanding the previous services; and the Lord Ordinary should have thought so. But the House of Lords, by reversing the judgment in the case of Sir A. Cochrane v. Ramsay, have excluded this also, because, as the last Sir John's special service as heir of provision included a general service in the same character, it is now determined that a second general service to the same ancestor is incompetent. In the peculiar state of the present case, therefore, the pursuer never could get a title by service at all, as a title to maintain this action, because he cannot by possibility serve to the last Sir John. Neither could he get a good title by trust-bond; for the charge to enter, which is to stand in place of service, must require him to enter heir to somebody; and if it required him to enter heir of Sir John, the son of Sir Alexander, it would be liable to the same objection with a service to him in the same character, viz. that the title had been already taken up, and vested in another party by general service. If the point, therefore, would have been doubtful before, there seems to be no alternative now, in such a case as this, but to sustain the title of apparency, where the propinquity is admitted or proved. On the cases referred to by the defenders, the Lord Ordinary may observe, that that of Carmichael does not appear to be applicable, the question there being, whether the title on the investiture being quite open, in consequence of the total error in those made up by Sir John Carmichael, Miss Carmichael was not bound to enter fully to James Carmichael before she could challenge the onerous marriage-contract of Sir John; and as she must thereby have incurred a passive title sufficient to support the deed under the act 1695, that question in reality involved the whole merits of the case. Neither is the case of Cunningham v. Glen in point; for if there had been a fee in George Cunningham requiring to be taken up by service, it had not been taken up; and the decision only imports that in such circumstances a general and not a special service was the proper course for founding the right to reduce the standing infeftment. The case of M'Callum v. Campbell is more applicable. But perhaps there is a material difference in this, that the entry in that case had been by precept of clare constat, which has not the same effects with service."

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heir entitled to succeed to the estate of Dean under the procuratory of resignation narrated, in consequence of the death of the late Sir John Nisbet (son of the granter Sir Alexander) without lawful issue, and the failure of the other substitutes;—that the decreet of adjudication said to have been obtained by Mr. John Edgar, proceeding on the trust-bond granted by John Rutherfurd, the pursuer's grandfather, forms no bar to the present action;—therefore repels the first dilatory defence."

The trustees reclaimed, and further contended that the pursuer ought at least to produce a service to his own grandfather, who had not only been vested with the right of challenge now exercised, but had actually exercised it. But to this it was answered, that the pursuer's grandfather, though possessing the same character of apparency which now belonged to the pursuer, and consequently entitled to exercise the same right of challenge, had made up no titles of any kind to the proprietors of the estate of Dean, and so had taken up no right of which it could be necessary for the pursuer to obtain the transmission by service.

Lord Glenlee.—As far as I can see, the interlocutor is right. The objection is in the first preliminary defence, "that the pursuer has neither libelled nor produced a title to pursue." Now the first thing in considering a title to pursue, is to look at what the action is. Here it is simply to reduce the titles made up by the last Sir John, in order that the pursuer may himself serve. It is often impossible to serve in order to set aside deeds; as, for instance, in the case of contravention by an heir of entail. But, to enable the pursuer to serve, he must set aside the service of the last man; and the conclusion is to set it aside, that he may serve. Now the title to pursue such an action as this, is just the character of apparency here admitted, which would entitle the pursuer to serve, if the service he challenges were out of the way; and though he, no doubt, must serve to get a right to the estate, he must first be allowed to set aside this before he can serve. As to the other matter, it is said that the grandfather was charged to enter; but does that make a bar to actual serving? I can see nothing in the objection.

Lord Cringletie.—I am completely satisfied that the interlocutor is right. The conclusion is to set aside deeds, in order that the pursuer may serve; and the defence is—You do not produce a service. Now the very gist of the action is, that he is prevented from serving by the service of the late Sir John, and he must therefore set it aside in order to serve. As to the adjudication being a bar, it does not affect the estate, and can be no bar whatever.

Lord Meadowbank.—I concur as to the adjudication; and though, on the whole, I come to the same conclusion with the Lord Ordinary, I still think it is going a step further than any former case to allow a party to pursue an action of this kind without a service. The Lord Ordinary seems to think, that, but for the judgment of the House of Lords in the case of Cochrane v. Ramsay, a service would have been necessary. I therefore thought it necessary to see the grounds on which that judgment was pronounced, and I accordingly read the speech of Lord Wynford, who moved it; and, with the utmost deference, I must say that I cannot hold that judgment as settling the law of Scotland on this matter. Taking

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this view, I have the greatest doubts whether the title of apparency should be sustained; and when I consider the cases of Polmood and others, I thought that the present would be a good case for consulting the other Judges, though, if it is to be held that a party is now precluded from all remedy by the judgment in the case of Cochrane, I would adhere.

Lord Justice-Clerk.—If the matter decided in the case of Cochrane could be considered open, I would not object to Lord Meadowbank's proposal here; but I must consider that judgment as settling the question there most ably argued and deliberately considered, and I would not stir any further doubt on it. On both questions here raised, I concur entirely in the luminous opinion of the Lord Ordinary, and am for adhering.

The Court accordingly adhered to the interlocutor of the Lord Ordinary.

Lockhart and Swan, W. S.—Scott, Finlay, and Balderston, W. S.—Agents.

No. 3.

Magistrates of Selkirk, Pursuers.—*Sol.-Gen. Hope—G. G. Bell.*
Adam Clapperton and Others, Defenders.—*D. F. Jeffrey—Watson.*

Et è contra.

Landlord and Tenant—Bona Fides.—Parties having obtained a lease of a mill for 20 years from Magistrates of a burgh, stipulating that they were to receive the value of their meliorations at the end of the 20 years, or obtain a new lease; and having continued to possess for more than 20 years additional after the 20 years, but without getting an express renewal; and having thereafter obtained a charter from the Magistrates of two-thirds of the subjects, and erected works and machinery upon the whole of it; but this charter having been afterwards set aside, in an action of reduction, as void, in respect of their not having the authority of an act of council thereto—Held, with reference to a claim for meliorations made in that action,—1.—That the parties could not claim the value of those on the third, to which they had obtained no charter, nor of erections made prior to the charter, nor of moveable machinery;—but,—2.—That they had a claim for all fixtures and permanent erections, which improved the property resumed, made after the date of the charter, and prior to decree of reduction.

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2d Division. Ld. Moncreiff. T.

Sequel of the case mentioned ante, Vol. VI. No. 345. p. 955, (which see.) The question remaining after decree of reduction had been pronounced, was as to the extent of meliorations for which Clapperton &c. were entitled to remuneration; and, in regard to this, they raised a supplementary summons, which was combined with the former process, wherein they claimed the sum of £1290. 15s. 6d. as the value of their meliorations, including the whole buildings on the subject contained in the charter 1817, viz. two-thirds of the original waulk-mill, and also on the remaining third, which had been continued to be possessed, without any new title, under the original minute of tack in 1768, together with the whole machinery fitted up therein, whether fixed or moveable.

To this claim the Magistrates objected generally, that it was com-

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pensated by that competent to the Magistrates for rent of the subjects since 1817, when the new title was granted; and, in particular,

1. That so far as regarded erections on the third not contained in the charter 1817, Clapperton &c. had no claim, as these erections must have been made solely on the faith of the possession by tacit relocation; and at any rate they had no claim in the present action, because that portion of the property had not been included under the titles which had been set aside; so that the only ground on which remuneration for these could be claimed was, that Clapperton &c. had been induced, by the conduct of the Magistrates in granting a charter of the adjoining two-thirds, which proved to be invalid, to expend money on the remaining third fruitlessly to himself, and to their benefit, which otherwise he would not have done:—a ground totally different from that on which the meliorations on the evicted part of the property were claimed, and not embraced in the present action.

2. That as to any of the original buildings, or those made during the possession under the lease, or the tacit relocation following thereon, i. e. prior to 1817, when the charter was granted, there could be no claim, because, till then, Clapperton &c. possessed merely as tenants, who never can have a claim for meliorations, unless stipulated for in the lease; while the stipulations for the value of the buildings contained in the original minutes being only applicable to the case of the Magistrates not renewing the lease, could not now be founded on, since, though no formal renewal was granted, Clapperton &c. were allowed to possess on tacit relocation, at the same terms, for a period considerably beyond 20 years, which was the utmost extent of renewal provided for in the lease as a consideration for the value of the erections.

3. That no claim lay for ameliorations after 1825, when it was intimated to Clapperton &c. that a reduction of the charter 1817 was immediately to be instituted; and,

4. That as to the machinery, and indeed the whole buildings, the Magistrates were willing that the whole should be removed; and this being the case, Clapperton &c. were not entitled to refuse to remove their property, and demand remuneration.

The Lord Ordinary pronounced this interlocutor:—"Finds that all questions as to the construction or effect of the original contract of lease, in regard to this claim for meliorations, are kept open by the interlocutor of Court of 11th June 1828;—that though the most probable construction of the contract seems to be, that if the Magistrates adopted the alternative of giving a new lease to the tenant after the expiry of the first 20 years, no claim for the value of the mill and appurtenances then erected could be made, this construction cannot be applied in the actual circumstances of the present case, in respect that no new lease for a definite term was in fact granted, and that the tenants were, at a later period, led to continue their possession, and their operations on the premises, in the bonâ

fide belief that they had obtained a permanent title to the property by feu-right;—therefore finds that the pursuers are entitled to the value of the erections and improvements of a permanent nature made on the subjects held by the lease, or other ostensible title, according to the actual state of them at the term of their removal;—but finds that this claim cannot extend to any thing done on ground not comprehended within the ground which was evicted from the pursuers by the decree of reduction;—finds further, that the claim does not extend to any of the furniture or machinery, which is properly of a moveable nature; but that it does comprehend every thing which is legally to be considered as fixture, forming a part of the heritable subject;—and, with these findings, remits the case to the Jury Court, in order that the sum due for meliorations may be ascertained."

Both parties reclaimed,—the Magistrates chiefly in so far as the claim was not limited to such meliorations as had been made subsequent to the granting of the charter, and prior to the institution of the action, and in so far as the interlocutor allowing the value of "erections and improvements" might be construed to include erections which, in the circumstances in which the Magistrates were placed in regard to other tenants, would be not only of no value to them, but actually prejudicial to their interests;—and Clapperton &c. in so far as their claims for the erections &c. on the third, to which they had no charter, and for the moveable machinery, were not allowed.

Lord Cringletie.—I see it stipulated in the original minutes of tack that the Magistrates are to grant a lease of the mill for twenty years, and, at the end of the tack, either to take the mill, paying the value, or to give a new lease. Now the tenants possessed the first twenty years, and afterwards till 1817. Then, though there was no express renewal of the lease at the end of the first twenty years, there was no demand made for the value of the mill as under the lease; and the tenants were not entitled to this, if they had the twenty years more possession; but as they did possess for more than twenty additional years, this is the quid pro quo; and therefore I cannot conceive how they are to get the value of the original mill. The Lord Ordinary mixes two things together. We should separate the possession before, and that after getting a permanent right. If a tenant make erections &c., I understand that, without a stipulation to that effect, no meliorations can be allowed, and so I would not allow the parties here, remuneration for any improvements made prior to 1817. After that, however, I think they were in bonâ fide till they were certified that their right was not good. Now they certainly ceased to be in bona fide by the judgment of the Court, or I rather think before that, if they came to the Magistrates, and asked permission to make meliorations, and they protested against it. I see they deny they made any after that; and I certainly cannot conceive them to be entitled to remuneration for these meliorations. As to the rent, it is a very dubious matter, as, now that the charter is set aside, they would be held as having possessed by tacit relocation; and the rent would, in this view, be a mere trifle.

No. 3.

Nov. 12. 1830. Magistrates of Selkirk v. Clapperton &c.

M'Dougall's Executor v. Wighton.

LORD GLENLEE.—I do not know that I differ much. The summons itself is confined to meliorations on the subjects from which it is concluded the parties are to be removed; and the claim for meliorations on the other portion, if any lie at all, must rest on totally different grounds from those forming the foundation of this action. As to the finding of which the Magistrates complain, I think some correction, such as Lord Cringletie suggests, should be allowed. Indeed, I suppose the Lord Ordinary had only in view meliorations after 1817. After the first term was over, the whole period of twenty years was allowed to be possessed; and till the charter was granted in 1817, these parties were just in the same situation as a tenant who has made meliorations in the hope that the landlord would remunerate him for his outlay, but who has no legal claim. As to those, however, made after they had reason to believe that they had a good right, they are entitled to get the value of the erections, in so far as they are improvements of the subjects which the Magistrates get back.

LORD JUSTICE-CLERK.—I agree; and I really do not see any ground for holding that these parties were in mala fide to make any of the erections which they did subsequent to 1817.

LORD MEADOWBANK concurred.

THE COURT accordingly so far altered the Lord Ordinary's interlocutor as to find "the pursuers entitled to the value of permanent meliorations on the subjects contained in the feu-right now reduced, the same having been made subsequent to the date of that feu-right, and prior to the judgment of this Court reducing the same.

W. HORSBURGH, W. S.—R. MERCER and J. S. DARLING, W. S.—Agents.

No. 4.

HUGH M'DOUGALL'S EXECUTOR, Pursuer.—*Sol.-Gen. Hope—Forsyth.*
W. WIGHTON, (MARTINSON and STEVENSON'S Trustee,) Defender.—*Baird—Keay.*

Cautioner.—Where a party elected trustee on a sequestrated estate was offered three cautioners; and a bond of caution was prepared by the agent for the estate, and sent to the trustee, who returned it as duly executed by himself and two of the cautioners, with a request to the agent to send it to the other, who lived in the same place with the agent; and the third cautioner signed it; and thereafter the trustee having intromitted, and become bankrupt in debt to the estate; and it appearing that the subscriptions of the two first cautioners, though genuine, had been adhibited outwith the presence of witnesses—Held that the third cautioner was not thereby liberated; and Observed that the two others could not have pleaded the above objection, after allowing the bond to be delivered and acted upon, as duly executed.

Single Bills.

SCOTT v. ANDERSON.

Nov. 12. 1830. 1st DIVISION.

A reclaiming note having been presented by Scott against an interlocutor of the Lord Ordinary refusing, as incompetent, a bill of suspension at his instance, the respondent craved to be allowed to print a document which had not been before his Lordship. This the Court refused.

No. 4.

Nov. 13. 1830.
2D DIVISION.
Ld. Medwyn.
R.

M'Dougall's Executor v. Wighton.

MARTINSON and STEVENSON, distillers at Gellybanks in the county of Perth, having been sequestrated in the beginning of the year 1820, the defender Wighton, merchant in Perth, was appointed interim factor; and thereafter James Cameron, agent at Dunkeld for the Perth Union Bank, was elected trustee. Cameron proposed for his cautioners two persons, named Stevenson and Duff, merchants in Dunkeld, together with the late Hugh M'Dougall, grocer in Perth, the original pursuer in the present action. These cautioners having been agreed to by the creditors, a bond of caution for Cameron's due execution of the office of trustee was prepared by Thomas Duncan, writer in Perth, who had been appointed by Wighton, as interim factor, his agent, and who acted as agent in the sequestration for the creditors. This bond, having been sent to Cameron at Dunkeld, was, on the 5th of February 1820, returned by him to Duncan, accompanied with the following letter:—"I have yours of yesterday's date, and now return you the bond signed by Mr. Stevenson, Mr. Duff, and myself. Please send one of your clerks to M'Dougall, and he will sign it also. The witnesses to the signature in the bond are Peter Conacher, my clerk,—and Peter Hall, my apprentice." In consequence of some error in this bond, it was refused by the clerk of Court; and a new one was accordingly prepared and transmitted by Duncan to Cameron, who returned it, on the 17th of February, with this letter:—"I received yours, and now hand the bond, signed this date before same witnesses as in the former one. Explain to Mr. M'Dougall the reason for signing the bond a second time." On the bond being received by Duncan, he sent it to M'Dougall by one of his clerks, who presented it for execution, and it was executed by M'Dougall accordingly. Ex facie of the bond, the subscriptions of Duff and Stevenson, the two other cautioners, were perfectly regular; but, in point of fact, as it afterwards turned out, the signatures, though genuine, had not been adhibited in presence of witnesses, nor had these persons acknowledged their subscriptions to the attesting witnesses. The bond was thereafter lodged in the sequestration process; and Cameron was confirmed as trustee, and intromitted with the funds of the estate. About two years thereafter he became bankrupt, and left the country, whereupon the defender Wighton was elected trustee. Cameron having been indebted to the estate in a considerable sum, Wighton claimed the whole amount from M'Dougall,—Stevenson, one of the other cautioners, having in the mean time died, and Duff having become bankrupt. M'Dougall, however, having now ascertained that the subscriptions of Duff and Stevenson had been adhibited outwith the presence of witnesses, conceived that he was thereby liberated from his obligation, and raised the present action for having the bond set aside in respect of that irregularity. After some procedure, the Lord Ordinary assoilzied from the reduction, whereupon M'Dougall reclaimed. The Court ordered a hearing in presence; but there appearing considerable difference between the parties as to what were to be held the facts of the case, the Court remitted to the Jury Court, where a trial was

No. 4.

Nov. 13. 1830. M'Dougall's Executor v. Wighton.

had on the general issue, Whether the bond was the deed of M'Dougall? When the evidence had been led, the parties, on the suggestion of the Lord Chief Commissioner, who tried the cause, instead of taking a verdict, agreed upon a special Case for the opinion of the Court, which Case set forth the facts as above narrated. The question for the opinion of the Court was stated to be, "Whether the said Hugh M'Dougall was legally bound, as cautioner for the said James Cameron, by his subscription to his said bond of caution; or whether he was freed from the said obligation in consequence of this bond not having been executed according to law by the said James Stevenson and John Duff,—the said bond having been presented to the said Hugh M'Dougall as appearing to be duly executed by the said James Stevenson and John Duff?"

For the executor of M'Dougall (who was now dead) it was pleaded—

It is undoubted law that a deed of importance is not probative, if the witnesses, or either of them, did not see the party subscribe, or hear him acknowledge his subscription.[1] The subscriptions, therefore, of Duff and Stevenson to the bond, having been adhibited outwith the presence of the witnesses, and not having been acknowledged to them, could not bind these parties; and consequently, as M'Dougall only became a cautioner, and agreed to bind himself as such on the faith of these parties being also bound, he is necessarily free. Nor is it a sufficient answer to this to say, that Duff and Stevenson, rei interventu, by allowing the creditors to intrust Cameron with the funds of the bankrupt estate, on the faith of the bond being regular, would have been barred from challenging it, and held to have homologated it, because, if invalid at the time of M'Dougall's signing the bond, so that he was not thereby bound, no actings of theirs could subsequently impose an obligation on him; and besides, it does not appear that Duncan, as agent for the creditors, may not have been made aware of the defect by Cameron. Neither can it be maintained that M'Dougall was bound to have seen that the subscriptions of his co-cautioners were valid, before the bond was delivered to the creditors; because, in the circumstances, it must be held that Duncan, the agent for the creditors, undertook to get the bond executed; and he, having presented it to M'Dougall, must be considered as having held out to him that the subscriptions previously adhibited were regular.

To this it was answered—

Even supposing that the defect in regard to the subscription of Duff and Stevenson would have liberated these parties, it does not follow that M'Dougall would thereby get free, because a co-cautioner is bound to see that the other cautioners have regularly subscribed before the bond be delivered to the creditor; and if he neglect this, sibi imputet.[2] It is no doubt true, that if the creditor undertake to see the bond duly executed, the

[1] Earl of Fife v. Duff, Dec. 22. 1825, (ante, V. 335, aff. May 22. 1826, 2. Wilson and Shaw, 166.) [2] 3. Ersk. 3. 64; M'Donald v. Stewart, July 5. 1810, (F. C.)

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cautioner may thereby be relieved; but there was no such undertaking here; for the facts clearly show that Cameron himself took on him, what was his peculiar province, the procuring a sufficient bond of caution; and Duncan's sending the bond, at his request, to M'Dougall, to be subscribed by him, cannot imply an undertaking to have it executed, or an assurance that the previous subscriptions were duly adhibited. But further, the only ground on which M'Dougall could at all maintain that he is free, would be the actual situation of the other cautioners, whereby he would be precluded from that relief to which he may have trusted; so that if they be bound in law, the obligation against him also is effectual. Now it is settled[1] that if a party give forth a deed subscribed by him as duly executed, and allow it to be acted upon, he cannot plead a latent nullity, arising from his own execution of the deed, to the effect of getting free of his obligation; and consequently Duff and Stevenson, who are admitted to have signed the bond, though outwith the presence of witnesses, and who allowed it to be given to and acted upon by the creditors as a valid deed, could have had no defence against payment; and consequently there is no foundation whatever for the plea of the pursuer, who, before he can be liberated, must show that his cocautioners were not bound, which he has completely failed to do.

Lord Justice-Clerk. — When the case first came before the Court, the parties were not at one on the facts; and as we were unwilling to pronounce judgment on an assumption of facts, we took the usual way to ascertain these facts. These are now adjusted in this special case. Now I confess that, from the way and manner the case was previously argued, I was moved by the argument of the pursuer; but my doubts have been completely removed by attending to the facts now settled. It is, no doubt, clear, that Duncan was agent for the interim factor, and the bond was prepared in his office, and he corresponded with Cameron, who was to find cautioners before he intromitted. This, however, was just the ordinary course of business in such an arrangement. Then Cameron returned the bond, saying it was signed by him and the two cautioners in presence of witnesses, and requesting Duncan to send it to M'Dougall for his subscription also. This was done, and it afterwards turns out that the two cautioners, Duff and Stevenson, had signed outwith the presence of witnesses; and M'Dougall now says that he is entitled to be free. I do not think he is; for,—1. There was no undertaking by the creditors to get the subscription of the cautioners to the bond; and, 2. Attending to the judgment in the case of Lord Fife v. Duff, and the particular circumstances of the case of Smith v. Bank of Scotland, I am by no means prepared to say, that cautioners who acknowledge their signatures to be genuine, and hand over the bond to creditors, who allow intromission on the faith of it, are entitled to avail themselves of their own laches, and be liberated, in consequence of their

[1] Smith v. the Bank of Scotland, Jan. 25. 1821, (F. C.) This report does not correctly state the ground of decision. See Earl of Fife v. Duff, (ante, V. 335, and 2. W. and S. 166.)

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signing it outwith the presence of witnesses; so that if they were alive and solvent, they could not have been free; and therefore I see no cause to alter.

Lord Chief Commissioner*.—I entirely concur. Your Lordship has just given the opinion I would have delivered to the Jury, but I thought it better to have a special case.

The other Judges concurred.

The Court accordingly pronounced this interlocutor:—"The Lords having advised this special case in the Jury Court, and the revised cases for the parties, they are of opinion that the deceased Hugh M'Dougall did become bound by the bond as cautioner for James Cameron; and therefore they sustain the defences, and assoilzie the defender from the conclusions of the libel; and decern."

D. Fisher, S. S. C.—R. Cargill, W. S.—Agents.

INTERIM ACT OF SEDERUNT

FOR

REGULATING THE PROCEEDINGS IN DEPENDING JURY CAUSES.

Nov. 16. 1830.

I. The Lords of Council and Session, and the Lord Chief Commissioner, being duly assembled under the authority of the statutes which empower them, by Act of Sederunt, to make regulations for the trial of causes by jury, in order to secure against delay to parties whose causes were remitted to the Jury Court before its jurisdiction ceased, and were in progress in that Court at that period, find it expedient to enact and declare, that the Divisions, or the Lords Ordinary, respectively, who remitted the causes which depended in the Jury Court on the 5th day of October last, shall order and direct all future proceedings in such depending causes; and that the same course shall be followed by the Divisions, or Lords Ordinary, in ordering and directing those proceedings, as that which has been heretofore practised in the Jury Court.

II. And in regard to the causes remitted from the Court of Admiralty to the Jury Court, and which were depending in the said last-mentioned Court at the time its jurisdiction ceased, it is hereby enacted and declared, that the pursuer in the cause before the Court of Admiralty shall choose the Division, or the Lord Ordinary, before whom the case shall proceed; and that, in all depending Admiralty causes prepared for trial, the pursuers, advocators, or suspenders, shall choose the Division in which such last-mentioned cases shall be placed; so that the Lord President of the Division, who is to preside at the trial of the cause, if it is to be tried in Edinburgh, may be ascertained; and all proceedings necessary for bringing such causes to trial shall be before the Division, the Lord President, or the Lord Ordinary so chosen, respectively:

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Provided always, that if the pursuer shall fail to make such election within ten days after being required to do so by the defender, the defender shall have the power to choose the Division or Lord Ordinary to which such cause shall belong; and all proceedings after verdict shall be in the Division, or before the Lord Ordinary, so chosen as aforesaid. Nov. 12. 1830.

III. That all the clerks who officiated in the Jury Court, and who are by statute appointed now to officiate in the Court of Session, shall act under the authority of the Divisions, the Lords President, and the Lords Ordinary, respectively, in all such depending causes.

IV. That the said depending causes, whether originating in the Court of Session or Admiralty, shall be taken up by the Divisions, or the Lords Ordinary, at the stage to which such depending causes had advanced in the Jury Court on the 5th day of October last.

V. That all commissions, and all other writs which have hitherto passed under the seal of the Jury Court, shall in future pass under the Signet; and the signature of any of the clerks in jury causes shall be a sufficient warrant to the Keeper and Depute-keeper of the Signet to affix the said seal thereto.

And the LORDS appoint this Act to be engrossed in the books of sederunt, and printed and published in the usual manner.

JAMES M'GAVIN, (Trustee on J. STEWART and COMPANY's Estate,) Petitioner.—*D. F. Jeffrey—Greenshields—Hunter.*
JAMES STEWART, Respondent.—*Sol.-Gen. Hope—Shaw.*

No. 5.
Nov. 16. 1830.
M'Gavin v. Stewart.

Appeal.—The House of Lords, in reversing a judgment, having remitted with instructions to allow a trial by jury, and ordered the Jury Court "to examine the parties viva voce before them," the Court delayed to apply the judgment until its terms should be submitted to the Lord Chancellor, with the view of obtaining explanation and further instruction.

THE House of Lords having reversed the judgment of this Court in an action at the instance of M'Gavin against Stewart, and further ordered that the cause be remitted "with directions to submit the question of facts to a special jury, and that it be an instruction to the Jury Court to examine the parties vivâ voce before them," M'Gavin presented a petition praying the Court to apply the judgment. Nov. 16. 1830. 1ST DIVISION.

LORD PRESIDENT.—It is impossible to apply this judgment. It directs us to do what is entirely at variance with the law of Scotland.

Dean of Faculty for the Petitioner. — It is the duty of the Court to apply the judgment of the House of Lords in terminis. I make that motion under the authority of the Lords Spiritual and Temporal in Parliament assembled.

LORD PRESIDENT.—We must consult the whole Court as to the course to be followed.

LORD GILLIES.—No doubt, the judgment will be applied, if we can apply it; but we must consult the other Judges as to the possibility

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No. 5.
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M'Gavin v. Stewart.

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LORD PRESIDENT.—We must consult the whole Court as to the course to be followed.

LORD GILLIES.—No doubt, the judgment will be applied, if we can apply it; but we must consult the other Judges as to the possibility

No. 5.

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of doing so. It does not, however, appear to me in what way we can apply such a judgment.

Lord President.—There is an order to examine "the parties vivâ voce;" but one of them is dead—a fact probably not known at the time when the House of Lords pronounced their judgment. How are we to obey this order? Besides, if it mean that the pursuer alone is to be examined, this will give him a great advantage in stating his own story to the jury.

Dean of Faculty.—An examination before the Jury *Court* does not necessarily imply before the *Jury*.

Lord President.—If the remit meant that we, as now embracing the jurisdiction of a Jury Court, might judicially examine the parties before ourselves, as a preliminary step to decide whether jury trial were necessary at all, that would create no serious difficulty. But it does not seem to admit of this interpretation; and if the parties' statements must be laid before the jury, it is impossible to take their examination, except in presence of the jury; and this last course is an innovation on our practice, which requires much caution on our part in proceeding to apply this judgment.

After advising with the other Judges,

The Lord President said, that they all concurred in opinion that it was impossible, as the judgment stood, to apply it; and that they had authorized him to submit the matter respectfully to the Lord Chancellor, for the consideration of the House of Lords. The petition was therefore delayed.

C. J. F. Orr, W. S.—W. Patrick, W. S.—Agents.

No. 6.

John Reid Miles, Petitioner.—*Sol.-Gen. Hope—Maitland.*
James Finlay and Co., Matthew Finlayson &c.—Respondents.—*D. F. Jeffrey—Cockburn—Ivory.*

Process—Penal Statute—Partnership.—A petition and complaint founded on a penal statute (5. Geo. III. c. 49) against a company, and the individual partners thereof, without naming them, dismissed as incompetent, quoad the company, but sustained against two persons named and described as the manager and clerk of the company.

Nov. 16. 1830.

1st Division.

John Reid Miles, teacher in Balfron, presented a summary petition and complaint, in which he set forth—"The Ballindalloch works are situated in Balfron, of which the respondents James Finlay and Company, merchants in Glasgow, are proprietors,—the respondent Matthew Finlayson their manager,—and the respondent Peter Marshall cashier or clerk. These parties have been in the habit, for some time, of issuing, or causing to be issued, certain unstamped checks, or notes for money, of the nature of bank notes, to be circulated as specie, some of them for seven, and others for five shillings, contrary to law, and to the special enactments of 5. Geo. III. c. 49." These notes are of the following form and tenor:—

16 Sep. 1829.

SEVEN SHILLINGS.
BALLINDALLOCH WORKS.
A GUINEA NOTE
Will be paid for an equal amount of our checks, if presented at the works within three months from this date.

No. B. 153.

To the Merchants of Balfron.

MATTW. FINLAYSON.

Entd. PETER MARSHALL.

No. 6.

Nov. 16. 1830. Miles v. Finlay and Co. &c.

Miles then subsumed certain facts against "the respondents,"—founded on the above statute, prohibiting the issue, "by any person or persons, bodies politic or corporate, their servants or agents," &c., of notes of a particular description, under which he alleged the above note was included; and prayed for an order of intimation "to James Finlay and Company, merchants in Glasgow, and the individual partners thereof, proprietors of the Ballindalloch cotton-works, and to Matthew Finlayson, the manager, and to Peter Marshall, the cashier or clerk of the said company, in terms of 5. Geo. III. c. 49. § 3 and 7;" and "to find that the said parties have incurred the penalties imposed by said sections," amounting to £500 for each of 36 notes founded on by him.

Answers were lodged in name of "Kirkman Finlay, Esq., merchant in Glasgow, and others, individual partners of the firm of James Finlay and Company, merchants in Glasgow, proprietors of the Ballindalloch cotton-works, Matthew Finlayson, their manager, and Peter Marshall, clerk at these works." No objection was stated to the competency of the petition; but, on advising it, a doubt was thrown out by the Bench as to the mode in which the complaint had been brought against the social firm. Their Lordships therefore ordered Cases "as well upon the competency of this action as upon the merits."

Pleaded for Finlay and Company—

1. Although an ordinary civil action may be competent against a commercial company, yet a penal action containing conclusions in modum poenæ is incompetent. In relation to civil contracts, there exists in each partner a prepositura, entitling him to bind his socii; but no such authority, either actual or presumed, exists with reference either to delict or quasi delict. Any claim, therefore, made in respect of delict, or quasi delict, must be directed, not against the social firm, but against the individuals. A social firm cannot be the subject of punishment. This can only be inflicted on the individuals; and consequently these individuals must be specially called to defend themselves.

2. If the complaint be not sufficient to bring the company before the Court, it cannot be sustained against parties called as their manager and clerk.

No. 6.

Nov. 16. 1830. Miles v. Finlay and Co. &c.

Veitch v. Harvey.

3. The libel is not sufficiently specific. It must be stated with the same accuracy as to time, place, and manner, as an indictment.

Pleaded for Miles—

1. As he had no means of discovering the individual partners, it was impossible for him to libel in any other way than against James Finlay and Company, merchants in Glasgow, and their manager and clerk specially named. His prayer was directed against the company, " and the individual partners thereof,"—and also against the manager and clerk nominativè. But the respondents are barred from now objecting, by having put in answers in name of " Kirkman Finlay, Esq., and others, individual partners of the firm of James Finlay and Company," &c.

2. Even if the complaint were not sustained against the company, the words of the act, being directed against " any person or persons," and " the servants or agents of any bodies, politic or corporate," were sufficiently broad to entitle him to insist against the manager and the clerk.

The Court being of opinion that the complaint could not be sanctioned against the company—that the words of the statute were sufficiently broad to comprehend Finlayson and Marshall under the descriptions given of them—but being doubtful as to the relevancy of the complaint as laid—" dismissed it as incompetent against James Finlay and Company; and, before further answer, allowed the other defenders, Matthew Finlayson and Peter Marshall, to give in a minute, stating the practice and procedure in cases of usury, and other cases of a similar nature, either upon a summons, or upon a petition and complaint, as authorized by particular statutes."

J. Cullen, W.S.—Gibson-Craigs, Wardlaw, and Dalziel, W.S.—Agents.

No. 7.

Hugh Veitch, Advocator.—*Skene.*
John Harvey, Respondent.—*Sol.-Gen. Hope.*

Statute—Public Officer.—Under a statute providing compensation for offices &c. thereby abolished, but limiting the period for claiming to twelve months ' after any claim for compensation shall have arisen—Held that this period falls to be calculated from the date when the act came into operation, and the office thereby fell; and not from the first term thereafter, at which the salary would have been due, had the office continued.

Nov. 16. 1830.

2d Division. Ld. Fullerton. T.

Prior to an act, 7th and 8th of the late King, for establishing a municipal government in Leith, the town-clerk of Leith, appointed by the Magistrates of Edinburgh, was, as collector of cess, intrusted, under certain previous statutes imposing a police assessment, with the collection of

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Single Bills.

Clyne v. Stewart.

Nov. 16. 1830.

2d Division.

Process.—Party reclaiming ordered to print all the documents referred to by the Lord Ordinary in his interlocutor and notes.

No 7.

Nov. 16. 1830. Veitch v. Harvey.

this assessment, which it was provided should be levied at the same terms as the land-tax or cess; and for this he received a certain salary from the police commissioners of Leith. By the above act, a new mode of collection was authorized; and it was enacted that the former statutes should stand repealed after six weeks from the passing of this act, when it was to come into operation; and it was further declared, that all claims for indemnity on the part of persons deprived of offices, privileges, &c., by the operation of the new act, should be made by petition to the Sheriff of Edinburgh "within twelve calendar months next after any claim for compensation shall have arisen." The act passed on the 2d of July 1827, and consequently came into operation on the 17th of August thereafter. On the 9th of July, intimation was given to Veitch, and the other officers of the police establishment, that their services would be dispensed with after the 13th of August; and on the 17th, at the first meeting of commissioners under the new act, they appointed another collector. On the 5th of March 1829, Veitch presented an application to the Sheriff, praying him to empannel a jury to estimate the value of this office, in terms of the act. To the competency of this petition it was objected by Harvey, as clerk to the police commissioners of Leith, that as the claim of compensation necessarily arose when the office fell on the 17th of August 1827, and no claim was made till the 5th of March 1829, the twelve months had expired.

To this it was answered by Veitch, That the assessment being, by the previous statutes, leviable at the same terms with the cess; and that tax being, by the Acts of Supply, leviable at the 25th of March of each year; his claim for salary did not arise till the period of collection of each year, and so his loss did not take place, nor his claim of compensation emerge, till the period for payment of his salary, viz. 25th March 1828; and consequently the petition was within the time allowed by the statute. The Sheriff dismissed the application, and in an advocation the Lord Ordinary and Court remitted simpliciter.

A. Robertson, W. S.—J. Stuart, S. S. C.—Agents.

Single Bills, &c.

Nov. 17. 1830. 1st Division.

Process—Inner House Rolls.—Several cases having been delayed to-day—

The Lord President observed, that a great deal of time was lost at the beginning of every session, from the remissness of agents at that period. This occasioned an unnecessary pressure of business towards the close of the session, and some remedy ought to be applied.

Lord Gillies added, that whenever parties were not ready, through remissness at the beginning of a session, the case should be struck out of its place in the rolls, and put to the bottom of them.

No. 8.

Nov. 17. 1830.
2D DIVISION.
Ld. Fullerton.
R.

Darling &c. v.
Adamson &c.

MRS. W. S. DARLING and Others, Pursuers.—*Skene—W. Bell.*
J. ADAMSON and T. WATSON, Defenders.—*Forsyth—Neaves.*

Special Case.—The Court adhered to the interlocutor of the Lord Ordinary.

J. S. DARLING, W. S.—J. ARNOTT, W. S.—Agents.

No. 9.

A. LYLE, and E. Bow (his Trustee,) Pursuers.—*D. F. Jeffrey—More.*
ROBERT BALFOUR, Defender.—*Skene—Shaw.*

Process—Declarator.—1.—Declarator of facts, not followed by any conclusion of right on the part of the pursuer, incompetent.—2.—Question raised, whether it be competent, by a relative action, to supply a statement of fact in a record in another action.

Nov. 17. 1830.

2D DIVISION.
Lord Medwyn.
T.

Lyle &c. v.
Balfour.

IN the year 1814, Mr. Graham of Gartmore granted to Mr. George Dunlop, W. S., a lease of the farm of Drum (part of the entailed estate of Gartmore) for 19 years, at a rent of £70. 4s. 10d. In January 1815, Dunlop granted a subtack to George Graham at a rent of £180, payable to him and his assigness. In the course of the same month, Dunlop, in consideration of £700, assigned his tack, to the extent of £100 of surplus rent, to Thomas Balfour, merchant in Stirling, with absolute warrandice, during all the years of the lease then to run. This assignation was transferred to the defender Robert Balfour in December 1816, and the assignation and transference were intimated to George Graham, the subtenant, in March 1820. In December 1820, Gartmore, being desirous to exchange certain lands called Gartchell, which he held in fee-simple, for those of Drum, conveyed the former in three portions to three different individuals, (Dunlop being one of them,) and had them then excambed with Drum under the 10th Geo. III. c. 51. The lands of Drum, so freed from the fetters of the entail, were acquired by the pursuer Lyle from the three individuals above referred to. The full subrent was thereafter exacted from Graham, the subtenant, by Lyle, who (as he alleged) was ignorant that Graham was not the principal tenant, Dunlop being always in use to pay to Balfour the £100. In July 1822, Lyle accepted from Graham a renunciation of his tack,—becoming bound to fulfil all the obligations thereby incumbent on him. In 1826, Dunlop having become bankrupt, Balfour raised an action against Lyle for payment of the £100 per annum, as liable in the obligations incumbent on Graham under his subtack. In this action a record was made up and closed; and the Lord Ordinary having decerned against Lyle, he, and Bow, the trustee on his sequestrated estate, reclaimed. When the cause came to be advised, a doubt was thrown out from the Bench, whether Dunlop was not to be considered as having been merely a trustee for Gartmore in the whole transaction, for the purpose of securing to him personally a surplus rent of £100 out of the

No. 9.

Nov. 17. 1830. Lyle &c. v. Balfour.

entailed lands, to the prejudice of the heirs of entail; and whether, in this view, Lyle, who had acquired the lands from the three individuals acting in trust for and on behalf of Gartmore, was not secure against any claim by a party coming in the place of Gartmore, as would fall to be considered the case, if Dunlop merely held the lease as trustee for that gentleman. There being, however, no plea to this effect on the record, the Court allowed a new plea to be proposed by Lyle; but it being objected that there was no allegation of fact on the record to support any plea founded on the assumption of Dunlop being a mere trustee, the Court, after some discussion, superseded the cause. With a view to remedy the defect in the record, Lyle and his trustee raised an action of declarator against Dunlop, to which they also called Balfour as a party, concluding to have it declared that Dunlop was merely a trustee in manner above detailed, but containing no conclusion of right as arising therefrom to Lyle. No appearance was made for Dunlop, against whom decree passed in absence; but defences were given in for Balfour, pleading, 1. That as this was, an attempt to evade the Judicature Act, the action should be dismissed; and, 2. That under authority of the decision in the Orkney and Shetland case,[1] an action for declaring abstract matters of fact, without any conclusion for a right consequent to the pursuers, was incompetent.

The Lord Ordinary having reported this matter to the Court on Cases, their Lordships sustained Balfour's defence, and dismissed the action with expenses quoad him.

Lord Justice-Clerk.—It is necessary to attend to the bearing of the original case on the new declarator. In reviewing Lord Medwyn's interlocutor in the former case, Lord Glenlee observed that the case was not well argued by Lyle, as it appeared to him that Dunlop was the confidential trustee of Gartmore, in taking the lease in question, for the purpose of securing to him a certain surplus rent; and that if so, he was not prepared to concur in the interlocutor, as Lyle was assignee to maills and duties in the disposition from parties acting for behoof of Gartmore. The Court conceived that the plea arising from this deserved consideration; but we were met with the objection that these were not facts to raise it; and we delayed, that the party might raise a summons of declarator. The note on my papers, I see, is, "Sist further procedure, with a view to the defender raising a counter summons of declarator;" but I cannot come to the conclusion that this is the summons we contemplated; and I doubt exceedingly if such a declarator as this, which has been brought, be competent. I hold, as was decided in the Orkney case, that a party cannot bring an action to declare an abstract fact, without some conclusions of right consequent thereon; and in the present case I cannot think that the pursuer can cure a defect in a closed record by a bare declarator of fact, and therefore I am not satisfied that we can give effect to this process.

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1 Gifford &c. v. Trail, July 8. 1829, (ante, VII. 854.)

No. 9.

Nov. 17. 1830. Lyle &c. v. Balfour.

Campbell v. Mann.

LORD GLENLEE.—I agree. I only doubt whether our judgment should not be confined to dismissing the process, so far as regards this party, without touching the decree against Dunlop.

LORD CRINGLETIE.—There is no conclusion against Balfour; and, so far as he is concerned, it is just the same as the Orkney case—viz. a declarator of an abstract fact, without any conclusion from it.

LORD MEADOWBANK agreed.

E. M'MILLAN, S. S. C.—J. PEDIE, W. S.—Agents.

No. 10.

JOHN CAMPBELL, Suspender.—*Sol.-Gen. Hope—Russell.*

ROBERT MANN, Respondent.—*D. F. Jeffrey—W. Bell.*

Reparation—Slander.—A party who had raised an action in the Small Debt Court, and while irritated at the production of a surgeon's certificate which excused the absence of two defenders, being asked by the Justices as to the character of the surgeon, called him a habitual drunkard, and renewed the charge after leaving the Court—found liable in damages.

Nov. 18. 1830.

1ST DIVISION. Lords Craigie and Gillies. S.

CAMPBELL, a grocer, having cited two parties before the Justice of Peace Small Debt Court held at Hamilton, a certificate signed by Robert Mann, surgeon, was produced, stating that the defenders (who, as well as Campbell, resided at a distance) were unable, from bad health, to attend. Campbell having then stated that he had seen one of the defenders in Hamilton on that day, (which he afterwards proved,) and having been then asked by the Justices, and an agent who attended for the defenders, what he knew of the character of Mann, he answered that his certificate was not worth a penny, as he was always drunk. This statement, with the addition that Mann was in the habit of drinking with colliers, was renewed by Campbell after he had left the Court, but while he was still under the influence of irritation, in consequence of his case having been delayed. Mann afterwards raised an action of damages before the Sheriff of Lanarkshire (Upper Ward), resting on the slander, both in Court and out of it. On advising a proof, the Sheriff Substitute found "that the slanderous words spoken by the defender were calculated to hurt the pursuer's feelings, and might injure his professional reputation; but that these words were not uttered voluntarily, in the first instance, in the Justice of Peace Court, but in consequence of questions put to the defender by the Justices, and by the agent for the defenders in the action before the Justices; and that the slanderous words afterwards spoken were uttered in the same way, and while the defender was under the influence of temporary passion;—that the pursuer has not alleged, or offered to prove, that the defender had ever before spoken disrespectfully of him; and therefore, under the whole circumstances of the case, decerned against the defender for the sum of £10, and for the expense of process;" and to this judgment the Sheriff Depute adhered, but restricted the damages to £5.

Campbell presented a bill of suspension, insisting, inter alia, to be allowed a proof (which had been refused in the Sheriff Court) of a general allegation "that the pursuer is often seen about Baillieston toll and neighbourhood in a state of intoxication, and is in the habit of getting himself intoxicated."

No. 10.

Nov. 18. 1830.
Campbell v. Mann.

Scotland v. Walkinshaw.

Lord Craigie refused the bill, but found no expenses due; and issued the subjoined note.*

A second bill was refused by Lord Gillies.

Campbell having reclaimed on the merits, and Mann on the point of expenses, the Court refused both notes.

Pursuer's Authorities.—1. Bankt. 10. 23; Williamson, Nov. 18. 1819, (F. C.)

C. Fisher,—Hunter and Whitehead,—Agents.

William Scotland, Suspender.—*D. F. Jeffrey—Neaves.*
Edward Walkinshaw, Charger.—*Sol.-Gen. Hope—Greenshields.*

No. 11.

Title to Pursue—Ship.—Where there is nothing to prevent the part owners of a ship from acting in concert, it is incompetent for one of them to pursue for recovery of his alleged proportion of freight or demurrage.

William Scotland, designing himself "shipowner in Kincardine, owner of the brig or vessel called the Unity of Kincardine," brought an action for an alleged sum of demurrage against Edward Walkinshaw, merchant in Glasgow, to whom the vessel had been freighted. Walkinshaw stated, as a preliminary defence, that William Scotland was not the

Nov. 18. 1830.

1st Division. Ld. Pitmilly. S.

* "The Lord Ordinary entertains some doubt whether, instead of a formal action of damages, the expense of which would be far greater than the sums awarded in name of damages, the charger ought not to have applied by petition and complaint to the Justices, and called upon them to protect him, as one who, in his professional capacity, had given evidence in a question before them. It appears of no importance whether the injury was done in Court, or immediately after, and as a consequence of what had passed in Court. It will be observed, too, that the certificate by the charger was not correct, importing that the parties summoned, or either of them, could not venture far from home until their health was improved, which was not the fact, at least as to one of them, who had gone to Hamilton for the purpose of attending the Court; and if upon this ground the suspender had rested his bill of suspension, the Lord Ordinary would have passed the bill, for the purpose, at least, of mitigating the amount of the damages awarded. The Sheriff, it appears, had properly diminished the sum originally given to the extent of one-half; but, upon the same principle, a still further reduction should have been made; but, instead of this, the suspender has improperly and irrelevantly insisted for a proof, not of the respondent's having been intoxicated at all times, or at that particular time, but merely of occasional intoxication, without reference to his situation when the certificate was made out, while the certificate itself goes far to prove the contrary. In these circumstances, the Lord Ordinary has refused the bill, but has followed out his opinion, so far as not to award the expenses of the answers."

No. 11.

Nov. 18. 1830.
Scotland v. Walkinshaw.

owner, but was registered as joint owner with his brother Robert, and therefore he could not maintain an action relative to the joint property.

This statement was admitted to be correct in point of fact, and a relative action was then raised by Robert against Walkinshaw, concluding for one-half of the sum of demurrage; while William, by a minute, restricted the claim in his action also to one-half. Walkinshaw being unable to find the usual maratime caution in Robert's action, decree passed against him in terms of the libel, and was extracted, without any conjunction having taken place. The question thus came to be, whether the action at William's instance had been originally well raised; and if not, whether it could now be sustained as restricted? On these points William contended, that, to the extent of one-half, his title was good:—He was a part owner of the brig, and not a joint owner; he had thus a separate estate under his own individual disposal, and was entitled to pursue for his share of the ship's freight, just as he would have been for the price of that share, if he had sold it; but if any objection existed at first, it was cured by Robert supplementary action.

To this it was answered—

That the incompetency of a joint owner, or part owner, to conclude even for his own share of joint property without the concurrence of his owners, was radical and incurable. The contract made by the freighter was with the owners of the vessel. It was therefore a contract with joint parties, and any action to enforce that contract must be at the instance of all these parties. This was not a mere matter of form. It was a rule of law, arising out of the nature of the contract. Accordingly it was settled that a partner cannot raise an action on a contract with a partnership for his share or interest in the contract; but the action must be brought by all the partners, or by the company. It is true that, inter se, owners of a vessel are properly joint proprietors; but, quoad transactions with third parties, they stand in the position of joint partners. The English authorities lay the rule down in express terms with regard to part owners of ships, and the principle was recognised in the law of Scotland in the case of partnership. The second and separate action could not affect the question; for if this one was originally incompetent, it could not be cured by an action which also was incompetent. Besides, it was extracted, and had never been conjoined.

The Judge Admiral "found that it is the general rule of law that a part owner of a vessel cannot, per se, insist in an action for debts due to the whole owners; that this action was brought by one part owner, without concurrence of his co-owner, for payment of the whole claim alleged to be due to both;" and, after narrating the procedure, found "that the proceedings which have taken place since the date of the original action cannot cure the defect in that action," &c.; and therefore assoilzied Walkinshaw with expenses, reserving to Scotland to bring a competent action.

Scotland then presented a bill of suspension, and, upon ordering answers, Lord Moncreiff subjoined this note.* No. 11.

Nov. 18. 1830.
Scotland v. Walkinshaw.
Thomson v. Gilkison &c.

Thereafter, Lord Pitmilly having reported the bill and answers, the Court (Lord Craigie dissenting) refused the bill, and awarded expenses.

Lord Gillies observed, that whatever rule might be applied in any case where one of the co-owners was so situated that his concurrence could not be obtained, there was no such specialty here. The co-owners were brothers, living near each other, and confessedly ready to act in concert.

Charger's Authorities.—Abbott, P. 1. c. 3. § 13, 14, (5th edit.); 1. Holt, p. 370, 371; 1. Bell, p. 519.

C. Fisher,—W. Mackersy, W. S.—Agents.

John Thomson, Pursuer.—*More.* No. 12.
William Gilkison and Others, Defenders.—*Skene—Maitland.*
Also,
Alexander Paterson, Advocator.—*Skene.*
John Thomson, Respondent.—*More.*

Process—Partnership.—One of several copartners having, as treasurer of the association, granted a bill; and an action for payment having been raised against him individually; and he having objected that it ought to have been brought against the partners; but having closed a record on the merits, this objection being reserved; and the Court having found that the other partners must be called, and a supplementary summons having been raised accordingly, and a record in it having been closed on summons and defences; the Court conjoined it with the first process.

Consequent on the judgment pronounced in the advocation Paterson v. Thomson, mentioned ante, Vol. VII. No. 328. p. 646, (which see,) Thomson raised a supplementary summons against the several proprietors of the Glasgow Free Press, including Paterson, who, it turned out, was a proprietor himself. These parties did not dispute that Paterson was authorized to act for them, and had power to bind them in the matter at issue; but they pleaded defences on the merits, similar to those which had been stated by Paterson in the advocation, in which, as formerly mentioned, a record had been made up and closed. The parties having closed the record in the new cause on the summons and defences, Thomson craved

Nov. 18. 1830.
2d Division.
Lord Medwyn.
F.

* "The original defence proceeded on a mistake in assuming that the complainer and his brother were *joint* owners of the ship. They certainly were not so, but *part* owners only, the shares being defined in the registry, whereby each had, like an heir-portioner, a *separate* estate, which he could dispose of. Still the general rule seems to be settled in England, that even *part owners* must concur in actions against third parties for money due on account of the ship. But this rule is complicated with something in the *form of pleading*, and does not infer a nullity in the action, so far as the Lord Ordinary is informed. He therefore thinks that the point deserves consideration under our law, lest we should act on a rule without being aware of its limits, or understanding the proper remedy."

No. 12.

Nov. 18. 1830.
Thomson v. Gilkison &c.

Sinclair v. Sinclair.

that it should be conjoined with the advocation. To this, however, it was objected by Paterson that the first process was inept, and ought to be dismissed, as it sued Paterson, as under an individual and personal obligation, on a bill signed by him expressly as treasurer of the Free Press, and this more especially, as the proprietors of the newspaper now recognised his actings to be binding on them; and it was in like manner objected by the defenders in the supplementary action, that they ought not to be made parties to a process with a closed record, in the making up of which they had not been concerned.

The Lord Ordinary conjoined the two processes, and the Court adhered.*

J. Dundas, W. S.—J. Cullen, W. S.—J. Hamilton, W. S.—Agents.

No. 13.

Alexander Sinclair, Advocator.—*Jameson—Russell.*
Peter Sinclair, Respondent.—*Sol.-Gen. Hope—Greenshields.*

Proof—Oath in Litem.—Circumstances in which the Court refused, in hoc statu, to alow an oath in litem by a pursuer as to the alleged contents of a book which had been traced into the hands of the defender, but could not now be made forthcoming.

Nov. 18. 1830.

2d Division.
Ld. Fullerton.
T.

The advocator Alexander Sinclair was sequestrated in 1817. The respondent Peter Sinclair, his brother, was ranked as a creditor, and had a sum of £54. 5s. 2d. allocated to him as a dividend. Thereafter he became cautioner for payment of a small additional dividend, to be paid as a composition, and for the expenses of the sequestration; and he allowed his dividend to remain in the trustee's hands, in security of his cautionary obligation. The sequestration was brought to a close, and the advocator discharged, in the course of the same year. Nine years thereafter, the respondent brought an action against the advocator, before the Sheriff of Lanarkshire, concluding for payment of an account, two items of which were,—1. The above-mentioned dividend of £54, alleged to have been wholly applied by the trustee to the expenses of the sequestration; and, 2. A sum of £36. 4s., said to have been advanced to the trustee by the respondent, pending the sequestration, for the advocator's behoof. The record having been closed, the Sheriff allowed the respondent a diligence for recovery of vouchers in support of his claims.

* "As it turns out that Paterson is himself one of the proprietors, he cannot get out of this process at present, even if it should be held that the libel against him was incompetent originally. At his request, the rest of the proprietors have been called and made parties, and justice will be best done by conjoining the two processes,—it being competent, at the issue of the cause, to dispose of the question of expenses prior to the raising of the supplementary summons. It was stated as a further objection, that, by the conjunction, the defenders in the last process are made parties to a record, in the making of which they were not concerned. Such an objection may, no doubt, be sometimes sufficient to prevent the conjunction of two processes; but that does not occur here, as the facts and pleas stated in defence in the two are the same in substance, and nearly the same in arrangement and expression."

No. 13.

Nov. 18. 1830.
Sinclair v. Sinclair.

Under this diligence, before any other vouchers were attempted to be recovered, the trustee was examined, and required to produce "the book in which he entered the disbursements made by him as trustee on the defender's (advocator's) sequestrated estate." The trustee deponed that he had, some years before, given it to a brother of the parties, who again deponed that he had, within two months, delivered it to the advocator's agent, who thought he had given it to the advocator himself; but the advocator, on being examined, while he admitted having seen the book in his agent's possession, denied that he had ever got it from him. The book, however, was not to be found, and the respondent was allowed to put in a minute, stating what he would have proved by it. In this minute (varying his statement somewhat from that in the closed record) he averred that the book would have shown that the dividend of £54 had been wholly applied to the expenses of the sequestration; and as to the other item of £36. 4s., that he had purchased, for the advocator's behoof, furniture to that extent at the sale of his effects, for which he had paid £11. 9s. in cash, and granted a bill for £24. 15s. for the remainder, which bill, he said, he had afterwards retired. Without attempting to recover any other vouchers, or lead any further proof, he craved to be allowed to give his oath in litem in support of these statements, in order to supply the defect arising from the absence of the book, which had been traced into the hands of the advocator and his agent. The Sheriff having found him entitled to the benefit of his oath in litem, the advocator brought this advocation as to the mode of proof, on the grounds, that as there was no evidence of his having wilfully made away with the book, and so committed a wrong, and as the object of the oath allowed was not merely to fix the amount of an admitted claim, but to establish the claim itself, which was denied, there was no room for the oath in litem; but, at all events, that it could not be allowed without a talis qualis probation, and that the respondent must at least resort to all the other sources of evidence open to him in the first instance.

The Lord Ordinary pronounced this interlocutor:—"Remits the case to the Sheriff, with instructions to recal the interlocutor complained of, and to reserve consideration of the effect of the disappearance of the cash-book, while in the hands of the defender or his procurator, until the diligence be exhausted by the recovery of the other writings called for, and until he have an opportunity of determining, upon a view of the whole evidence so recovered, to what extent, and in what manner, the absence of the document amissing requires to be, or admits of being supplied; reserving the question of the expenses of this advocation, which is hereby remitted to the Sheriff to be disposed of, alongst with the expenses in the Inferior Court, at the conclusion of the cause."*

* "The loss of the book in question, under such suspicious circumstances, may possibly affect the onus probandi in some particulars, and may, for any thing as yet seen by the Lord Ordinary, ultimately authorize the Sheriff, upon considering the evi-

No. 13.

Nov. 18. 1830. Sinclair v. Sinclair.

Stalker v. Munnoch.

LORD JUSTICE-CLERK.—I cannot entertain the slightest doubt of the propriety of the course adopted by the Lord Ordinary. It would be a very strong measure indeed, at once to allow the contents of this book to be proved by the oath in litem. Let the evidence be concluded, and then the claim will be considered. The case of Calder,[1] so far from strengthening the respondent's plea, shows that the course adopted by the Lord Ordinary is just that which ought to have been followed.

LORD GLENLEE.—I have no idea that, because the book has been lost in possession of the advocator or his agent, the respondent is at once to be entitled to his oath in litem, without attempting to supply the evidence otherwise. There may exist a great deal of evidence to establish what was in the book, and I think the interlocutor quite right.

LORDS CRINGLETIE and MEADOWBANK agreed.

THE COURT adhered.

C. FISHER,—WOTHERSPOON and MACK, W. S.—Agents.

No. 14.

JAMES STALKER, Suspender.—*Sol.-Gen. Hope—Russell.*

ROBERT MUNNOCH, Charger.—*D. F. Jeffrey—W. Bell.*

Expenses.—Circumstances under which neither party was found entitled to expenses.

Nov. 19. 1830.

1st DIVISION. Lord Newton. S.

MUNNOCH was trustee on the sequestrated estate of Forfar and Stalker, who were discharged on a composition on the 15th of December 1827. At this period Munnoch had £90. 16s. 11d. of money, arising from the bankrupt estate, in his hands, to which Stalker had, by an arrangement with his partner, the sole right. When the offer of composition was accepted of, but before its approval in Court, Stalker had commenced business on his own account, in the prospect of his discharge. In the course of this trade, he granted a bill to Munnoch for £31. 8s. 6d., which fell due on the 3d of January 1828, nearly three weeks after he had obtained his discharge. In the mean while Munnoch claimed retention of the £90. 16s. 11d. in respect of certain alleged but disputed counter claims, and Stalker brought an action of count and reckoning. Stalker having refused to pay the bill, and Munnoch having charged him, he presented a bill of suspension, which was passed "on payment,"—"reserving to both parties any future claims for the expenses of process to the final issue of the cause."

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dence actually recovered, to supply the defect of that evidence by the respondent's oath in supplement, or oath in litem, as the case shall require. But, according to the interlocutor now complained of, the loss or disappearance of a document which is called for under a diligence by one party, and which is traced into the hands of the other, seems to be held at once to confer a right on the party calling for the document to prove what he alleges to be its contents by his own oath—a proposition to which the Lord Ordinary cannot assent, and for which he sees no authority either in principle or practice."

[1] Dec. 20. 1825, (ante, IV. 331.)

Thereafter, in the count and reckoning, decree was pronounced against Munnoch for the £90. 16s. 11d.; and, in the suspension, the Lord Ordinary "found that the sum charged for had been paid, but found the charger entitled to the expenses incurred by him," &c. Stalker reclaimed; and the Court, being satisfied, on the one hand, that as it was now ascertained Munnoch was debtor, and not creditor, when he charged on the bill, and that it was by his own fault that the claims against him were not then liquid,—and, on the other hand, that Stalker had, by circumstances in his own conduct, barred himself from claiming expenses,—altered, and allowed expenses to neither party.

No. 14.

Nov. 19. 1830.
Stalker v. Munnoch.

Reid &c. v. Grindlay.

M'Kenzie v. Ewing.

Charger's Authorities.—Henderson, May 20. 1824, (ante, III. 31); Laing, Nov. 23. 1827, and March 11. 1828, (ante, VI. 123. 750.)

J. Cullen, W. S.—J. Malcolm,—Agents.

Jean Reid and Cautioners, Suspenders.—*D. F. Jeffrey—Christison.*
James Grindlay, Charger.—*Sol.-Gen. Hope—Forsyth.*

No. 15.

Bill of Exchange—Notary Public.—It is no objection to a protest of a bill of exchange, made payable at the office of the son of the creditor, that it was taken by the son as notary.

James Grindlay, residing near Falkirk, drew a bill for £45. 5s. 6d. on Mrs. Jean Reid or Risk, "payable at the office of James Grindlay, writer in Falkirk." This person was the son of the drawer, and was also a notary public, and in that character protested the bill at his office after it fell due. A charge having been given on the registered protest, Mrs. Reid suspended, on the ground that a protest taken by the son of the creditor was inept.

Nov. 19. 1830.

1st Division.
Ld Corehouse.
D.

The Lord Ordinary "repelled the reason of suspension founded on the circumstance that the notary who extended the protest, the presentment being at his own office, was the son of the creditor in the bill."

In the mean while Mrs. Reid died, and her cautioners appeared and reclaimed; but the Court, without hearing the charger's counsel, unanimously adhered.

Suspenders' Authorities.—Dalgleish, June 18. 1822, (ante, I. 506); Farries, June 9. 1813, (F. C.)

W. Renny, W. S.—J. Stuart,—Agents.

Mrs. M'Kenzie or Cullen, Pursuer.—*Wilson.*
William Ewing, Defender.—*Keay—Maitland.*

No. 16.

Husband and Wife—Reparation—Title to Pursue.—A married woman living separate from her husband, and maintaining herself, is entitled to insist in an action of damages in her own name, for slander, and to have a curator ad litem appointed when her husband refuses to concur.

No. 16.

Nov. 19. 1830.
1st Division.
Lord Newton.
H.

M'Kenzie v. Ewing.

Mrs. Helen M'Kenzie or Cullen raised an action of damages against William Ewing, merchant in Edinburgh, setting forth that she was a married woman, wife of Thomas Cullen, writer in Glasgow; that in 1825 she had separated from her husband, and opened a boarding-house in Edinburgh; that subsequently a Mr. Wight had become a boarder, against whom Mr. Ewing had raised an action, in the course of which he maliciously accused Mrs. Cullen of being participant with Wight in various frauds, and of living in adultery with him. She therefore concluded for damages and solatium.

Ewing pleaded as a preliminary defence that the action was incompetent, being raised by a married woman without the concurrence of her husband. As the husband refused his concurrence, the pursuer, (who stated that her husband was in a conspiracy with Ewing against her,) petitioned the Court for the appointment of a curator ad litem; and her petition was remitted to the Lord Ordinary, to be disposed of along with the preliminary defence. His Lordship refused the petition for the appointment of a curator ad litem, and "sustained the dilatory defence," with expenses. The pursuer reclaimed, and prayed the Court to appoint a curator ad litem, and allow the expenses of the preliminary discussion.

Lord President.—This is an action of damages for slander, pursued by a married woman. Any sum which she recovers would fall under her husband's jus mariti, and belong to him. But he refuses to concur in the action, which is equivalent to a discharge of the pursuer's claim by the party competent to discharge it. This seems to me to throw a difficulty in the way of appointing a curator ad litem; for where is the title to pursue a claim, when the party, for whose eventual behoof it is presented, discharges it?

Lord Gillies.—If that principle were carried to its full extent, a married woman would be denied the protection of the law, precisely in those very cases where she most required it; for it might be, as indeed is averred here, that the husband conspires with the defender to ruin his wife, and she cannot seek redress, unless we appoint a curator ad litem. It also appears to me to be quite a novel thing for the defender to object to the appointment of a curator ad litem to the pursuer. What interest or title has he to stir such an objection?

Keay for Defender—

We have a right to sift the title of the pursuer, and to see that she has the power to grant a valid discharge of any claim which may be recovered under a decree, and also that we have a party liable to the ordinary diligence of the law, if we get an absolvitor with expenses. Now it is a question presently depending, whether a curator ad litem incurs such liability.

Lord Craigie observed, that as the pursuer was living separately from her husband, and supported herself by keeping boarders, she had a right to

pursue an action against Ewing for slander which hurt her boarding-house, and deprived her of her means of support. If her husband refused to concur, the Court should appoint a curator ad litem. No. 16. Nov. 19. 1830. M'Kenzie v. Ewing.

Lord Gillies.—I concur with Lord Craigie. The action is laid for damages in consequence of injury done to this woman's trade of keeping boarders for her own support. The profits of this trade were the means of her separate livelihood and aliment, and did not fall within the jus mariti. If Ewing's defamation deprives her of these, he owes her a sum in reparation which she has a right to recover. It no more falls under the jus mariti than the profits of which it is the surrogate. Gemmels v. Barclay &c.

Lord President.—I am much moved by the consideration now stated, and incline to appoint a curator.

The Court accordingly appointed a curator ad litem.

Pursuer's Authority.—Finlay, Feb. 5. 1748, (6051.)
Defender's Authority.—1. Ersk. 6. 21.

W. Dalrymple, S. S. C.—Daniel and Ross, W. S.—Agents.

J. and J. Gemmel, Suspenders.—*Houstoun.* No. 17.
John Barclay and Others, Chargers.—*Sol.-Gen. Hope—Hamilton.*

Society—Title to Pursue.—The members of an unincorporated society of subscribers for building a town-house &c. having by articles bound themselves to pay a subscription by five instalments to a committee, and authorized the committee to uplift the subscription—Held that two of the members who had paid two instalments were not entitled to object to the title of the committee to pursue for the remaining instalments.

Certain inhabitants of Saltcoats, having resolved to build a town-house and clock, with reading-rooms &c., by subscription, entered into an agreement with each other, containing the following articles:—1. "The society shall be called the Saltcoats Town-house Society." 3. and 4. Every person subscribing one guinea shall be a member; and subscribing five, shall have a vote in the choice of office-bearers, &c. 6. "The business of the society shall be managed by a committee of ten, five a quorum." 10 "As soon as £500 shall be subscribed, the subscribers shall be called together to appoint a committee in terms of the above articles; which committee shall receive estimates, contract with tradesmen for the buildings," &c. 12. "The committee, on its election, shall proceed immediately to lift the money subscribed, by regular instalments, in the following proportions:—One fifth part immediately after their appointment, and an equal proportion every three months till the whole be collected." 14. Authority to the committee to borrow, if necessary, on the security of the buildings. 22. "Every person, by subscribing to the proposed buildings and clock, in terms of the above articles, shall be considered as bound by them." Nov. 19. 1830. 1st Division Lord Newton. D.

To these articles the following minute was appended:—"We, whose

No. 17.

Nov. 19. 1830.
Gemmels v. Barclay &c.

names are hereunto annexed, agree to pay the following sums affixed by us to our respective names, for the purpose of erecting a town-house and clock in Saltcoats, agreeable to the above regulations and plan submitted to us, as made out by Peter King, mason in Saltcoats."

Among the subscriptions was that of "J. and J. Gemmel, £5. 5s." This was the subscription for John and James Gemmel, writers, Saltcoats. They attended several of the meetings of subscribers, and, after a committee of ten was appointed in terms of the articles, they paid to the committee the first two instalments of £1. 1s. The committee in the mean time had incurred considerable liability on the faith of the articles; but when they called on Messrs. Gemmel to pay their subsequent instalments as they fell due, payment was refused on various grounds. Upon this, an action was raised against them in the Sheriff Court of Ayrshire, for the balance of their subscription, by John Barclay, smith in Saltcoats, with nine other individuals designed as "the committee of management appointed for the current year at a general meeting of the subscribers to the Saltcoats Town-house Society, instituted for the purpose of erecting a town-house and steeple in the town of Saltcoats." The defences having been repelled, and a charge given, Gemmels brought a suspension, pleading, as their first reason, as follows:—"The chargers are a mere committee of subscribers appointed for the special purpose of superintending the buildings, receiving the estimates, &c., and are not the office-bearers of the body of the subscribers; and it is not alleged, nor does it appear in the minute of their appointment, that they are authorized to prosecute actions for behoof of the alleged society, or that they have any better right to do so than any of the other subscribers. Suppose, however, that the chargers were the regular office-bearers of the alleged society; that body, being neither incorporated by royal charter, nor being a friendly society qualified as the law directs, cannot sue or be sued by its office-bearers. The only exception to this rule is the case of a mercantile company pursuing in the company firm, or in the name of its ordinary directors and managers, subscribing obligations bearing to be for the company."

The Lord Ordinary ordered Cases on the first reason of suspension, and reported them to the Court.*

The Court unanimously repelled the reason of suspension and sustained the title.

Lord Balgray.—There is no general principle of law arising out of the

* "The Lord Ordinary would have repelled the objection to the title of the pursuers, had it not been for the decision in the case of Wilson v. Kippen, June 7. 1823. The authority of this decision may indeed be thought to be weakened in consequence of some later judgments in the case of private banks; but as the companies there were more of a commercial character than the society which the pursuers represent, and as it very nearly resembles that which was the subject of consideration in the case of Wilson, he thinks it proper to report the case for the judgment of the Court."

facts of this case It depends on its own specialities. Here articles of agreement were entered into, by which the suspenders expressly undertook to make payment of £5. 5s. to the chargers forming the committee, and the chargers were specially instructed by one of the articles to uplift that subscription. Both parties are directly taken bound to implement these articles towards each other. Upon the faith of this, the committee incurred considerable liability. It is quite impossible, therefore, for the suspenders to dispute the title of the chargers, who are clearly constituted their mandatories to make the very call in which they now insist.

The other Judges concurred.

No. 17.

Nov. 19. 1830.
Gemmels v. Barclay &c.

Mackintosh v. Macdonald.

Suspenders' Authorities.—Lodge of Lanark, June 11. 1730, (14554); Wilson, June 30. 1750, Crawford, June 13. 1761, (1958 and 14555); Wilson, Dec. 13. 1771, (14555); Lawson, July 7. 1810, (F. C.); Wilson, June 7. 1823, (ante, II. 378.)

Chargers' Authorities.—Hein. D. lib. 3. t. 4. § 439; Gow on Partnership, (2d Edit. p. 2. 137. 143. and 195); Adair v. New River Co., 1805, (2. Ves. 429); Cockburn v. Thomson, 1809; (16. Ves. 321); Moore and Others v. Hammond, May 5. 1827, (6. Barn. and Cressw. 456); Rogget v. Bishop, 1826, (2. Carrington and Payne, 343); Wilson, June 23. 1821, (ante, I. 88); 1. Stair, 17. § 1, 2.

J. Moore, S. S. C.—W. Patrick, W. S.—Agents.

Donald Mackintosh, W. S., Raiser.—*Skene—Thomson.* Coll Macdonald, W. S., Objector.—*Jameson—Macdonald.*

No. 18.

Process — Multiplepoinding. — A creditor called in a summons of multiplepoinding, and who had given in a claim, having lodged objections to the raiser's condescendence of the fund in medio, as making deductions which he was not entitled to charge against it, the Court refused to decide on the objections till a plea of the raiser's, that the objector's claim was not preferable to his claims of deduction, should be determined.

Mackintosh, W. S., setting himself forth as indebted in a certain sum of money to one Dallas, saddler in Inverness, raised a summons of multiplepoinding, in which he called as parties Coll Macdonald, W. S., and certain other persons who had used arrestments in his hands. In this process Mackintosh lodged a condescendence of funds, in which he stated counter claims against Dallas to such an extent as to bring out a balance of £11. 15s. 11d. due to himself, instead of any sum due by him to Dallas. To this condescendence objections were given in by Macdonald, who was not denied to be a creditor of the common debtor, and who had lodged a claim of preference, founded on his arrestment, on the ground that the deductions made by Mackintosh from the fund ought not to be allowed.

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2d Division. Ld. Mackenzie. F.

In his answers to these objections, Mackintosh pleaded that Macdonald's arrestment was inept, as laid on prior to the fund having come into his hands, and stated this as his first plea in law, to the effect that Macdonald could not compete with his claims of retention.

The Lord Ordinary having sustained the objections, (to the merits of which it is unnecessary to advert,) Mackintosh reclaimed; and the Court, conceiving that Macdonald had no title to object, unless he could instruct

No. 18. a preferable counter claim, remitted to the Lord Ordinary to hear parties on the raiser's first plea in law.

Nov. 19. 1830. Macintosh v. Macdonald.

D. Mackintosh, W. S.—Coll Macdonald, W. S.—Agents.

No. 19. Patrick Dudgeon, W. S., Pursuer.—*Jameson—Wood.*
Hugo Arnot, Defender.—*D. F. Jeffrey—Ivory.*

Interest—Provision to Children.—Younger children being entitled to certain provisions, with interest from the father's death, forming a burden on the heir; and having, during their childhood, been supported out of the rents of an entailed estate belonging to the heir, then also a minor,—the interest for that period imputed to their aliment.

Nov. 19. 1830. 2d Division. Lord Medwyn. T. Dudgeon v. Arnot.

Question on the construction of a mortis causâ disposition and settlement, whether certain provisions to younger children were a general burden on the disposition, or on a particular fund disponed; and whether they bore interest from the death of the testator, or only from that of his widow, who had a liferent of the whole of his unentailed property. The Court, considering the terms of the deed plain and unambiguous, held the provisions to be a general burden, and found that interest was due from the testator's death, allowing, however, deduction of a few years during which the whole family, while in minority, had been maintained together chiefly out of the rents of a small entailed estate which fell to the eldest son, who was also the disponee, burdened by the disposition,—it not being contested that the expense of aliment was equivalent to the interest of the provision.

P. Dudgeon, W. S.—A. Stevenson, W. S.—Agents.

No. 20. George Brodie, Pursuer.—*Boswell.*
William Sinclair, Defender.—*G. Napier.*

Nov. 19. 1830. 2d Division. Lord Medwyn. T. Brodie v. Sinclair.

Action by Brodie, who had at one time been grieve on the estate of the defender Sinclair, for payment of certain items of advances alleged to have been made by him in that character in the years 1806 and 1807, but selected from his general accounts, and without any conclusion for a count and reckoning. The Lord Ordinary, holding that there was no sufficient evidence of these advances having been made by Brodie, except as to two items, which were scarcely disputed, assoilzied the defender, except as to those items; and the Court, after remitting to an accountant, whose report confirmed the views of the Lord Ordinary, adhered.

D. Clyne, S. S. C.—G. and W. Napier, W. S.—Agents.

ACT OF SEDERUNT

Nov. 20. 1830.

Act of Sed.

TO REGULATE

THE ROTATION AND BUSINESS OF THE SIX PERMANENT LORDS ORDINARY IN THE OUTER HOUSE.

The Lords of Council and Session being duly assembled—Having taken into consideration that part of the Act of Sederunt, of date 11th July 1828, which regards the arrangement of business and rotation of Lords Ordinary in the Outer House; and seeing that by the removal of Lord Meadowbank, one of the permanent Lords Ordinary of the First Division, to the Inner House, the number of permanent Lords Ordinary has now been reduced from seven to six, whereby it becomes necessary to alter the said arrangement of business and rotation of permanent Lords Ordinary; do therefore hereby repeal the 40th, 41st, 42d, 43d, and 44th sections of the said Act of Sederunt, and enact and declare, that from and after this date, and until otherwise provided for, Nov. 20. 1830.

1. Each of the five senior permanent Lords Ordinary shall, in his turn, officiate as Ordinary for the week in the Outer House, and upon oaths and witnesses, beginning with Lord Newton of the First Division, for the next ensuing week, as the Lord Ordinary in the Outer House then in rotation, Lord Fullerton of the Second Division for the second week, Lord Corehouse the third week, Lord Mackenzie the fourth week, Lord Newton the fifth week, Lord Medwyn the sixth week, Lord Corehouse the following week, and so on, in time coming,—a permanent Lord Ordinary of the one Division being always succeeded by a permanent Lord Ordinary of the other Division alternately; but with power to any of the other permanent Lords Ordinary, when in the Outer House, to take the oaths of witnesses and havers.

2. The said five senior permanent Lords Ordinary shall call their respective hand-rolls each week as follows, viz.

Lord Mackenzie on Tuesday, Wednesday, and Thursday;
Lord Medwyn on Tuesday, Wednesday, and Saturday;
Lord Corehouse on Tuesday, Wednesday, and Thursday;
Lord Newton on Thursday, Friday, and Saturday; and,
Lord Fullerton on Thursday, Friday, and Saturday;
Each beginning at nine o'clock in the morning.

3. The Lord Ordinary officiating in the Outer House for the week shall call the regulation-roll, and the roll of advocations and suspensions, on the first day of his officiating in the Outer House, and the ordinary action-roll on the day following; with power to call his hand-rolls also on either of these days, if time permit, and his continued causes, as well as his hand-roll, on the third day; and also power to call a regulation-roll daily at the end of each session, as at present.

4. The junior permanent Lord Ordinary shall continue to call his respective rolls on Wednesday, Friday, and Saturday, beginning at nine o'clock in the

Nov. 20. 1830.

Act of Sed.

Falconer v. Gray.

morning,—all as directed by the 39th section of the said Act of Sederunt of 11th July 1828.

5. The above-specified arrangement and rotation of Outer House business shall be followed out, in time of session, as long as six permanent Lords Ordinary continue to officiate in the Outer House.

6. Upon Friday, one of the Bars shall be at the disposal of the Court, for the use of any of the three permanent Ordinaries, hereby appointed to sit on Tuesday, who may apply for it. In like manner, on Tuesday one of the Bars shall be at the disposal of the Court, for the use of any of the other three permanent Ordinaries who may apply for it. All which applications shall be made to the Lord President in the First Division of the Court.

And the Lords appoint this Act to be engrossed in the Books of Sederunt, and printed and published in the usual manner.

No. 21

HUGH FALCONER, Suspender.—*Pyper.*

PETER GRAY, Charger.—*J. W. Dickson.*

Bill of Exchange—Erasure—Legal Diligence.—1.—Where an acceptor of a renewed bill did not deny having received value, but alleged an agreement by the creditor to grant indulgence when the first bill was drawn, the Court, being satisfied that as much indulgence had been given as was ever contemplated, refused a bill of suspension, with expenses.—2.—Certain words written on an erasure in the narrative of letters of horning no ground of suspension.

Nov. 20. 1830.

1st Division. Lord Newton. S.

HUGH FALCONER, of Falconer's hotel, Edinburgh, offered a bill of suspension of a charge on his accepted bill for £49. 12s. This bill was a renewal of a previous one, and he did not deny that it was granted for value, but contended that the charger had agreed, on signing the first bill, to grant an indefinite delay to him. The Lord Ordinary passed the bill on consignation. Gray reclaimed. At the Bar, the suspender, besides pleading the merits, objected to the regularity of the diligence that the following words, printed in italics, were written on an erasure in the narrative of the letters of horning,—" which bill was duly protested," &c. ; " *and the instrument of protest* taken upon the said bill, &c., was registered," &c. But the Court, being satisfied that the suspender had obtained all the delay which was ever contemplated, and that the words were not material, altered, and refused the bill, with expenses.

J. SOUTER, W. S.—A. BAYNE,—Agents.

THOMAS STEPHENS, Pursuer.—*D. F. Jeffrey—Wilson.*
HIS CREDITORS, Defenders.—*Whigham.*

No. 22.

Nov. 20. 1830.
Stephens v. His Creditors.

Brown v. Sandeman.

Cessio.—Where a pursuer had been guilty of extensive and systematic imposition in obtaining credit on false pretences, and had lived extravagantly, and gave no satisfactory account of his funds, the Court only granted the benefit of the cessio after an imprisonment of about three years and nine months.

THOMAS STEPHENS, late tacksman of Niddrie coal-works, pursued a cessio. The Thistle Banking Company of Glasgow, and several other Banking Companies who were his creditors to the extent of about £3000, opposed him. It appeared that the pursuer, who was an Englishman, came to Scotland in 1823, and had, between that period and March 1826, when he was incarcerated, contracted debts to the amount of £16,769; that, under the pretence of being a person of good credit and mercantile connexions, although the reverse was the case, he obtained leases of the Niddrie and Crail colleries; that he had raised money from different banks in Scotland to the extent of about £17,000; that, in particular, he obtained in one day £1200 from the banks in Glasgow, by discounting bills on firms or individuals in England whom he falsely held out as possessed of respectability. On subsequent inquiry, some of the drawees proved to have been bankrupt; others could not be traced; and the existence of others was doubtful. It further appeared from the pursuer's own account of the mode in which he acquired these bills, that he had been attracted by an advertisement of Messrs. Richard Coster and Company, designing themselves money-brokers, Staining-lane, Cheapside, London, and had made an arrangement with them, under which they supplied him with accommodation-bills to his order, arranged for the market here, which he put into circulation to the extent of £16,860, while they received a commission of two and a half per cent. on the amount of bills supplied. The pursuer for some time lived extravagantly, and a considerable sum for plate remained among his debts at the time of his raising the process.

After an imprisonment of about three years and nine months, the Court, with some hesitation, granted the benefit of the cessio.

Nov. 20. 1830.

1st DIVISION.

A. SPALDING,—J. MACANDREW, Agents.

ALEXANDER BROWN and Others, Suspenders.—*D. F. Jeffrey.*
EDWARD SANDEMAN, Charger.—*Sol.-Gen. Hope—Dunbar.*

No. 23.

Suspension.—Bill of suspension of a decree in absence passed on jurary caution.

Nov. 20. 1830.

1st DIVISION.
Bill-Chamber.
Lord Gillies.
D.

W. POLLOCK,—J. BENNETT, W. S.—Agents.

No. 24.

Nov. 20. 1830.
2D DIVISION.

Wallace, Petitioner.

WILLIAM WALLACE, Petitioner.—*Fergusson.*

Curator ad Litem.—The Court refused to appoint a curator ad litem to a party said to be fatuous, in reference to an action which had not been actually raised.

GEORGE RITCHIE, W. S. Agent.

No. 25.

Nov. 23. 1830.
Hamilton v. Kerr.

THOMAS HAMILTON, Petitioner.—*D. F. Jeffrey—Cuninghame.*
JAMES KERR, Respondent.—*More.*

Bankrupt—Sequestration.—The trustee on a sequestrated estate having admitted and duly ranked a creditor's claim, without any objection having been made, and a scheme of division conformably thereto framed, and exposed during the statutory period of a month, also without objection,—not entitled thereafter, of his own accord, to withhold the dividend, and strike the claim out of the ranking, on the allegation that it had originally been admitted through his ignorance or mistake.

Nov. 23. 1830.

1ST DIVISION.
Ld. Moncreiff. D.

THOMAS HAMILTON, mercantile agent in Edinburgh, made sales for certain English houses to James Chisholm and Company of Glasgow, and got their acceptance at three months, in October 1828, for £364. 10s. He discounted the bill, on the 15th of November, with Messrs. Watsons, bankers in Glasgow; and, on or about that date, he paid £21 in cash to Chisholm and Company. They were sequestrated in December, and James Kerr, accountant in Glasgow, was chosen trustee. The bill for £364. 10s. was dishonoured, and duly ranked for upon the estate by Messrs. Watson. In May 1829, Hamilton made affidavit and lodged a claim for the £21 of cash advanced, which was too late for the first dividend, the term of payment having been accelerated. In June 1829, he voted at the election of two new commissioners.

The trustee then prepared a continued scheme of ranking in reference to a second dividend, and also embracing the new claim which had been lodged too late for the first. In that scheme there was the following entry:—"No. 135, Thomas Hamilton, Edinburgh,

"Cash paid 15th November 1828,	£21	0	0
"Interest, twenty-six days,	0	1	6
	£21	1	6"

After an audit of the trustee's account by the commissioners, Hamilton, on the 4th of November 1829, received a circular, intimating the audit and approval, and giving notice of the second dividend, as payable on the 12th of December, to the creditors admitted to rank. Preparatory to the dividend, the trustee, on the 9th of November, made the following deliverance:—"Having reconsidered the scheme of ranking of the creditors made up for the first dividend, and the continued scheme of ranking of claims subsequently lodged, all as engrossed in this book, I confirm (with the exception of the claim No. 131, as after mentioned) the ranking of the various claims, amounting," &c. "But I reject the fol-

No. 25.

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Hamilton
v. Kerr.

lowing claims," &c. The claim of Hamilton was not rejected in this deliverance, but, on the contrary, was comprehended in the amount of claims confirmed. Some months elapsed before he asked payment, when it was refused by the trustee, who gave this explanation of his refusal: He stated that the £21 claimed by Hamilton proved, on examination, to be part of the proceeds of the bill for £364. 10s., the whole of which was already ranked in the name of Messrs. Watson; that as soon as the mistake of the double ranking of the same sum in the name of Mr. Hamilton was discovered, (although this was after the term when the second dividend was payable,) he felt it his duty to rectify the error by withholding payment; that, in doing so, it was not necessary for him to lay the matter before the commissioners or creditors; that he meant to enter this correction of the scheme in the sederunt-book; and that although he could not complain of his own judgment to the Court, he was entitled to rectify his own mistake.

Hamilton, on the other hand, stated that the £21 claimed by him were not included in the £364. 10s. ranked for by Messrs. Watson; that the bill held by them was granted by the bankrupts in August 1828, as the invoice price of goods delivered to them; but that, by the practice of the trade, they were entitled to discount to the amount of £21. 5s., if they paid cash, or granted an available bill within four months; that in November, and while the bill was current, Hamilton was applied to by the bankrupts, and, in the full reliance that their bill would be duly paid, (in which event they would have earned a deduction of £21. 5s. from its amount,) he advanced them that sum from his own pocket; but that, as they were sequestrated before the term of payment arrived, and were thus liable for the full contents of the bill as the invoice price of the goods, this advance was an additional and separate loan, and must be separately ranked for, as it did not fall under the bill.

The trustee having still refused to pay the dividend, Hamilton, in in July 1830, presented a petition and complaint to the Lord Ordinary on the Bills, craving an order on the trustee for payment of the dividends on his claim. He pleaded, 1. That the trustee's judgment, sustaining his claim, on the 9th of November 1829, was final, having never been competently recalled; and, 2. That his right to be ranked was well founded on the merits, if open to review. The trustee answered, that he had ranked Mr. Hamilton's claim, merely from oversight in not observing that it was already ranked under the bill for £364. 10s.; and that having discovered this mistake, although not till after the term when the second dividend was payable, he was still entitled immediately to rectify it, and withhold payment of the dividend.

The Lord Ordinary reported the cause on Cases, subjoining this note.*

* "The record has been prepared in this case in the Bill-Chamber; but the Lord Ordinary does not think it necessary or expedient to close it. The case relates only

No. 25.

Nov. 23. 1830. Hamilton v. Kerr.

Lord Balgray.—The first point involves a general question, not yet disposed of, I believe, by any decision; and I have examined the 45th and 46th sections of the statute, with special reference to it. The act provides that the resolutions of creditors at general meetings shall be final, if not complained of within thirty days; but it is nowhere ordained that a trustee, by the mere general entry of a creditor's claim, along with the others in the sederunt-book, in initio of the proceedings towards distribution under a sequestration, and when no objection has been stirred in regard to it, is barred from afterwards rectifying this, if it has been done by mistake. It is only said that the relative scheme of division, when prepared, shall lie open during one month for inspection and if no objection be then made, he is warranted in paying away the funds in conformity to it. I think it would be very dangerous to carry a doctrine so far as to find that after that term he has no means of correcting any error in ranking into which he perceives himself to have fallen. I observe that Mr. Bell, in his last edition, points out, in his observations on the 45th section of the Bankrupt Act, the oversight which seems to have been committed by not expressly declaring whether the trustee's judgment becomes final, if not objected to within the month. But I feel some hesitation as to another point. The trustee is the mere factor and representative of the creditors; and if none of them objects to the ranking of one of their number after it has been made, there is a difficulty in discovering on what principle the trustee is to be allowed to do it. Perhaps he should have called a meeting of the commissioners, and got their authority for rejecting the claim, and have made an entry of this in the sederunt-book. But then, although he has omitted this, can we pronounce a judgment depriving him of all right to correct a mistake he had made in the

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to a *ranking* of a small claim of £21. But it involves two questions, the decision of which is said to be looked to for the guidance of trustees in other cases:—1. Whether the act of a trustee in *sustaining a claim*, and *ranking* it without discussion, becomes final, if not complained of within thirty days? and, 2. Whether the claim in this case is well founded on the merits?

"The plea of the complainer on the first point appears to the Lord Ordinary not to be well founded. He cannot think that a trustee who had inadvertently ranked a claim, may not correct a mistake; and the plea would amount to this, that the judgment was final, as to the trustee, the instant after he pronounced it, because he could not bring a complaint against his own act.

"The other point is perhaps more doubtful. Goods are sold at a fixed price, but with the understanding, that if cash, or a bill at three months, be paid, a certain discount shall be allowed. A bill is drawn for the full nominal price, without discount; and the seller, relying on the regular payment of the bill, pays over in money the amount of the discount. The purchaser becomes bankrupt before the bill falls due; and the bill is ranked, being in the hands of an onerous indorsee. The question is, Whether the seller is entitled to be ranked for the sum of discount which he paid over, the bill not having been paid? This seems to be the same question in principle as if the bill had been originally drawn for the price, minus the discount, and the seller claimed a right to rank for the sum so discounted from the credit price. It is admitted that if no bill had been granted, the ranking would have been for the full price, without discount; and though there may be difficulty in the question, the Lord Ordinary thinks that the granting of the bill ought not to make any difference. In the present case, the seller is simply creditor of the bankrupt for repetition of a sum of money which turns out not to have been due."

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ranking, which mistake he has discovered while the funds are still in medio, and in his own hands? There is nothing direct in the 45th and 46th sections to warrant this conclusion, and the inference on which it is founded is very doubtful.

LORD PRESIDENT.—I do not think the petitioner's conduct is free from error, any more than that of the trustee. He permits a long delay to occur before he prefers any complaint to the Court.

LORD GILLIES.—I fear that the trustee's error is the greater of the two. He makes up a regular scheme, and submits his accounts to the audit of the commissioners. Then, in a full and explicit report, the petitioner's claim is admitted as unobjectionable, while other claims are repelled. This is on the 9th of November 1829. Now, what does the statute say as to the distribution of a second dividend? After enacting the audit by the commissioners, and that the scheme shall be made up, and shall remain open for inspection for one month, it proceeds—"At the expiration whereof, or on the first lawful day thereafter, the dividend shall be paid after the like previous advertisement," &c. In not making the payment as enjoined here, the trustee disobeyed the statute. But we cannot judge of the pleas maintained by him in a more favourable view in consequence of this disobedience. He ought to have made the payment then; and as in such a case this question could never have arisen, I think he cannot be allowed to raise it, and found on his own irregularity. It is said to be a hard case that a trustee cannot correct his mistake in judgment, when he is satisfied he has been wrong; but so it may be in many similar situations. A Lord Ordinary in the Outer House, after pronouncing judgment, may become satisfied he has committed an error, and may entertain the strongest desire to rectify it; but he cannot do so, just because his judgment is final. The whole question comes to this point—Can a trustee, by expressly disobeying a statutory injunction, gain a power, in a contest with a creditor, which he could not have had, if he had yielded due obedience to the act? I think he cannot, and am for granting the prayer of the petition on the first ground stated in the Lord Ordinary's note.

LORD CRAIGIE considered the point both doubtful and important, and wished delay.

LORD PRESIDENT.—As the trustee did not act by the authority of the commissioners, and as no creditor took any objection to this ranking after it was made, I conceive the trustee was not authorized to alter it.

THE COURT then "found that the trustee, in terms of his judgment in the scheme of ranking, was bound, in terms of the Act of Parliament, to pay the complainer the dividend effeiring to his claim, and that on the expiry of thirty days after the date of his judgment; and therefore sustained the complaint in terms of the prayer of the petition, and decerned;—also found the petitioner entitled to the expenses incurred by him," &c.

J. CULLEN, W. S.—W. and A. G. ELLIS, W. S.—Agents.

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M'Kenzie v. Morison's Trustees.

JOHN M'KENZIE, Pursuer.—*Keay*—*W. Bell.*
MORISON'S TRUSTEES, Defenders.—*Skene.*

Implied Obligation—*Warrandice*—*Trust.*—Trustees having inserted a clause in a building feu-contract, that the feuar should have no claim against them for the expense of mutual gables &c., "but should be entitled to claim half of that expense from the feuars of the adjoining lots," and granted warrandice from fact and deed; and having omitted to insert in the contract of an adjoining feuar an obligation to pay that half; and the first feuar having raised action for it against the second, who was assoilzied, as not being bound in his feu-contract, though subjected on a separate ground, and no expenses allowed to either party—Held that the trustees were bound to relieve the first feuar of the expenses incurred by him.

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Ld. Corehouse.
8.

MORISON'S trustees entered into a feu-contract with John M'Kenzie, W. S., in relation to a building stance in St. Cuthbert's street, Edinburgh, marked No. 45 on the feuing plan. In this contract there was the following clause:—"Declaring that the said John M'Kenzie shall have no claim upon the said trustees for any part of the expense of erecting the mutual gables of the tenement to be built on the area hereby disponed, or the mutual division-walls of the back ground; but he shall have power to add twelve inches from the adjoining feu for each mutual gable, and shall be entitled to claim the expense of building the half of said gables with the chimney-stalks, and of the said division-walls, from the feuars of the adjoining lots, as the same shall be ascertained by two builders mutually chosen by the parties, which shall be payable within one month after the said gables and division-walls are completed, if the said adjoining lots are then feued, or otherwise within one month after such adjoining lots are feued, and shall bear interest thereafter till paid; which gables and division-walls shall thereafter be the mutual property of the said John M'Kenzie and the said adjoining feuars, and upheld at heir mutual expense." The trustees also granted warrandice "from their own proper facts and deeds."

About the same time, the trustees entered into a feu-contract of the adjoining stance with Alexander M'Kenzie, builder, and William Hossack, mason in Edinburgh. It contained a clause in the same terms with that already quoted; but it did not lay any express obligation on the feuars to pay to John M'Kenzie one-half of the expense of the gables &c. John M'Kenzie erected a house on the stance feued by him; and thereafter Alexander M'Kenzie and Hossack built on their stance a small part of the front wall of an intended house, which was attached to John M'Kenzie's mutual gable. These parties having refused to pay him any part of the expense of that gable, he, proceeding on the assumption that they had been taken bound by the trustees to relieve him of one-half, raised an action against Alexander M'Kenzie and Hossack. Alexander M'Kenzie alone made appearance, and pleaded, inter alia, that no

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obligation was laid upon him by the trustees, in his feu-contract, to pay any part of the mutual gables &c.; and that whatever recourse John M'Kenzie might have against the trustees under his warrandice, he had no claim against the adjoining feuars. John M'Kenzie then intimated this action to Morison's trustees, and gave notice that he held them liable in any damage which might accrue to him from their omission. In that action Lord Medwyn, as Ordinary, "found that there being no obligation in the feu-contract of the defender to pay the half of the mutual gable built by the pursuer, he is not liable to make such payment in terms of the clause in the feu-contract granted to the pursuer; but found that although the defender has not built any house upon the feu adjacent to the pursuer's, he has made use of the said mutual gable by attaching to it a part of the front wall of the house which is to stand on said feu, and which was built by the defender at the same time that he built the pursuer's house for him; and therefore that he is liable, on this ground, to pay for the half of the said mutual gable."

Against this interlocutor both parties reclaimed to the Second Division; and John M'Kenzie then raised an action against Morison's trustees, founding on the above clause as importing an obligation to take the adjoining feuar bound to pay one-half of the expense of the gables &c.,—and on their omission to do so, as a fact or deed for which, under the warrandice, they were responsible. He therefore concluded, 1. That they should be ordained to relieve him of all the expenses and consequences of the action against Alexander M'Kenzie; and, 2. In the event of that party being ultimately assoilzied in toto, also to relieve him of one-half of the expense of the gable.

The trustees pleaded in defence, 1. That the insertion of the same clause in both the feu-contracts warned the feuars of the obligations which they undertook towards each other, as well as towards the trustees; and that their respective acceptance of feu-rights containing these provisions gave the party building a mutual gable in terms thereof a good claim for one-half against the other, and at the same time laid the other under a legal obligation to pay it. But, 2. Independently of this, as Alexander M'Kenzie had taken use of the mutual gable, he was clearly liable for one-half of its value on that account alone; and therefore John M'Kenzie, having a clear ground of action against him, had no right to claim the expense of raising a point which was doubtful, and which he had no interest to press, as the other ground of action was alone sufficient.

The Lord Ordinary "found that it is an implied condition in the feu-contract between the pursuer and the defenders that the feuars of the lot adjoining to that which the pursuer feued should be taken bound to pay half the expense of building the mutual gable, chimney-stalks, and division-walls, to be ascertained in the manner, and payable at the time, mentioned in the said contract;—that the defenders, having omitted to insert an obligation to that effect in their contract with Alexander M'Kenzie, the feuar of the lot adjoining to that of the pursuer, are liable to the

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pursuer in the expenses which he incurred in his action against the said Alexander M'Kenzie; and therefore found in terms of the first conclusion of the libel, and allowed an account of the said expenses to be given in; but in respect that Alexander M'Kenzie has been found liable for half the expense of the gable, in consequence of having taken benefit of it to a certain extent, found it unnecessary to consider the second conclusion of the libel; and found the pursuer entitled to expenses."*

The trustees reclaimed; but the Court unanimously adhered.

J. M'Kenzie, W. S.—Gibson-Craigs, Wardlaw, and Dalziel, W. S.—Agents.

No. 27.

John Fraser and James Tait, Suspenders.—*Skene.*
Edinburgh and Glasgow Union Canal Co. &c., Chargers.—*Keay.*
Sir Thomas Carmichael, Charger.—*Rutherfurd.*

Interdict—Landlord and Tenant.—Circumstances in which the tacksmen of a quarry were found not entitled to an interdict against the sale or removal, by a canal company, of part of the stones composing the quarry, although their landlord was debarred from opening any new quarry within the grounds let to them,—the operation being in implement of an agreement entered into by the landlord with the canal company prior to the tack, and being necessary for the cutting of a tunnel under the canal, for the purpose of the tacksmen's ulterior workings; and the canal company being obliged to pay a lordship for the stones excavated, as well as to be at the expense of excavation.

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1st Division. Bill-Chamber. Lord Craigie. D.

By an agreement, in 1818, between Sir Thomas Carmichael, proprietor of the estate of Hailes, containing an extensive stone quarry, and the Union Canal Company, then newly formed, Sir Thomas consented to the canal being carried through his estate according to a particular line; and the Canal Company bound themselves, "in case, at any time after the said line shall be executed, a face of rock shall be found, and wrought up to the canal, to turn, at the expense of the said company, the canal over the rubbish of such quarry, leaving a proper access, by aqueduct, for a road and water-level from the workings; or, in the option of the said Sir Thomas Carmichael, to construct such an aqueduct as will allow of the rock being wrought to the southward, and to pay to him and his foresaids the lordship, or worth to him for the time, of whatever stone the canal may cover, to be ascertained by reference to proper judges at the time, as soon as the adjoining workings prove that it really does cover such rock, and impedes the operations of the quarry."

In 1820, Sir Thomas granted a 19 years tack of the whole stone quarry in the farm of King's Knowes, on his estate of Hailes, to John Fraser and James Tait junior. There was a royalty of 11s. per pound sterling of gross output imposed on the tacksmen, who were bound to work the quarry constantly during the lease. It was further stipulated that Sir

* "Expenses might have been refused to the pursuer in this action against M'Kenzie, on grounds independent of the difficulty of the question; but there is no allegation to that effect on the record."

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Thomas " is not to be at liberty to open up any quarry for the sale of freestone, of a similar description with that contained in the quarry hereby let, on any part of the estate of Wester Hailes, without the consent of the tacksmen."

In 1825, a face of rock having been found, and wrought by Fraser and Tait until they were about to be stopped by the canal, Sir Thomas Carmichael declared his option to the company, under his agreement with them, to be, that the canal should remain in its present situation, instead of being turned aside over the rubbish of the quarry. He, at the same time, claimed a lordship of 11s. per pound sterling on the value of the rock covered by the canal, and insisted that the company should carry an aqueduct and tunnel under the canal, and throw a stone bridge across it, so as to give access to his tenants to carry on their southward working of the quarry.

The company having concurred with Sir Thomas in a submission of these claims to Lord Newton, his Lordship ordered Mr. Jardine, engineer, to inspect and report on the necessity of a tunnel, and its best form, if necessary. Mr. Jardine reported on the form of a proper tunnel; and the company, having built a bridge over the canal, proceeded to the formation of a shaft and tunnel below it, in compliance with the order of the arbiter. In doing this, some delay having occurred, the tacksmen of the quarry, Tait and Fraser, on the 4th of September 1830, wrote the agents of Sir Thomas, complaining that " nothing had been done towards the completion of the tunnel for some time past, &c. If this operation is not finished as expeditiously as possible, (agreeably to the directions given by Mr. Jardine in his report of 22d January last,) so as to afford a proper communication under the canal to remove the rubbish, and cart away the stones, the workings will in consequence be entirely obstructed."

After some ineffectual attempts to make an arrangement with the tacksmen for their cutting the shaft and tunnel under the canal, the company agreed with Mr. George Johnston, who undertook to perform the operation in the terms of the engineer's report, without expense to the company, on being allowed to dispose of the stones excavated in the course of the work. Johnston began to do this, when the tacksman presented a bill of suspension and interdict of the sale or removal of the stones against the company, Johnston, and Sir Thomas Carmichael. They founded on the clause in their tack which prohibited Sir Thomas from opening any quarry on the Hailes estate for the sale of freestone similar to that in the quarry let to them; and maintained, that as the tunnel was cut through part of the rock let to them, and exposed them for a time to the competition of a rival quarry, they were entitled to an interdict against its being allowed to proceed, as being in violation of their rights under their lease.

The Canal Company and Johnston answered, that the agreement under which they had been enjoined to cut the tunnel, was prior in date to

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the tack founded on by Fraser and Tait; that the cutting of this tunnel was in reality not the opening of any new quarry, so as to infringe the lease of the complainers; and that they (the company) had no interest to make the operations in question, unless constrained to do so under their agreement with Sir Thomas and the relative submission,—the object of their proceedings being expressly to enable the suspenders to continue the working of their quarry.

Sir Thomas contended that he had fulfilled every obligation incumbent on him towards the suspenders, and should not have been made a party to the process.

The Lord Ordinary passed the bill, and granted interdict in the mean time. The respondents having reclaimed, the Court altered, and remitted to refuse the bill, with expenses.

PHIN and PITCAIRN, W. S.—J. G. DAVIDSON, W. S.—Agents.

No. 28.

ELIZA W. H. ALLSOPP, Pursuer.—*Fergusson—Mylne.*
JAMES ALLSOPP, Defender.—*Keay—Thomson.*

Mandatory — Process. — A defender not resident in Scotland is bound to sist a mandatory.

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1st DIVISION. Ld. Moncreiff. H.

ELIZA W. H. ALLSOPP raised a reduction of a decree of divorce which had been obtained in absence against her by James Allsopp, paymaster of the 17th regiment of foot. After obtaining an award, under an incidental petition, for an interim sum of aliment and expenses,[1] she stated that the defender resided out of Scotland, and was bound to sist a mandatory.

The Lord Ordinary, on the 7th of July last, in respect the fact was admitted, "appointed the defender to produce a mandate to a person in this country who is willing to sist himself as his mandatory in this cause, and that by the first box-day."

Allsopp reclaimed; but the Court adhered.

G. RITCHIE, W. S.—A. M'KENZIE, W. S.—Agents.

No. 29.

DONALD M'AULAY, Complainer.—*Skene—Cockburn—Cuninghame.*
JOHN M'KENZIE, Respondent.—*D. F. Jeffrey—Jameson—W. Bell.*

Title to Pursue—Summary Complaint—Expenses.—1.—Incompetent for a private party, without concourse of the public prosecutor, to insist in a complaint against an inferior judge for malversation in office, though in reference to causes in which the complainer was a party, but concluding only for deprivation of office and penalties.—2.—Party, after concluding his cause on the merits, without stating an objection to the competency, still allowed so to object, without payment of previous expenses.

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[1] Ante, VIII. 1032.

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2D DIVISION.
R.

M'Aulay v. M'Kenzie.

THIS was a complaint presented by M'Aulay, surgeon in the island of Lewis, against M'Kenzie, the Sheriff Substitute of that island, setting forth that M'Kenzie had been guilty of malversation in his office on various occasions; and in particular that he had violated the A. S. 1825, which requires Court days to be held once a week, whereas, between April 1826 and March 1827, he had only held nine Courts, (this, however, it appeared, was under the sanction of a regulation by the Sheriff); that he never adjourned to any particular day, so that parties were ignorant when a Court was to be held; that, in various actions in which the complainer was a party, the respondent had refused to proceed, and had further, in consequence of the complainer having stated in Court, "that when his conduct should be examined into by the Superior Court, it would be found as correct as either the Sheriff Depute's or the Sheriff Substitute's," pronounced this order—"In respect of the disrepectful language used by Dr. Donald M'Aulay at this diet, and his disrespectful and improper conduct at former diets of Court, supersedes procedure in any cause he may have to move in this Court as party;" and that he had thereafter refused to receive any paper signed by the complainer, and required that it should be subscribed by a procurator, although there was not one resident on the island; and finally, that on the complainer having borrowed a process, and sent it to Edinburgh to consult whether a judgment should be advocated, the respondent had issued a process caption for imprisoning him in the jail of Dingwall, about 100 miles beyond his particular district of the county; and that the complainer was actually taken to Dingwall, where he was only liberated by an order of the Sheriff. The petition further set forth that the complainer had suffered damage by the misconduct of the respondent, and concluded with a general prayer, craving the Court, after investigation, to find him "incapable of acting as Sheriff Substitute in the said county; suspend him from said office; and to find him liable in such damages, or other penalties, for malversation, as your Lordships may think just; and also in the expense of the procedure to follow hereon; or to do otherwise in the premises, as to your Lordships may seem just."

The cause, having been prepared on the merits, was reported to the Court on Cases; but, when put out for advising, certain objections to the competency were suggested from the Bench, in regard to which the respondent was allowed to give in a note of additional pleas in law. These were to the following effect:—

1. That as by 20. Geo. III. c. 43, authorizing the appointment of Sheriffs Substitute, it is declared that the Sheriffs shall be answerable for their Substitutes, they can only be answerable in the first instance to the Sheriff, and cannot at once be complained of to the Court of Session, to whom no authority is expressly given by the statute.

2. That, at all events, the Sheriff, being answerable for his Substi-

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tute, ought to be made a party to all complaints against him for malversation; and,

3. That the prayer of the petition being for the infliction of penalties for malversation in office, it could not competently be brought by a private party, without concourse of the public prosecutor.

As the Court did not decide the first two pleas, it is unnecessary to advert to the argument upon them. In regard to the third, it was

Pleaded by the Respondent.—No principle of the law of Scotland is more clear than that a private party cannot insist ad vindictam publicam without concourse of the public prosecutor. This principle, as applied to the case of a complaint against a Judge for malversation, was fully argued, and held to be established, in the case of Syme v. Murray;[1] and it has since been confirmed by a judgment of the House of Lords in the case of M'Intosh of Raigmore.[2] Now here the prayer is solely for deprivation of office, and the infliction of "damages, or other penalties for malversation," which cannot infer a conclusion for damages as in reparation of private injury, which, besides, would be incompetent in the form of a summary complaint.

Pleaded for the Complainer.—A distinction may be taken between the case of a complaint by a party who has sustained no injury from the malversation complained of, and one who has suffered loss; and this distinction seems to have entered into the judgment in the case of M'Intosh; so that when the party, as here, has suffered actual damage by malversation in his own cause, he may complain without the concourse of the public prosecutor; and this, indeed, seems to have been allowed in several previous cases.[3] But at all events he here craves damages.

Lord Justice-Clerk.—We must look to the prayer of the complaint, which admits of no such construction as is attempted by the complainer to be put on it. It prays for suspension from office, censure, and "damages, or other penalties for malversation." There is no prayer for damages for injury done to himself; and it is clear he cannot avail himself of the general words, "or to do otherwise," &c., as embracing any thing more than is specially craved. To this prayer we must apply the common rules of law; and if there is any thing fixed in the law of Scotland, it is this, that no complaint to deprive a man of office, or to punish him, can be made by a private party without concourse of the public prosecutor. This was clearly settled in the case of Sim v. Murray; and there can be no doubt here, as there is no concourse of the public prosecutor, that the complaint is incompetent. There is one part of the complaint, though not in the prayer, which might have warranted our consideration, if prayed for—viz. to enforce the provisions of the A. S. 1825. But the prayer asks nothing in respect of that, being confined to penal conclusions for malversation, and we cannot sustain it. The other points it is not necessary to decide, as the defect,

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[1] Jan. 19. 1810, (F. C.) [2] 1829, 1. Bligh, 272. [3] Creditors of Dickson v. Bailies of Forfar, June 13. 1735, (Elchies, v. Sup. and Vass.); Angus, Feb. 1. 1751, (14976); Duff v. Sutherland, Dec. 7. 1793, (14981.)

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from want of concourse, cannot be remedied. I may mention that there was a case here lately which has not been noticed, in which, while we gave civil redress, we refused to do more. [1]

Lord Glenlee.—It is a very different thing when a complainer points out a grievance subsisting at the time, and craves to have it redressed, and where he prays, as here, for the infliction of penalties for injuries which are past. It has happened that, on a petition praying for redress of a subsisting grievance, the Court, ex officio, have censured the Judge, the main body of the complaint being, for redress of the particular grievance subsisting in consequence of the malversation, though without concourse. But it is totally different as to a petition like this, which I agree in thinking incompetent. As to the other matters, I have no idea that it is an universal rule that the Sheriff must be called in all complaints against his Substitute; but in some cases I should think he must; and one of the complaints stated in the petition is of that description—viz. the alleged violation of the A. S., which, it appears, was done by orders of the Sheriff. As to the other matters, it is not necessary to decide; but I must make one remark: I doubt whether most of the things complained of are proper subjects for a summary complaint. I always understood that, to warrant a complaint, the act complained of must be subsisting; and that if all the evil be done, the form of obtaining redress is an ordinary action. What justifies a complaint in a summary form is, that the evil is subsisting, and is capable of summary redress. But it is needless to go into these matters, as, considering the prayer, I am satisfied the complaint is incompetent without concourse.

Lord Cringletie.—I agree that the Sheriff Substitute is liable to be complained of at common law—but to whom? This Court could not have removed a Sheriff, unless allowed by statute; and where is the authority given to remove a Substitute? This, however, is only obiter; for it is not necessary to decide the question, it being clear that, as there is no concourse, the petition is incompetent.

Lord Meadowbank.—I entirely concur with the opinion delivered from the Chair. If any one point is fixed, it is, that a complaint of this kind requires the concourse of the public prosecutor. Material justice requires that this form should be observed, though the prosecutor cannot refuse to concur. As concourse is not given here, it is sufficient for the decision; and thus I am saved from the delivery of an opinion on many difficult points—as, for instance, the power of this Court. It would, however, require much consideration before I could come to the conclusion that we had not power to interfere. As to the necessity of calling the Sheriff, I concur with Lord Glenlee.

D. F. Jeffrey, for the Respondent, craved expenses.

Cockburn for the Complainer.—In the case of Speirs v. Buchanan,[2] where a complaint was allowed to go on upon the merits, and an objection to the competency was afterwards started, the Court, while they sustained the objection, and dismissed the complaint as incompetent, found the complainers entitled to their previous expenses on the merits. This is exactly the same

[1] Anderson v. Spence, May 27. 1830, (ante, VIII. 820.) [2] Feb. 21. 1823, (ante, II. 237). See also Auld v. Magistrates of Ayr, Jan. 16. 1825, (ante, IV. 99); and Adam v. Watson, June 19. 1829, (ante, VII. 775.)

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case; and at all events the respondents certainly never can get more than their expenses since they stated their new pleas.

THE COURT, in respect of the terms of the prayer, and that there was no concourse by the public prosecutor, dismissed the complaint, and found the complainers liable in those expenses only incurred since the new pleas were stated.

ADAM and BROWN, W. S.—J. MACKENZIE, W. S.—Agents.

No. 30.

JOHN M'KENZIE, Suspender.—*Skene—M'Dougall.*
GEORGE SMITH, Pursuer.—*Thomson.*

Bill of Exchange—Notary—Diligence, Legal.—1.—No objection to the validity of a protest on a bill of exchange that the notary had, some years before, been a partner of a company, drawers of the bill, and was subsequently found liable for the debts of the company, in respect of insufficient notification of his retirement.—2.—The short copy of a charge, given in the same year in which the bill charged on was dated, having omitted the year in reciting the date of the bill, held not a good objection to the diligence.

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2D DIVISION.
Ld. Cringletie.
T.

THE suspender M'Kenzie, in March 1827, accepted a bill for £29. 17s., drawn upon him by Ingram, Duguid, and Company, ironmongers in Aberdeen. This bill having been indorsed by them to William Smith, advocate and notary in Aberdeen, he indorsed it, but without recourse, to the charger George Smith, his father, who protested the bill when it fell due, in the month of June 1827,—William Smith having officiated as notary on the occasion. M'Kenzie, having been charged immediately thereafter, brought a suspension on the grounds,—

1. That the short copy of charge did not sufficiently specify the date of the bill, which was merely described as dated '2d March,' without any year; and it is not necessarily to be inferred, when no year is specified, that that in which the charge is given is intended.

2. William Smith, the notary who protested the bill, was a partner of Duguid, Ingram, and Company, the drawers, and so disqualified from legally taking the protest.

The facts as to this latter objection were as follows:—Prior to 1822, Smith had been a partner of Duguid, Ingram, and Company; he retired in that year, and notified his retirement in the Gazette; but gave no other notice, although after that he ceased to act as a partner. About a month after the bill was protested, Duguid, Ingram, and Company were sequestrated, and thereafter a demand was made on Smith, as liable for the debts of the company, in consequence of his not having duly notified his retirement. Being advised by counsel that he was liable for the debts of the company, he obtained himself sequestrated, and compounded with his creditors, including those of the company.

Under these circumstances, the suspender contended that Smith's interest in the company was sufficient to disqualify him from acting as a

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notary in protesting a bill drawn by them, on the principle laid down in the cases of Farries v. Smith,[1] and Russell v. Kirk.[2]

On the other hand, it was maintained by the charger that these cases only established that a person appearing on the face of a bill as party thereto, or the acting and managing partner of a company parties to a bill, could not legally act as notary in protesting it; but that it would be extremely dangerous to invalidate protests in consequence of some latent connexion, which could not be known to the creditor, between the notary employed by him and the parties to the bill; but besides, that in the present case there was no real interest on the part of the notary; for although, in a question with the public, he remained responsible for the debts of the company, in consequence of his neglect duly to notify his retirement, still in fact he was not a partner of Duguid, Ingram, and Company, and in any question with them he never could have claimed any share of their funds or profits.

The Lord Ordinary having repelled the objection to the regularity of the protest, and found the letters orderly proceeded, the suspender reclaimed. Two of the Judges at first expressed some doubt of the interlocutor, and Cases were accordingly ordered. On advising these, however, their Lordships unanimously adhered.

Lord Justice-Clerk.—When the case was formerly before us, I thought it deserved serious consideration, and at that time my inclination certainly was to give effect to the objection. But, on reconsidering the matter, I am satisfied that, under the circumstances, it ought not to be sustained. In the case of Farries there was merely an observation (for there was no judgment on the point) that it would be dangerous to allow the acting manager of a company, parties to a bill, to act as notary in protesting it; and in Kirk v. Russell the notary was acceptor on the face of the bill. Here the circumstances are very different. I think nothing of the relationship between the charger and the notary; nor do I think it a sufficient objection that he had been formerly a partner of the company, drawers of the bill; and that although he advertised out in the Gazette, he had failed to notify his retirement, so as to relieve him from responsibility. We have not, on any former occasion, gone so far as to sustain an objection like this; and seeing great danger in doing so, when there is no reason to suspect any collusion, I think the interlocutor should be adhered to.

Lord Meadowbank.—I see from the notes of the late Lord Meadowbank in the case of Farries that the Court held Napier, the notary, to be in fact the Bank whose bill was protested; but it is added, that they thought it perilous to cut down such protest at once; and they therefore decided on another ground. I agree with your Lordship.

Lords Glenlee and Cringletie concurred.

G. Monro, S. S. C.—J. M'Cook, W. S.—Agents.

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[1] June 9. 1813, (F. C.)

[2] Nov. 27. 1827, (ante, VI. 133.)

No. 31.

Nov. 23. 1830.
M'Lachlan
v. Likly.

NATHAN M'LACHLAN, Complainer.—*Jameson—Shaw.*
J. LIKLY, (RENNIE'S Trustee,) Respondent.—*Sol.-Gen. Hope—Cuninghame.*

Acquiescence—Bankrupt—Sequestration.—A creditor on a sequestrated estate not allowed, after a lapse of 20 years, to insist on an investigation of the trustee's management, the same having been tacitly acquiesced in, and being now approved of, by the whole other creditors.

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2D DIVISION.
Ld. Moncreiff.
R.

THE estates of John Rennie, merchant in Greenock, having been sequestrated, in the month of February 1803, under the 33d Geo. III. c. 74, the respondent Likly was elected trustee. At the meeting for electing commissioners, and giving instructions to the trustee, the creditors, putting full confidence, as they informed him, in his fidelity and prudent management, declined giving him any special directions, and merely instructed him "to use his utmost endeavours in realizing the estate." On the 5th of January 1804, a full state of the trustee's intromissions was laid before the commissioners, and approved; and, on the 25th, a scheme of division of the whole free funds then in the hands of the trustee, amounting to £952. 17s. 6d., after deducting his commission, was approved by the commissioners, and immediately thereafter (February 1804) carried into effect, by payment to the whole creditors of a dividend of 4s. 6d. per pound. Among the creditors who ranked on the estate were Daniel and John M'Lachlan, merchants in Greenock, who claimed on two bills of £90. 8s. 10d. and £69. 17s. 2d. Their estates having been sequestrated, the dividend effeiring to their claim was paid to Mr. Bain, their trustee. Subsequent to this dividend, additional funds to the amount of £152. 18s. 11d. were realized by the trustee on Rennie's estate, prior to the month of July 1804; but, as appeared from the minutes of the commissioners, new claims had emerged, sufficient, at the same rate of dividend as had been paid to the other creditors, to exhaust the fund, so that no further dividend could be declared. Certain other small sums, not exceeding £30, came afterwards into the hands of the trustee; but his payments on account of the estate exceeded his receipts. No further steps were taken in the sequestration, and no copy of the sederunt-book was lodged in process. In 1809, Bain, the trustee on M'Lachlans' estate, having exposed to sale all the outstanding debts due to them, amounting to £2000, and including those ranked for on Rennie's estate, they were bought by the complainer for £21. The complainer never took any steps for calling Likly, the trustee, to account for any supposed mismanagement of the estate till 1827, when he gave in this complaint, praying that Likly should be ordained to give an account of his management, and pay such a dividend as the funds for which he might be held accountable would afford, and should be subjected in penal interest for such sums above £50 as should appear to have been retained in his hands, without being lodged in a bank. In a condescendence the complainer averred, that although it appeared

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from Rennie's declaration that certain fraudulent and improper preferences had been given, Likly had taken no steps to have them set aside; that he had neglected to expose to sale the outstanding debts of the estate, and had failed to lodge the sederunt-book in terms of the statute; and that he had in his hands at several times, both before and after the dividend, a sum exceeding £50, without lodging the same in the bank. In answer, Likly, besides giving certain explanations as to some of the alleged preferences &c., to which it is unnecessary specially to advert, and denying that he ever had funds beyond £50 in his hands, pleaded, that after such a lapse of time, and so long an acquiescence by the complainer and all the creditors in the management of the estate, it was not now open to him to insist on an investigation of the facts averred by him regarding these preferences &c., when the trustee was in a great measure precluded from showing that his conduct was fully justified by the circumstances, as might have been done, had the complaint been presented within a reasonable time; and as to the neglect of lodging the sederunt-book, (which was remedied after the complaint was presented,) it was at that time, and under the old act, communis error, and at all events could not subject him in the liability here sought to be imposed upon him. The Lord Ordinary having appointed a meeting of the creditors to be called, to give their opinion on the conduct of the trustee, a very full meeting was held, at which the complainer M'Lachlan moved "that the creditors disapprove of Mr. Likly's conduct in not having followed out the directions of the statute in winding up the sequestration, and particularly in not having formally sold the outstanding debts, in not having investigated various obvious preferences, and in having entered into a submission without the consent of the commissioners or the creditors; and that there are various matters connected with the estate which require investigation, and which, if gone into, will afford a fund of division to the creditors."

No person, however, seconded this motion, and it was then, with the exception of the complainer, unanimously resolved as follows:—"That the trustee has completely done his duty to the estate; and that although he might have raised various actions against persons connected with Rennie's affairs, or pursued those actions that he did raise, the result would have been the reverse of being beneficial to the estate, inasmuch as there would have been a large account of law expenses incurred, which would have fallen on the creditors to sustain; and with regard to the complaint that the commissioners did not expressly concur in the submission with William Robertson, the creditors are satisfied that Robertson's claim was well founded, and that the commissioners were consulted, and gave their consent: In general, that the creditors entirely approve of Mr. Likly's conduct as trustee, and again authorize him to apply for a discharge, provided he has funds in his hands to pay the expense of it; and that they are of opinion that no further proceedings should take place in this sequestration, the same being substantially, and for many years, wound up. With regard to the proceedings of Mr. M'Lachlan, the creditors

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are of opinion that there are no grounds whatever for sanctioning the proceedings; and it is their unanimous opinion that these have been adopted solely for the vindictive purpose of annoying Mr. Likly. Last of all, the creditors, with the exception of Mr. M'Lachlan, direct that no future meeting should be called, and they protest against being liable for any expense whatever, being completely satisfied, as already mentioned, that the estate is completely wound up."

Thereafter the Lord Ordinary pronounced an interlocutor, which, after finding the facts of the case as above detailed, proceeded thus:—"Finds that, in these circumstances, the facts condescended on by the complainer, whatever relevancy some of them might have had for investigation, if stated in due time, are not such, when taken in connexion with the explanations given, and the documents in process, as to entitle him, post tantum temporis, and after the acquiescence and homologation of the proceedings by his author and himself, to demand the particular inquiries to which the complaint and the condescendence are directed;—that this complaint does not conclude either for the removal of the trustee, or for any censure upon him for neglect of any of the strict forms of the statute, and that there is at present no question before the Court as to his claim for a discharge;—therefore, on the whole, finds that no sufficient grounds in support of this complaint have been laid; dismisses the same; finds the complainer liable in expenses, and decerns; and allows an account of expenses to be given in."*

The Court adhered.

(For opinions of Judges see next case.)

J. Bennett, W. S. Agent.

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* "The Court will always give full opportunity of investigation where improprieties of management, or neglect of the rules of the statute, are alleged against a trustee, in a fair and reasonable manner, by whatever title the creditor may have acquired the debt. But it is their duty also to protect trustees, who appear to have done their duty honestly, against attempts to extort money by means of allegations of error or omissions, as to which there was full opportunity of investigation at the time, and where the whole creditors have acquiesced in the proceedings. In the present case, the Lord Ordinary thinks it is altogether out of the question, after a lapse of much more than twenty years, to permit an investigation as to the measures adopted for recovering the funds, or the payments made on account of the estate, and this at the instance of a single creditor who has acquiesced in the proceedings from the beginning. As to the objections founded on the statute, it is probable that the strict rule as to lodging a copy of the sederunt-book has not been observed. But it must be remarked, that the dividend declared on the 27th of February 1804, which, in reality, exhausted the whole divisible funds, was only two days after the expiry of twelve months from the date of the sequestration, at which time the rule of the act did not apply; and at any rate this ground of complaint would only be relevant in a question as to the removal or censure of the trustee, or as to his discharge.

"The only point in the case which appears to the Lord Ordinary to admit of much doubt, is the claim for the penal interest, on the allegation that the money was not

NATHAN M'LACHLAN, Complainer.—*Jameson—Shaw.*
J. LIKLY, (M'CLYMONT's Trustee,) Respondent.—*Sol.-Gen. Hope—Cuninghame.*

No. 32.

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M'Lachlan v. Likly.

Acquiescence—Bankrupt—Sequestration.—1.—A creditor on a sequestrated estate not allowed, after a lapse of 20 years without complaint, to insist on an investigation into the trustee's management, even although he alleged neglect to follow out special instructions of the creditors, they having all acquiesced, and now approved of the trustee's conduct.—2.—Held entitled, however, to insist on the infliction of any specific penalty imposed by the bankrupt statute, as for penal interest on sums above £50, retained in his own hands.

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2D DIVISION.
Ld. Moncreiff.
R.

THIS was a case differing from the preceding only in the following particulars:—1. There was here an objection to the title and interest of the complainer, on the ground that his debt was fully extinguished; but as this was reserved, it is unnecessary to advert to it. 2. The creditors, in their instructions to the trustee with reference to certain preferences alleged to be illegal, but admitted by the bankrupt to have been granted, had specially directed him "to enter into submissions with Messrs. Hugh Love and Company, John Taylor, and Duncan M'Dougal jun. of Glasgow, and M'Naughton and Mason of Greenock, of his respective claims of preference against them, on account of the transactions detailed in the bankrupt's public examination before the Sheriff, and should either of them refuse this equitable mode of adjustment, then to take such measures against such of them as shall not agree, as may be necessary to bring these preferences to a decision as soon as possible." No steps, however, were taken in consequence of this instruction; but it appeared that one of the parties mentioned therein had been allowed to rank as a creditor on the estate for a claim still due to him, and to draw a dividend, without objection by any of the creditors. 3. The M'Lachlans had lodged no

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deposited in a bank. The act 54. Geo. III. does not apply, because it is clear that the trustee never had funds to the amount of £50 after 1814. It also appears that the trustee did open an account with the Renfrewshire Bank, in terms of a resolution of a general meeting of the creditors of 28th February 1803, and the account is produced. The Lord Ordinary thinks it not improbable that, on strict inquiry, it might be found that, during some short period, there may have been sums exceeding £50 in the trustee's hands which were not deposited. But, considering that all the money has been fairly accounted for, and that the commissioners and creditors approved of the whole accounts many years ago,—he, on the whole, thinks that even this investigation should not be granted, especially where it appears that the trustee had realized the funds which were thought recoverable, and actually divided them with so much expedition, to the entire satisfaction of the commissioners and the whole creditors. That there may be serious doubt even in the grounds of the allegation, appears from this circumstance, that a sum of £669. 3s. 2d. was brought by the trustee to his debit on the 5th January 1804, with a view to striking the dividend—although this fund consisted only in bills not then payable. If any claim on this ground were made out, it would only go to the trifling amount of the complainer's share of the difference between 7½ per cent. and the interest credited on such sums as were proved to have been in this situation for a few weeks or months."

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claim on the estate prior to the dividend, (6d. per pound, paid in March 1804, the estate having been sequestrated in May 1803); but it was subsequently, in April 1804, lodged by Bain, their trustee. 4. After the dividend in 1804, and prior to January 1809, the trustee recovered funds amounting to £132. 9s. 10d., no part of which was paid to the creditors, or deposited in a bank. 5. The complainer, it was alleged, had offered to withdraw his complaint on getting payment of £100, the whole amount of the debt on which he claimed being only £85, and a large proportion of it, if not the whole, having been paid by rankings on other estates.

In these circumstances, the case being in every other respect similar to the preceding, and the trustee's conduct having, as in it, been approved of by the creditors, who declared their conviction that the estate had not sustained any loss by his neglect of duty, the Lord Ordinary pronounced an interlocutor, which, after finding the facts, proceeded thus:—"Finds that in these circumstances the complainer is not entitled, post tantum temporis, to investigate the grounds on which particular claims were admitted, or alleged preferences by the bankrupt were not brought under challenge, and that so far the complaint ought not to be sustained; but finds, that it being admitted that money was received by the respondent, for which he is still bound to account to the creditors, and that the said money was not deposited in the bank prescribed by the general meeting, the complainer is still entitled under the statute, in so far as it may ultimately be decided that he is a creditor, to a proportion or dividend corresponding to his debt, not only of the principal money in the defender's hands, but also out of the interest thereof, reckoned at the penal rate of 7½ and 20 per cent., according to the periods during which the money was so held by him; and, before answer, remits to
to ascertain the amount of the sum due to the complainer on this footing,—reserving all questions of expenses in this case."

The Court adhered, varying so as to reserve more specially the question of the complainer's title.

Lord Meadowbank.—I do not see any thing in the petition or prayer as to the alleged preferences; and therefore, even if the averments were sufficient to warrant investigation, it cannot competently be allowed here. But, at any rate, I agree with the Lord Ordinary.

Lord Cringletie.—There is a great deal in Lord Meadowbank's observation. No doubt, the want of the sederunt-book may have prevented the complainer from ascertaining how the matter stood, till he had an opportunity of investigating. But, as soon as the sederunt-book was lodged, this was in his power, and he should have amended his prayer before closing the record. The Lord Ordinary, however, is quite right on the merits. The creditors never would have submitted, had there been any just ground of complaint.

Lord Justice-Clerk.—I am firmly of opinion that it would be a most dangerous proceeding if your Lordships were to alter this interlocutor, particularly considering that the creditors have approved of the conduct of the

trustee, and that the object of this complainer appears to have been to extort a sum of money. No. 32.

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Young v. Roberton &c.

Lord Glenlee.—The Lord Ordinary has drawn a proper distinction between those instances of neglect in the management, as to which a precise penalty is imposed by statute, and those where there is no such provision. As to this latter class of cases, there must, in common sense, be some limitation as to the time within which complaint must be made. Here, all the alleged injury was done more than 20 years before the complaint was brought. The objection to its now being insisted in does not rest on acquiescence alone, but on the fact, that when a party asks justice, it must be in a case where the thing he wishes done is possible. What he asks here, is now impossible. Taciturnity is rather the nature of the objection, and it is different from proper acquiescence. I agree entirely with the Lord Ordinary, and think it would be absurd to allow the investigation demanded.

J. Bennett, W.S. Agent.

Archibald Young, Advocator.—*Cockburn—Cuninghame.* No. 33.
J. W. Roberton and Others, Respondents.—*D. F. Jeffrey—Neaves*

Sale—Jurisdiction.—1.—Circumstances in the conduct of the seller of outstanding debts which were held not sufficient to liberate the purchasers from their contract.—2.—Observed—An Inferior Judge has no jurisdiction in determining how far a party is entitled to be freed from a written contract.

Nov. 24. 1830.

2d Division. Ld. Mackenzie.

In the year 1819, the advocator Young was admitted into partnership with Andrew and Thomas Ballingall, writers in Glasgow, and thereafter the business was carried on under the firm of Ballingall and Young. Ballingalls, being also engaged in trade, were sequestrated in July 1820, and Young claimed as a creditor on their estate for a considerable sum. In these circumstances, Young, as the only solvent partner, on the application of Ballingalls and their friends, agreed to sell the outstanding debts of the concern; and accordingly, on the 21st of February 1821, he addressed a missive-letter to John Hamilton, writer in Glasgow, (one of the respondents,) in these terms:—"I hereby agree to sell you my right, as solvent partner of the concern of Ballingalls and Young, to the outstanding debts of that company, from the 1st of February current, at the price of £420 sterling, payable by equal proportions, at three and six months, from the 14th current, by bills to be granted by you, and Mr. J. W. Roberton, merchant in Glasgow, (another of the respondents,) and another person or persons to be fixed upon to my satisfaction." No reference was made in this missive to any list of outstanding debts, and it was expressly stipulated, inter alia, as follows—"The outstanding debts are warranted from my own personal fact and deed only." Bills for the £420 were subsequently delivered by Roberton, Hamilton, and certain other persons, including the trustee on the Ballingalls' estate, on which most of these persons were creditors; and it was alleged by Young (though this was denied by Roberton &c.) that they merely be-

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Young v. Roberton.

came parties to the transaction for behoof of, and as cautioners for Ballingalls, whose friends they were. On receiving these bills, Young withdrew his claim on the Ballingalls' estate, and granted an acknowledgment for the price so received, by which he bound himself to execute a regular assignation, in terms of his missive-letter, when required. Roberton &c. thereupon proceeded to act upon the missive, and recover the debts; but no assignation was demanded by them till June 1822. Young having then refused to grant an assignation without a clause declaring it to be understood that Roberton &c. were not thereby entitled to recover accounts due to the Edinburgh or other agents who had been employed by Ballingalls and Young, Roberton &c. presented a summary petition to the Magistrates of Glasgow, praying them to ordain him to execute an assignation in their favour, and to find him liable in damages alleged to have been sustained by his previous refusal. After some discussion as to the terms of the assignation which Young was bound to grant, the Magistrates approved of a draft which he alleged he had always been, and still was, willing to execute; but which, it was said, Roberton &c. had never proposed to accept. A claim, however, was now made by Roberton &c. for repetition of the price paid, on the ground that Young had failed to give an assignation in terms of his missive, and that certain of the debts said to have been held out by him as outstanding appeared to have been previously paid or compensated. The Magistrates having found such claim incompetent under this petition, Roberton &c. raised an ordinary action before them, concluding for repetition of the price, and for damages. This action having been conjoined with the former process, Roberton &c. averred that the debts had been sold according to a list produced by them, containing items to the amount of £744, and bearing a docquet by Young in these terms—"None of the above sums have been collected by me;" and they further alleged that certain debts therein set forth had been either paid or compensated prior to the date of the missives; while, on the other hand, it was admitted that Roberton &c. had recovered debts not contained in that list. The list in question bore date in pencil, in the handwriting of one of the Ballingalls, '23d February 1821,' on which day the bills for the price had been delivered by Roberton; but, as already mentioned, no reference was made in the missive (dated 21st February) to any list, nor was there any competent proof offered that the one produced had formed the basis of the agreement; and Young alleged that it had truly been prepared by Ballingalls, and docqueted by him subsequent thereto. A proof was allowed, from which it appeared that two of the debts in the list, to the extent of about £20, had been compensated, and a small sum of £4 paid, prior to the assignation, but under circumstances which, except as to the £4, rendered it extremely probable that Young could not have been aware of this at the time. On the other hand, the debts not in the list, recovered by Roberton &c., amounted to £30. The Magistrates found that, in the circumstances above mentioned, Roberton &c. were "entitled to decline proceeding further in

the transaction, or to expose themselves to the hazard and expense of discussing others of the accounts which may be similarly situated, and are entitled to insist on repayment of the sum paid to the defender (Young) as the price or purchase-money of the debts in question;" and they decerned accordingly for repetition, but assoilzied from the conclusion for damages. Young thereupon brought an advocation, in which he contended, 1. That the action, being truly rescissory in its nature, to set aside a written contract, was incompetent before the Magistrates; and, 2. That there were no grounds whatever for liberating Roberton &c., even in a competent process.

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Young v. Robertson.

Banner v. Gibsons.

The Lord Ordinary found, "that supposing it competent for the Magistrates of Glasgow to rescind a written contract of the nature referred to, yet that there do not appear to be proved, or competently offered to be proved, any sufficient grounds for such rescission in the circumstances of the case as appearing from the record;" and therefore advocated in the ordinary action, and assoilzied, appointing the cause at the same time to be enrolled, with a view to the disposal of the original summary petition.

Roberton &c. reclaimed; but the Court adhered.

Lord Justice-Clerk.—I agree with the Lord Ordinary on the merits, and I have also the greatest doubts of the competency of the action.

Lord Glenlee.—Were the action ever so competent, there are no grounds whatever for setting aside the contract.

Lords Cringletie and Meadowbank concurred.

W. Young, W. S.—Campbell and Macdowall, S. S. C.—Agents.

Miss Mary Ann Banner, Pursuer.—*D. F. Jeffrey—Pyper.*
T. and R. Gibson, Defenders.—*Keay—Skene—Graham Bell.*

No. 34.

Process — Foreign — Acquiescence. — A party to whom an English bond had been assigned in security and for payment of what might be due on a current account, having obtained judgment in the English Courts against the debtor in the bond, and imprisoned him thereon; but having liberated him, on receiving a partial payment, without consulting the original creditor, whereby he, according to the law of England, discharged the bond, and became liable to account for the full amount of it; and having been, immediately thereafter, repeatedly asked for information as to the nature of the settlement, which he withheld; and having been also warned that he would be held responsible; but no steps having been taken for more than six years, during which time both parties were resident in Scotland, and by the lapse of which period the assignee was said to have lost recourse against his attorneys in England; but being then called in an ordinary action of count and reckoning, proceeding on a general statement of his intromission with the bond, without specially libelling his misconducting the proceedings against the debtor—Held,—1.—That under this libel it was competent to found on this misconduct, as preventing him from taking credit for the balance unrecovered.—2.—That the action was not barred by acquiescence;—and,—3.—That the English statute of Limitations did not apply.

No. 34.

Nov. 24. 1830. 2D DIVISION. Lord Medwyn. T.

Banner v. Gibsons.

IN the year 1818, the pursuer Miss Banner and her sister, then carrying on business as dressmakers at Wooler in the county of Northumberland, applied to the defenders Thomas and Robert Gibson, cloth-merchants in Leith, to furnish them from time to time with supplies of goods necessary for carrying on their business. Gibsons agreed to this, but required security; and Miss Banner accordingly (Sept. 4. 1818) executed a bond, whereby she became bound to pay the sum of £1900, or such part as might be due on the account-current between her and her sisters and Messrs. Gibson; and further assigned in security a bond in the English form for £1200, granted in her favour by one Henderson, with power to recover and discharge the amount thereof, which was to be applied pro tanto in payment of their account. The bond itself was delivered to Gibsons. In July 1819, there being then due by the Misses Banner about £600, Gibsons raised a suit on the bond in the English Courts in name of Miss Banner, it not being there competent for an assignee to sue in his own name; and having obtained a judgment against Henderson for the full amount, they had him imprisoned thereon. In November 1819, a commission of bankrupt was issued against Henderson, whose application for a certificate was opposed by Gibsons in name of Miss Banner, whose brother, on her behalf, gave every assistance to Gibsons in regard to this matter. In the course of these proceedings, Mr. Banner, in his correspondence with Gibsons, repeatedly requested information from them in regard to the steps taken by them against Henderson,—complained of their silence, and warned them that they would be considered responsible for their conduct. In January 1821, however, Messrs. Gibson, without, so far as appeared, any communication to Miss Banner or her brother, accepted from Henderson or his friends the sum of £400, and discharged him from custody under the judgment on the bond; which proceeding on their part, according to the law of England, was in effect (as stated in an opinion obtained from the Attorney General) "a satisfaction of the judgment," so "that it became afterwards impossible for the pursuer to have any remedy upon the judgment, or upon the bond." A few months after his liberation, Henderson obtained his certificate of discharge without further opposition, and he died about two years thereafter. In the mean while Mr. Banner, with whom Gibsons had always communicated, as acting on behalf of his sister, immediately on learning that a settlement had been made by them with Henderson, wrote them on the 27th of January 1821, asking information as to the nature of it, and whether they had left a claim for the balance on the bond open against Henderson. In reply, Gibsons, after stating that they had expected his letter would have enclosed a remittance in payment of a trifling prefixed account of his own, observed—"Regarding the many applications you make respecting Henderson, we decline entering into any [*torn*], as we do not perceive you have (directly) any thing to do in the matter. If you write again, you will please pay the postage, as we will

not receive any letter from you unpaid, except a remittance for the above account, which will oblige," &c. Shortly afterwards (May 5), a second application of a similar nature was made by an agent employed by Miss Banner, warning Gibsons that they would be held responsible for any loss sustained by her through their settlement; and to this they returned for answer—"Your letter, dated 5th inst., we duly received, and hasten to instruct you that the Misses Banner owe us nearly £300 sterling yet of their account, over and above what we have received from Mr. Henderson;" and to subsequent pressing letters to the same purpose, they either returned no answer, or replied in a similar strain—as thus (June 20): "Ladies, We must now beg of you to appoint a period not far distant when you are to settle the balance of your account. Your answer to this will be waited for." In 1822, Gibsons having threatened to raise an action, for payment of the balance, against Misses Banner, (who had, in the course of the year 1821, established themselves in Edinburgh,) were met by a counter demand, in respect of Miss Banner's claims on them to account for Henderson's bond. No legal proceedings, however, took place, and the matter lay over on both sides till 1828, when Gibsons conceiving that the Misses Banner, who had continued to reside in Edinburgh, but who had hitherto been in straitened circumstances, were now able to pay the balance alleged to be due by them, (two of these ladies having in the mean while married respectably,) renewed their demand for payment of this balance, whereupon Miss Banner raised the present action, the summons in which simply narrated the assignation of Henderson's bond as above set forth, and that Gibsons had never accounted for their intromissions under it, and therefore concluded for a count and reckoning as to their "intromissions with the principal sum and interest contained in and due by the bond," in common form. A record was thereafter made up, detailing the transactions above narrated, which were either admitted or substantiated by written evidence; and Miss Banner averred that, according to the law of England, the conduct of Gibsons in discharging Henderson from custody without her privity or concurrence, as it operated a satisfaction of the judgment and the bond, so it rendered them liable to account to her for the full amount thereof; and an opinion taken of the Attorney General stated the law to be as averred.

Gibsons, however, pleaded in defence—

1. The summons proceeds on the narrative of intromission with the amount of the bond, and it is incompetent under it to set forth on the record a totally different ground of action, viz. their conduct in improperly discharging Henderson, and, in respect of this, to obtain decree.[1]

2. The pursuer is barred from insisting on this ground of action by acquiescence, in consequence of which the defenders delayed taking any

[1] Dickie v. Gutzmer, Feb. 27. 1828, (ante, VI. 637); Ewing's Trustees v. Farquharson, Feb. 25. 1829, (ante, VII. 464.)

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steps against their attorneys in England, who conducted their business, for relief, of which they were now cut out; and,

3. The English statute of Limitations is a bar to the action.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer having assigned to the defenders, in security for goods furnished to her by them, a bond granted to her by Francis Henderson, the defenders obtained a judgment against him on the said bond, and having taken him in execution therefor, afterwards consented, by their attorneys, to his discharge from custody, on payment, as they allege, of £400 of said bond;—finds it established by the opinion of the Attorney-General of England that this was in terms of the English law, by which law this part of the case must be regulated—"A satisfaction of the judgment, and that it was afterwards impossible for the pursuer to have any remedy on the judgment or the bond;"—finds it not alleged that the consent of the pursuer was asked prior to discharging Henderson, or even that she, or her brother who was acting for her, was informed of it, nor that any stipulation was made so as to enable the pursuer to maintain an action for the balance, as "upon a new contract expressly made as a consideration for his discharge;" finds that the pursuer has not acquiesced in or ratified the actings of the defenders in this matter; and that as, without the knowledge or consent of their principal, the defenders have realized the debt, they become liable for the debt themselves; and that this liability to account is not cut off by the statute of Limitations, which the defenders are not in a situation to plead in this case.*

The Court adhered.

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* "This is a very hard case for the defenders, arising out of their ignorance or disregard of the rules of the law of England, so different in this matter from the law of Scotland. Although the effect of the proceedings under the bond must be regulated by the English law, so as to make the defenders liable for the amount, the statute of Limitations, which it seems would have operated if the defenders had been merchants resident in England, and sued in an English Court, will not protect them, because, after the date of their liability to account in 1821, they did not remain for six years subject to the English law and Courts, but were resident all along in this country, where an action of accounting suffers no such prescription. The nature of the debt, and mode of its constitution, do not seem to make this a different case from those on which these principles have been applied; Grove v. Gordon, November 1740; Lord Lovat v. Lord Forbes, Dec. 2. 1742, where the defence was sustained, because the defender resided six years in England; Renton v. Baillie, July 7. 1755; M'Neil v. M'Neil, March 2. 1761, where it was found not applicable, because the defender had not resided for such a period under the law of the limitation as to give him the benefit of it; and the pursuer was entitled to hold that she was not bound to bring the action to account within six years, or any number of years less than the prescription applicable to the law under which the defenders were now living, and to which they were alone subject. The Lord Ordinary at one time thought the form of the action not precisely applicable to the nature of the case; but as the view of the law of England is, that the debt has been realized, and that the defenders are to be accountable, just as if they had obtained full judgment, there seems no difficulty in point of form."

No. 34.

Nov. 24. 1830.
Banner v. Gibsons.

Scott &c. v. Anderson.

LORD JUSTICE-CLERK.—As to the objection to the competency, the cases quoted were totally different from this. In these the attempts went to make out a totally new ground of action, and they do not apply here, where the statements and pleas on the record are advanced by the pursuer, to the effect of preventing the defenders discharging themselves of the balance of the bond, for which they are called to account in proper form. As to the merits—I can have no doubt at all of the propriety of the Lord Ordinary's interlocutor on the general point; and the only question, as it appeared to me, was, Whether the pursuer was barred by acquiescence and delay? But when we look at the correspondence, and see that these parties were apprized, in 1821, that they would be held responsible, and again in 1822, when judicial steps were threatened, I am satisfied this was amply sufficient to have warned them, and set them to advance any claim they might have had against their attorneys. The interlocutor therefore is right.

The other Judges concurred.

D. CHRISTIE, S. S. C.—T. RANKEN, S. S. C.—Agents.

No. 35.

A. SCOTT and Others, Complainers.—*Sol.-Gen. Hope—J. Anderson.*
J. ANDERSON, Respondent.—*Sandford.*

Sheriffs' Small Debt Act—Jurisdiction.—A party designed in a summons, raised before the Sheriff of Lanarkshire under the Sheriffs' Small Debt Act, "portioner, Tollcross," (which is within the county,) having been cited personally, and allowed decree in absence to pass against him; and having been charged thereon, according to the execution, "at his dwelling-house, Tollcross," and thereafter imprisoned—The Court passed, on caution, a bill of suspension and liberation presented on the allegation that he had no residence in Lanarkshire, but had been merely on an occasional visit when personally cited.

Nov. 24. 1830.

2D DIVISION.
Bill-Chamber.
Ld. Fullerton.

BILL of suspension and liberation by Scott, who had been incarcerated on a warrant of the Sheriff of Lanarkshire, proceeding on a decree in absence, under the Sheriffs' Small Debt Act, pronounced on a summons which designed him "portioner, Tollcross," (in the county of Lanark,) and had been executed against him personally within the county; and the charge on which was, in the execution returned, set forth as left for him at "his dwelling-house, Tollcross." The ground of suspension was an allegation that, in point of fact, Scott had no residence in Lanarkshire, but had been cited while on a short visit to his mother at Tollcross, his own residence being in Dumbartonshire; and this, it was contended, was sufficient to authorize an application to the Court, notwithstanding the excluding proviso of the act, since, if this allegation were correct, the Sheriff must have been acting without jurisdiction,—it clearly not being the policy of the act to allow persons to be convened before the Sheriff's Small Debt Court, who were not, in other matters, subject to his jurisdiction. Two bills were successively refused by Lords Medwyn and Fullerton, Ordinaries; but, on a reclaiming note, the Court altered, and remitted to pass, on full caution.

J. M'GILL,—A. HAMILTON, W. S.—Agents.

No. 36.

Nov. 25. 1830. Carruthers v. Hall &c.

WILLIAM CARRUTHERS, Suspender.—*Greenshields.*
JEAN HALL and Others, Chargers.—*Graham Bell.*

Submission—Executor—Process.—Where two executors were appointed by a settlement exempting each from liability, except for his own actual intromissions; and a count and reckoning was raised against them, concluding for exhibition of "an account of their intromissions," and for decerniture "to invest or consign the sum which shall be ascertained to be in their hands," failing which, "to make payment of £200, less or more," &c.; but not concluding to have it found that by their irregularities they had incurred a joint and several liability; and "the whole cause" having been submitted to an arbiter, who not only ascertained the balance, but decerned against the executors, as having by irregularity incurred a joint and several liability,—a bill of suspension of a charge on his decree, on the ground that the finding of joint and several liability was ultra vires, passed.

Nov. 25. 1830.

1st DIVISION. Lord Newton. H.

MRS. JANET BELL in Holmhead died in 1810. By her settlement, she appointed William Carruthers of Nutholm, and the Rev. Andrew Jameson, her executors; and it was provided that "my said executors shall not be liable for omissions, but each for his own actual intromissions, and not in solidum of one another."

In November 1827, Jean Hall and others, having right to the residue of the funds, raised an action against Carruthers and Jameson before the Sheriff of Dumfries, with this conclusion:—"Therefore the defenders should be decerned to exhibit and produce to the complainers an account of their intromissions with the property of the said deceased Janet Bell, showing the balance remaining in their hands, after deduction of the debts, legacies, and other payments made by them, and to produce the whole vouchers and instructions of the same—all to be seen and considered by the complainers; and the said Rev. Andrew Jameson and William Carruthers ought and should be decerned and ordained to invest the sum which shall be ascertained to be in their hands, upon good security, in terms of the above deed of settlement, or to consign the same in the Bank of Scotland, or any other bank which we may direct; failing which, to decern or ordain them to make payment to the pursuers of the sum of £200, less or more, to be by them invested as aforesaid, and to find them liable to the said Jean Hall in the interest of the said balance, in so far as the same has not been already paid to her."

Defences were lodged, followed by replies, embracing the intromissions of the defenders from the outset. The parties then "agreed to refer the whole matters in dispute to the determination of Mr. James Wright, writer, Dumfries, with power to him to hear parties &c., to enable him to decide the whole cause; and whatever he shall determine, the parties agree to abide by." The Sheriff interponed his authority to the reference.

Before the arbiter the pursuers not only insisted on an adjustment of accounts, but contended that certain alleged irregularities on the part of the defenders, in disobeying the injunctions of the testatrix, had forfeited their right to the benefit of the clause, which rendered each liable for

his own intromissions only; and that both were accountable singuli in solidum.

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The arbiter pronounced a judgment which fixed the principles of accounting between the parties; "and in respect they were, by the deed of settlement, appointed to convert the whole property into money as speedily as possible, and lend out the same on such security as they should judge proper, and that they have failed to comply with this part of their instructions for a period of nineteen years, finds them liable, jointly and severally, in the whole intromissions had by each with the said estate and effects," &c. He afterwards decerned for a sum of £90. 9s. 9d.; and the Sheriff gave decree in terms of that judgment. Carruthers, being charged on the decree, presented a bill of suspension without caution, alleging that the arbiter had exceeded his powers in deciding the question of joint and several liability, which had not been submitted to him, and further pleading that certain partial payments subsequently made to the chargers must be deducted. This was refused; and a second bill having been offered on caution, the Lord Ordinary passed the bill as to the sums admitted by the chargers to have been received since the decree; but refused it quoad ultra.

Carruthers reclaimed.

Lord Balgray.—I feel some difficulty on this case. When the process was submitted, the referee just came in place of the judge, and was empowered to decide on all the claims made under the summons. In the circumstances, I do not concur with the arbiter in thinking that the executors were blameable. But my doubt of his judgment lies here: When I look at the terms of the summons in the Sheriff Court, its object is just to call the defenders to account for the funds in their hands, and nothing is said in it about their joint and several liability. The summons is the measure of the matters submitted, and I conceive that question did not fall under the reference. The arbiter's judgment is therefore objectionable, as being ultra vires.

Lord Craigie.—The parties here referred "the whole matters in dispute" to the arbiter, and gave him the fullest powers to hear parties, call for vouchers, &c., "and to do every thing necessary to enable him to decide the whole cause." But it appears to me, that when the action of count and reckoning was raised against the defenders, the point of their joint and several liability was embraced under the terms of their summons, being just one element in the general question of accounting. I therefore hold that it fell within the matters submitted; and I am further of opinion with the arbiter that the executors did not obey the injunctions of the testatrix. [His Lordship was understood to add, that on this ground he held the arbiter's judgment to be well founded on the merits, even if it had been open to review.]

Lord Gillies.—The merits of the arbiter's judgment are not before us. The single question is, Did he, or did he not, exceed his powers? If he did, his judgment cannot stand; if he did not, it cannot be shaken. When I look at the whole case, and see the provision in the settlement expressly limiting the liability of the executors, I think, if a different and more extensive responsibility were to be insisted in as the basis of accounting in the count and reckoning, it

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should have been expressly set forth in the summons. But the summons has no conclusion to have it found that the executors had forfeited the protection which that clause in the settlement was meant to afford them, and were to be subjected in joint and several liability. It is true that "the whole matters in dispute" were submitted to the arbiter, with power to him to decide "the whole cause;" but this just leads to the question, What was the whole cause? On turning to the summons to answer this, as I find no conclusion for joint and several liability against the executors, I do not think that point was submitted to the arbiter. His decision of it was therefore ultra vires, and his judgment cannot stand.

LORD PRESIDENT.—I entertain the same opinion which has now been expressed, and rest it on the same grounds.

THE COURT therefore altered the judgment, and passed the bill on caution.

W. MARTIN, S.S.C.—W. STEWART, W.S.—Agents.

No. 37.

ALEXANDER NISBET, Suspender.—*Skene—Macallan.*
ARCHIBALD GIBSON, (GORDON'S Trustee,) Charger.—*Rutherfurd.*

Nov. 25. 1830.

1ST DIVISION.
Lord Gillies.
D.

THIS was a special case, relative to the right of a party to withhold payment of an annuity till the issue of an accounting. The Lord Ordinary refused a bill of suspension, and the Court adhered.

G. LOGAN, W.S.—A. C. HOWDEN, W.S.—Agents.

No. 38.

CATHERINE SMITH, Advocator.—*D. F. Jeffrey—Russell.*
JOHN SMITH, Respondent.—*Hope.**

Nov. 25. 1830.

1ST DIVISION.
Bill-Chamber.
Lord Balgray.
H.

Marriage.—Catherine Smith, daughter of Alexander Smith, merchant in Dundee, raised an action before the Commissaries against John Smith, cabinet-maker there. She concluded alternatively for declarator of marriage, or for damages on account of seduction. After a proof, the Commissaries assoilzied with expenses; and she then presented a bill of advocation, which the Court unanimously refused.

G. RITCHIE, W.S.—SCOTT and RYMER, W.S.—Agents.

No. 39.

ALEXANDER CRICHTON, Suspender.—*Cuninghame.*
ALEXANDER WATT, Charger.—*D. F. Jeffrey—Shaw.*

Legal Diligence—Erasure—Expenses.—Where a bill was duly protested in November, and registered on 20th December following, and the word 'twentieth' was written on an erasure in the narrative part of an extract on which diligence was done—Held,—1.—That the erasure was no ground of suspension, it being immaterial on which day of December the registration took place.—2.—Expenses refused to the charger, the litigation having arisen from the blunder of the clerk in making the extract, against whom he had relief.

* Mr. Hope this day took his seat behind the bar, having ceased to hold the office of his Majesty's Solicitor-General.

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1st Division.
Lord Newton.
S.

Crichton
v. Watt.

In July 1828, Alexander Crichton accepted a bill for £60 in favour of Alexander Watt, and when it fell due, on 19–22d November, it was dishonoured, and protested by Watt, who registered the protest on the 20th of December following. He afterwards obtained an extract, on which he gave Crichton a charge. In the record there was no erasure; but the clerk, in making the extract, and narrating that the protest had been recorded on the 20th of December, had made a mistake in the date, and having erased the word, he wrote 'twentieth' on the erasure. Crichton suspended, alleging, inter alia, That as the extract was the warrant of the charge, and was erased in the date, which was inter essentialia, it was vitiated, and could not support the charge—an objection which had been held fatal in the date of a summons,[1] and should be equally so in the date of a decree of registration.

Crichton answered, 1. That the instrument of protest had been correctly registered on the 20th of December, in evidence of which he produced a second extract from the record; that the word 'twentieth' was not in this case inter essentialia, since the bill fell due only in November; and if the registration took place any time in the month of December, an extract of it would support the charge, being within the six months, and that it was thus quite immaterial though the extract had merely stated the registration to have occurred on the December. But, 2. As the record was unexceptionable, and the erasure occurred only in the extract, which was a mere copy from the record, and not an original writ, an erasure in the copy was not fatal, and could at least be remedied by the production of a second extract, and in this respect was different from a summons, which was a principal and original writ whose date was essential, and, if written on an erasure, could not be exposed to any certain check.

The Lord Ordinary, "in respect of the erasure in the registered protest, which was the warrant of the charge, sustained the reasons of suspension, &c., and found the suspender entitled to expenses."

Watt reclaimed, and the Court called on the suspender to support the interlocutor.

Lord Balgray.—The erasure occurs neither in the instrument of protest, nor in the record. It is merely in the extract, and it is in an immaterial part of it; because the registration, if it occurred upon any day in December, would have warranted the charge, just as well as if it had been done on the 20th.

Lord President.—The case is different from that of a summons, which is an original writ.

Lord Gillies.—The circumstance of the day of the month being transcribed in the extract on an erasure is in this case perfectly immaterial. A registration on any day of December would produce the same effect as a registration on the 20th.

[1] Taylor, March 5. 1829, (ante, VII. 547.)

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THE COURT then altered, but refused to allow the charger his expenses, in respect of the carelessness of the clerk in making the extract, against whom he had a right of relief.

GREIG and MORTON, W. S.—J. WILSON, W. S.—Agents.

No. 40.

SIR EDWARD ANTROBUS and Others, Pursuers.—*Rutherfurd.*
JOHN INNES, Defender.—*Buchanan.*

Entail—Clause—Provision to Wives and Children.—An heir of entail having, in reference to his eldest daughter's marriage-contract, granted a bond to pay £3000 to trustees within six months after his decease, and that he should, within three months, "so far as an heir of entail lawfully can or may, by and at his own proper costs and charges, well and sufficiently charge all his entailed estate aforesaid with the payment of the said sum of £3000;" and being sued by the trustees in an action concluding to have him decerned to execute a deed, in terms of 5th Geo. IV. c. 87, "binding the succeeding heir of entail in payment out of the rents and proceeds of the entailed estate; the Court ordained him "to exercise in favour of the pursuers the powers competent to him, as heir of entail in possession of the estate, under the act of the 5th Geo. IV. c. 87, of burdening the succeeding heirs of entail, and the rents and proceeds of the estate, with provisions for his children, and this to the extent of £3000, or of the largest of such smaller sums as he may have power so to provide in security of the payment of his bond of provision."

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1ST DIVISION.
Lord Newton.
S.

MR. JOHN INNES was proprietor of the entailed estate of Cowie, descendible to his brother in preference to his daughters. In 1826, when his eldest daughter was about to be married to Lieutenant-Colonel Lautour, he became a party to several deeds executed in the English form, and in particular granted a bond binding himself that the sum of £3000 should be paid, within six months after his decease, to the trustees under their marriage-contract; and "that he, as a further security for the payment of the said sum of £3000 &c., shall and will, on or before the expiration of three calendar months from the date of these presents, so far as an heir of entail lawfully can or may, by and at his own proper costs and charges, well and sufficiently charge all his entailed estate of Cowie aforesaid with the payment of the said sum of £3000; and shall and will, at his own proper costs and charges, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, &c., all such acts, deeds, things, decrees, conveyances, and assurances in the law whatsoever," as the trustees should by counsel be reasonably advised to require, "for the purpose of so charging the said estate as aforesaid."

The trustees under the marriage-contract raised an action against Mr. Innes in April 1829, libelling on the bond and marriage-settlement, and concluding that he should be ordained "to execute and deliver, at the sight of our said Lords, a deed or obligation by him the said John Innes, as heir of entail in possession of the entailed estate of Cowie, in terms of an act passed in the 5th year of our reign, c. 87, entitled "An act to authorize the proprietors of entailed estates in Scotland to grant provi-

sions to the wives or husbands and children of such proprietors," binding the succeeding heirs of entail in payment, out of the rents and proceeds of the same, to the said pursuers, in behalf of the said Mrs. Innes or Lautour, eldest daughter of the said John Innes, of the said sum of £3000, or to such extent as he the said John Innes is entitled to grant such obligation, under the powers and provisions of the said act of Parliament; or otherwise to grant and deliver, at the sight of our said Lords, a sufficient heritable security for the said sum of £3000, payable to the pursuers, in trust as aforesaid," &c.

Mr. Innes pleaded in defence, 1. That the bond and marriage settlement libelled "did not confer on the pursuers any statutory title to pursue under Lord Aberdeen's Act, 5th Geo. IV. c. 87, or to insist that he shall exercise the discretionary powers thereby committed to him." 2. That the proper parties to the action were not all called. The defender had two younger daughters, for whom he had no other statutory fund of provision except that which was demanded by the trustees; for the estate of Cowie did not yield above £1000 per annum free, and the sum of £3000 concluded for would exhaust his whole powers under Lord Aberdeen's Act, in favour of the eldest daughter alone. Her sisters ought, therefore, to be made parties to the action. 3. That the obligation he had undertaken was not that of exercising the faculty conferred by Lord Aberdeen's Act, but "to charge his entailed *estate*, so far as an heir of entail lawfully can or may." The present action did not conclude that he should charge his *estate* in any shape, but libelled on Lord Aberdeen's Act, which only permitted an heir to charge the yearly *rents*, and disabled him from granting a security "to affect the fee of his lands and estates." But the defender could not thus be compelled to grant a security of a different kind from that which he contemplated, and which was solely to charge his estate itself, if an heir of entail could lawfully do so, and not otherwise. 4. That the alternative conclusion "for a sufficient heritable security" was inept, as he could not burden his entailed estate with a sum payable six months after his death.

The Lord Ordinary "found that, by the clause in the marriage settlement founded on in the summons, the defender came under an effectual obligation to exercise in favour of the pursuers, as trustees for his daughter Mrs. Lautour, the powers competent to him, as heir of entail in possession of the estate of Cowie, under the act of the 5th of his present Majesty, c. 87, of burdening the succeeding heirs of entail, and the rents and proceeds of the estate, with provisions for his children, and that to the extent of £3000, or of the largest of such smaller sums as he may have power so to provide in security of the payment of his bond of provision; and that as the time at which that obligation became prestable has long since arrived, the pursuers are entitled to demand implement of the same, in terms of the conclusions of their libel; therefore repelled the defences, and appointed the pursuers to lodge, within ten days, the draft or

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scroll of such deed as they conceive to be necessary for implementing the above obligation."*

Mr. Innes reclaimed; but the Court unanimously adhered, and allowed the expenses of the discussion before them.

LORD GILLIES.—No interlocutor can be more carefully guarded than this, to protect the just interests of the defender as an heir of entail.

LORD BALGRAY.—The defender is bound to do all that he lawfully *can* or *may*, and the interlocutor does not ordain him to do more.

W. MACKENZIE, W. S.—J. J. FRASER, W. S.—Agents.

No. 41.

JAMES HAIG and SON, Suspenders and Pursuers.—*D. F. Jeffrey—Ivory—Moir.*

MAGISTRATES of EDINBURGH.—*Tawse—Hope.*

Burgh — Statute. — It being declared in a statute regulating the exaction by the Magistrates of Edinburgh of certain shore-dues leviable from freemen and unfreemen merchants, (the former being only liable in half the amount payable by the latter,) that every burgess and guild-brother "who by residence is or shall be

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* NOTE.—"As to the first defence, the Lord Ordinary thinks it of no consequence that the obligation does not specially refer to Lord Aberdeen's Act; it refers generally to the powers which Mr. Innes, as heir of entail, may possess by *law*—of course to those competent to him under that or any other statute.

"The second defence is founded on the interest of the other children, who, as the claim of the pursuers will, it is alleged, extend to the whole sum which their father can have power to provide under the act, may be left entirely destitute. But it does not appear to the Lord Ordinary that any effectual objection can arise from such interest. Children have no jus crediti in the provisions which their father is empowered by this statute to settle on them. It is quite optional to him to avail himself of the power, or not. He may refrain from using it, in order to benefit the succeeding heir of entail,—or, without any such object, from mere neglect or inattention; and the children can neither compel him to provide for them, nor have they any remedy against the succeeding heirs of entail, if he shall die without exercising his power, however destitute they may be left. As he may thus give nothing to any of them, so he may settle the whole sum he is entitled to provide, on one child out of a number; and from the effect given by the statute to provisions made by the father in a child's marriage-contract, it appears that he may at that time fix effectually the amount of such provision, so as to exclude his power of afterwards making a different distribution.

"The third defence, which rests on the circumstance that the obligation is *to charge the estate*, whereas it is only the rents and proceeds which can be burdened with the provisions, might be of importance, if the rules of strict interpretation were applicable to such a case; but, so far from this, contracts of marriage by the law of Scotland (and the Lord Ordinary presumes that the same obtains in England as to this class of deeds) are held to be uberrimæ fidei. Now there cannot be a doubt that the parties to the present contract meant, by the obligation in question, to bind Mr. Innes to exercise, in security of the payment of his bond, all the powers competent to an heir of entail of affecting the estate, or its rents and proceeds; and to charge these last, which constitute the main benefit which the possessor of lands derives from them, may, in in ordinary language, be naturally said to charge the estate."

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liable in scot and lot, and in payment of city taxes," should be deemed a freeman merchant, and all others non-freemen—Held that burgesses and guild-brethren carrying on a distillery in the neighbourhood, and having a place of business within the city, (in respect of which they were liable in burgal prestations,) were freemen merchants under the intendment of the statute, and liable only in the low rate of dues, though not actually dwelling within the city.

Nov. 25. 1830.

2D DIVISION.
Lord Medwyn.

THE Magistrates of Edinburgh have from time immemorial been entitled to levy on all goods imported or exported at Leith or Newhaven certain shore-duties, being 3⅓d. per ton from freemen, and 6⅔d. per ton from unfreemen. By the 28th Geo. III. c. 58, which confirms and regulates this privilege, it is inter alia declared, "that all and every burgess or guild-brother of the city of Edinburgh, who by residence is or shall be liable in scot and lot, and in payment of the city taxes, is and shall be deemed and held to be a freeman merchant, and that all other persons shall be deemed and held to be non-freemen merchants." The pursuers Messrs. Haig and Son, distillers at Lochrin in the immediate neighbourhood of Edinburgh, were individually burgesses and guild-brethren of the city, and they occupied a place of business at the Royal Exchange, in respect of which they were liable in scot and lot, and paid the city taxes. None of them, however, actually dwelt within the city, though it was not disputed that their occupancy of the place of business qualified them to be members of council, under the statutes which require residence as a qualification; and one of them had actually served as a Magistrate. In these circumstances, being charged the double rate of shore-dues leviable from unfreemen, they brought a suspension and declarator, in which they contended, That within the meaning of the statute they were freemen merchants, being liable in scot and lot &c., in virtue of their occupancy of a place of business within the city, which has always been held such a constructive residence as to infer liability for burgal prestations, and to afford a title to the corresponding privileges.[1]

To this it was answered, That if liability for city taxes had been intended to form the sole requisite to constitute a freeman who should pay only the minimum rate of shore-dues, it would have been unnecessary to specify that liability as incurred "by residence;" and that the use of these words, therefore, implied that actual personal dwelling within the city was required.

The Lord Ordinary having reported the cause, the Court in the suspension suspended, and in the declarator decerned.

GIBSON-CRAIGS and WARDLAW, W. S.—MACRITCHIES, BAYLEY, and HENDERSON, W. S.—Agents.

[1] Barbers of Edinburgh v. Duff and Menzies, Dec. 4. 1738, (1925); Buchanan v. Parker, Feb. 21. 1827, (ante, V. 390), and authorities there cited.

No. 42.

Nov. 25. 1830. Sanderson &c. v. Donaldson.

J. SANDERSON and A. EDINGTON, Pursuers.—*Cowan.*
JOHN DONALDSON, Defender.—*Boswell.*

Factor—Acquiescence—Proof.—1.—A party having become cautioner for payment of a composition offered by two individuals, partners in business, one of whom was his own brother-in-law, on condition of being allowed to realize their funds, but not having stipulated then, or at a subsequent settlement of accounts, for any commission for his trouble, held not entitled to commission.—2.—Proof allowed, prout de jure, that the parties in right of a bill had acquiesced in a discharge of the debtor, by a person authorized to recover the amount, on a partial payment.

Nov. 25. 1830. 2D DIVISION. Lord Medwyn. T.

THE affairs of the pursuers, Sanderson and Edington, leather-cutters in Edinburgh, having become embarrassed about the end of the year 1825, they stopped payment, and offered a composition to their creditors, which was accepted on condition of their granting bills, with good security, for the amount. The defender Donaldson (who was Edington's brother-in-law, and an intimate friend of both partners) agreed to become surety for the composition, on condition of being intrusted with the realization of their funds. The pursuers consented to this, but nothing was said as to commission being chargeable by Donaldson for his trouble. Donaldson intromitted with their funds; and, in February 1827, a state of accounts was drawn up and a docquet signed by the pursuers, which brought out a small balance due them, and acknowledged payment of the same as of that date. Some time thereafter the pursuers brought this action for payment of £10 omitted, errore calculi, in the balance above mentioned, and of certain other sums alleged to have been recovered by Donaldson subsequent to the date of the docquet, or for which they held him otherwise liable. The only one of the items sued for, to which it is necessary here to advert, was a sum of £20,—being the balance of a bill for £30 taken by Donaldson from two persons, Brown and Miller, for part of the stock sold to them by him, of which he had discharged Miller on payment of £10; and as Brown, the other acceptor, was worth nothing, the balance became irrecoverable. The £10 thus received from Miller had been entered in the docqueted accounts; and Donaldson alleged that he had got the authority of the pursuers to discharge him, and had given up the bill to them prior to the docqueting. But he contended that, at all events, the accounts so docqueted having stated the payment of this £10, the pursuers were barred from objecting to the transaction; and he made a claim for commission as a set-off to the demand of the pursuers.

The Lord Ordinary pronounced an interlocutor, which, in so far as regarded these two points, was as follows:—"Allows the defender to prove by the writ or oath of the pursuers that they, or one or other of them, authorized or acquiesced in his discharging Miller, one of the acceptors of Brown and Miller's bill, on payment of £10;—finds that the defender did not stipulate at the time for any commission to himself, nor did he make a claim for any at the settlement in February 1827;

and therefore that he is not entitled to charge a commission for his trouble,—it being obvious that his sole object was to secure himself from loss in consequence of the cautionary obligation for their composition, undertaken by the defender out of friendship to the pursuers."

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Nov. 25. 1830. Sanderson &c. v. Donaldson.

Macintosh &c. v. Robertson.

Donaldson reclaimed against both findings; and, as to the former, he contended that if the claim of the pursuers were held not to be foreclosed by the docqueting of the accounts, he should be allowed to prove their authority and acquiescence prout de jure.

The Court adhered, with this variation, "that the Lords allow the defender to prove, prout de jure, that the pursuers acquiesced in the arrangement made with Miller as to payment of the bill, as alleged on the record."

D. M. Adamson, S. S. C.—D. Gray, S. S. C.—Agents.

A. Macintosh and Others, Suspenders.—*Skene—Graham Bell.* Arthur John Robertson, Charger.—*Buchanan.*

No. 43.

Process—Suspension.—1.—After a Sheriff's decree of ejection has been extracted, and put to full execution, a suspension is an inapplicable remedy.—2.—This rule applied where, after a first bill of suspension had been refused, and a remit made to the Sheriff to allow the suspender ten days to find caution, and a second bill was refused simpliciter, and a reclaiming note lodged, but no prorogation of the sist being obtained, the charger got a certificate of refusal, and executed the decree before the note came to be advised.

Arthur John Robertson of Inches, proprietor of Parks of Culcabock, raised a summons of irritancy and removing, before the Sheriff of Inverness-shire, against Alexander Macintosh junior, and others, tenants holding a tack of the lands of Parks. After a variety of procedure, the Sheriff, on the 5th of April 1830, decerned in terms of the libel. On the 3d of June, the tenants presented a bill of suspension, which was sisted, and, on answers, refused by Lord Medwyn; but his Lordship at the same time (11th August) "remitted to the Sheriff with instructions to allow the suspenders ten days to find caution; with certification, if they fail to do so, the decreet of removing already pronounced will be carried into effect." Time was then allowed for the presentation of a second bill, which, on answers, Lord Corehouse, on the 8th of September, refused, without making any remit to the Sheriff. Upon this, the suspenders reclaimed to the Court. They did not, however, apply for a prorogation of the sist of execution in the mean time; and, before their reclaiming note came to be advised, the charger had obtained a certificate of refusal, and carried it to the Sheriff Court, whereon the Sheriff's decree was extracted, and the suspenders were removed and ejected in terms of it.

Nov. 26. 1830.

1st Division. Bill-Chamber. Lords Medwyn and Corehouse. D.

In these circumstances the charger maintained, That as there existed no prohibition against the issuing of the certificate of refusal after the second bill had been simpliciter refused, and a certificate of refusal had been issued, and the Sheriff's decree had been executed, it was impossible to entertain a process of suspension, and therefore the reclaiming note was incompetent.

No. 43.

Nov. 26. 1830. Macintosh &c. v. Robertson.

Hunters v. Evans &c.

Smyth &c. v. Hunter.

The suspenders answered, That when their reclaiming note was boxed, the decree had not been put to execution, and the Court should dispose of the note now, precisely as they must have done, if they had advised it at the moment of its presentation; that the certificate, as issued, applied only to the second bill, and took no notice of the qualification in the refusal of the first, by which the suspenders were to be allowed ten days to find caution; and that as this allowance remained entire to them after the refusal of the second bill, as much as before it, it was irregular on the part of the charger to conceal from the Sheriff that qualification in the refusal of the first bill, when he proceeded to put the decree to execution.

The Judges were of opinion, that as execution had actually taken place, a process of suspension was unavailing.

THE COURT accordingly refused the reclaiming note.

T. B. FERRIE, W. S.—H. M'QUEEN, W. S.—Agents.

No. 44.

WILLIAM and MALCOLM HUNTER, Suspenders.—*Monteith.*
EVANS, FOSTER, and LANGTON, &c., Chargers.—*Jameson.*

Bill of Exchange—Cautioner.—The acceptor of a bill of exchange allowed to prove by the oath of the holder an allegation that he was known to be the mere cautioner of another party primarily bound for the debt, which party the holder had discharged without his consent, on receiving payment of a composition.

Nov. 26. 1830.

1st DIVISION. Bill-Chamber. Lord Gillies.

WILLIAM and MALCOLM HUNTER, merchants in Glasgow, presented a bill of suspension, on caution, of a charge on their acceptance for £1025, under a certain deduction. The case turned on the point whether certain other parties, including David Cannan and Company of London, primarily liable for the debts charged on, had been discharged by the chargers, on receiving a composition, without the consent of the suspenders; and whether it was known to them that the suspenders stood only in the position of cautioners. The chargers denied having discharged Cannan and Company; and the suspenders having referred their allegation to the oath of the chargers, the Court remitted to the Lord Ordinary to adjust a reference, and dispose of the question of expenses.

A. HAMILTON, W. S.—A. CLASON, W. S.—Agents.

No. 45.

JOHN SMYTH and MANDATORY, Pursuers.—*More—Hope.*
JAMES HUNTER.—*D. F. Jeffrey—Keay.*

Cautioner—Letter of Credit.—A party abroad, who was in course of building a ship which he was to consign with a cargo to merchants in this country in payment of furnishings sent out to him, having received from them a letter authorizing him to draw on them to the extent of two-thirds of the value of the freight and cargo—Circumstances in which the home merchants were held liable to honour drafts to that extent discounted more than a year and a half after the date of their letter by a foreign merchant on the faith of it, although in the mean time they had shipped further goods to their correspondent, which more than exhausted the value of the vessel, freight, and cargo.

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2d Division.
Ld. Cringletie.
F.

Smyth &c.
v. Hunter.

The late firm of Robertson, Hunter, and Company of Greenock, of which the defender Hunter was a partner, had, for some time prior to the year 1825, carried on a course of mercantile dealing with Alexander Wedderburn, merchant at St. John's, New Brunswick, supplying him with goods for a store kept by him, on an understanding that he was to remit them, in bills or produce, the price of one cargo before shipment of the next. On the 27th of August 1825, Wedderburn wrote Robertson, Hunter, and Company, stating that he had an offer of getting a ship built on very advantageous terms, and inquiring if they would purchase her. This proposal they declined, but agreed to send out the rigging materials &c., on the understanding that the ship, when built, was to be loaded for the Clyde, and consigned to them. In reply, Wedderburn, on the 13th of December, thanked them for their "handsome offer to furnish materials for my vessel, with which I shall join, and take an early opportunity of writing more fully on the subject." On the 22d of December, Wedderburn wrote Robertson, Hunter, and Company, observing, in reference to the balance due them by him, "I shall from time to time pick up bills of exchange, so as to keep matters as square as possible; but it is difficult to procure drafts here." And he again wrote, a few days afterwards, with a memorandum of materials &c. requisite for the new vessel, and mentioning that he should be able to send home a "respectable remittance in ship and cargo." On the 10th of February 1826, Robertson, Hunter, and Company wrote to Wedderburn in these terms:—"We now beg leave to hand you duplicates of your account-current, showing a balance still against you of £553. 8s. 6d., which we hope will be shortly remitted for. With respect to your present order for goods, we have to remark, that we would have no objections to continue shipping for you such articles as you may require for your wine and spirit store, according to our original agreement, viz. that each shipment should be remitted for, or nearly so, before another was made; and should this be the case before the shipping season begins, we will send you that part of your order; but the other, containing the general assortment, we are sorry that we must decline doing any thing in it at present, as we have determined not to enter into that description of business with any person in New Brunswick, but keep by the shipping only such articles as may be necessary for the fastening, equipping, &c. of any vessels that are, by previous agreement, to be sent home to us for sale. When your new vessel is nearly ready for sea, we have no objections to accept your drafts upon us for a reasonable proportion of cargo and freight—say two-thirds." On the 10th of May, Wedderburn replied to the above as follows:—"With respect to the articles ordered for my store here, I implicitly rely on their being sent, otherwise I shall be a considerable loser, having so established myself here, that any interruption of my business would have a very prejudicial effect. Had the times not taken so unexpected and great a change, a very small if any balance would have appeared against me with you by the period of the year

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when shipments are made from Britain. No consideration would have induced me to enter upon shipbuilding upon my own account, but the desire to remit with greater punctuality than it is possible almost to do in a cash business like mine, and to remit to such an extent as would enable me to keep up a regular supply of my wine and spirit business." On the 15th of May, Robertson and Company sent goods to Wedderburn, to the value of £1963. 5s. 1d., which were duly received, and increased the balance by him to £2567. 10s. 6d.—no remittances having been made to account. On the 6th of December following, Wedderburn wrote—"The depressed price of timber, and the state of my account with you, have placed me in a very awkward dilemma with regard to your liberal offer to me, as communicated in your letter of 10th (last) February, wherein you authorize me to value on you, when the vessel is nearly ready for sea, for two-thirds of her and her cargo. Since you came forward in this liberal manner, both ship and timber have fallen in value, whilst your account against me has been increased by the shipment of goods and ship's materials, which I have been unable to reduce as I wished, from the situation of this place during summer, in any other way than by the ship and cargo, which, at the lowest rates of both, will, I trust, realize with you about £4000 sterling, if I have not very ill luck. But, under existing circumstances, I shall endeavour to keep down, as far as possible, the amount of any drafts it may be necessary to pass before the ship is launched."

Some time now elapsed without any accounts of the vessel, in the course of which the firm of Robertson, Hunter, and Company was dissolved,—the debts being undertaken by the defender, who paid two bills drawn by Wedderburn towards completing the vessel,—the one for £100, drawn in March 1827, in favour of the pursuer Smyth, a merchant at St. John's; and the other for £200, drawn in April, in favour of certain other persons. In May 1827, a further supply of goods, to the extent of £581. 10s., had been sent to Wedderburn; and, in September thereafter, a third bill in favour of Smyth for £150 being presented, Hunter refused to accept it, on the ground of not having been advised of it; and, on the 20th of that month, he wrote Wedderburn in these terms:—"In case the Nimrod (the vessel above mentioned) should not have sailed by the time this comes to hand, I have wrote Messrs. Fiddes and Robertson of Halifax, requesting one of them to proceed to St. John's, (if, at the time they receive my letter, they understand the ship is still there,) and learn the cause of her being so long detained; and if they find her nearly ready for sea, and that she still requires a little money to complete her outfit, I have directed them to draw on me for the same, and to attend that the money is applied to the necessary equipment of the vessel. It is far from being agreeable to me to do business in this way; but I have been so much in the dark respecting the progress you were making, and disappointed at the delay which has taken place already, that I am obliged, for my own satisfaction, to know from a third party how matters really are. I trust, however, before

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this reaches you, that the Nimrod has been dispatched to Liverpool, as formerly requested by me, and that Messrs. Fiddes and Company will have no occasion to appear in this transaction, or be put to any trouble whatever."

By the time this letter reached St. John's, the vessel was ready to sail, and consequently there was no necessity for the interference of Fiddes and Company. Wedderburn had, however, previously drawn on Hunter various bills, amounting, with those mentioned above as having been paid by him, to above £1200, of which, besides the one of £150 already alluded to, there were two, each for £100, dated the 29th of September and 13th of October 1827 respectively, which had been discounted with Smyth. The vessel, with her cargo, having been consigned to Hunter, was by him sold,—the proceeds being £2440. 17s. 10d. for the ship, and £762. 15s. 10d. for the freight and cargo, whereof two-thirds were £508. 10s. 6d. But, after crediting Wedderburn with these sums, there was still a balance due by him of £91. 16s. 10d. Hunter, in consequence of this state of the accounts, refused to pay any of the drafts in addition to the two of £100 and £200 already accepted and retired by him. On this, Smyth raised the present action, concluding for payment of the three drafts above mentioned, amounting to £350, on the ground that he had discounted them to Wedderburn on the faith of Robertson, Hunter, and Company's letter of the 10th of February 1826, authorizing drafts to the extent of two-thirds of the freight and cargo to be sent; and that Hunter, as in place of that company, was bound to pay them to that extent, without regard to the balance due by Wedderburn on his general account.

The Lord Ordinary assoilzied Hunter, adding the subjoined note.*

Smyth having reclaimed, the Court ordered Cases, with a statement by each party as to the practice of merchants in such circumstances.

The statements of the parties on this point were somewhat at variance; but there was no precise offer on the part of Hunter to prove that, according to the usage of merchants, he would not, in the circumstances, have been considered liable to pay Wedderburn's drafts to the extent of two-thirds of the cargo. He, however, pleaded—

The letter to Wedderburn, of the 10th of February 1826, no doubt authorized him to draw on Robertson, Hunter, and Company to the extent of two-thirds of the freight and cargo to be shipped by him; but any party discounting drafts on the faith of such a letter is necessarily driven to inquire whether the amount may not already have been drawn for or remitted in some other way. He cannot possibly rely simply on the letter,—more especially when, as here, the first of the drafts in question was not discounted till 17 months after the date of the letter; and had Smith inquired, as he ought to have done, he would have found that the ship and cargo were, according to the original agreement between the parties, to be consigned in satisfaction of the general balance due by Wedderburn; and that, subsequently to the date of the letter of the

* "The Lord Ordinary has advised the closed record, after having fully heard parties at the bar. To him it appears that this case involves a point of law of much importance, being simply whether a letter from one person to another, giving the former

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10th of February 1826, remittances had been made, in the shape of goods, greatly exceeding the amount for which he could be entitled to draw.

To this it was answered—

A foreign merchant discounting bills on the faith of a letter, such as that written by Robertson, Hunter, and Company, is certainly exposed to the risk of the person holding the letter having already overdrawn the amount allowed, and so far must trust to his honour; but if the full amount have not been already exhausted, the foreign merchant is entitled to advance money on the faith of such letter, this being its only purpose; and his claims cannot be defeated by the granter of it pleading retention on a general balance. In the present case, besides, it is clear from the correspondence that Hunter was anxious to get the ship home to liquidate the general balance, and had no intention whatever of recalling the credit he had granted to the extent of two-thirds of the cargo and freight, the operating on which by Wedderburn was absolutely essential to his ever obtaining possession of the vessel at all.

leave to draw a bill or bills on the latter, shall have the effect of binding the latter to a third party with whom the bills may have been discounted? It is the case in almost every mercantile transaction, where one party furnishes goods to another, the receiver gives the other liberty to draw for the value; but does it thence follow that the receiver of the goods is bound to a third party who may have discounted the bill, when in the mean time the receiver has paid the value, or given an equivalent for the goods to him who furnished them? If he have not paid the value, he must accept the bill, because drawing the bill is an assignment to the debt; but if the debt have been paid in the mean time, the assignment is to a debt which does not exist.

"In the present case, Mr. Wedderburn dealt with Robertson, Hunter, and Company of Greenock, from whom he got stores of wine and spirits, and commodities, to keep a store in New Brunswick; and from the closed record it is established that the understanding on which the parties dealt was, that one cargo should be paid, or nearly so, before another should be furnished. It further appears that to enable Wedderburn to pay for his stores, he became shipbuilder, which he was enabled to do by the facility he enjoyed of getting timber for the purpose; and accordingly Robertson, Hunter, and Company looked to their payment for articles furnished to him, to enable him to build the ships, such as stern-posts, rudders, and other parts of a ship, which were more substantially fabricated here than in New Brunswick; and also ultimately, for their furnishings to his stores, to the consignments of the ships which he built, with their cargoes and freights for sale.

"On the 10th of February 1826, Robertson, Hunter, and Company wrote to him upon the different matters in which they were connected. They told him that he was in their debt £732. 6s. 7d.; that they would have no objection 'to continue shipping for you such articles as you may require for your wine and spirit store, according to our original agreement—viz. that each shipment should be remitted, or nearly so, before another was made.'

"At this time he was building a vessel, which was to be consigned to the company for sale; and they wrote in same letter, 'When your new vessel is nearly ready for sea, we have no objections to accept your drafts upon us for a reasonable proportion of cargo and freight—say two-thirds.' This was evidently intended to enable him to raise money on these drafts, for the purpose of enabling him to dispatch the ship and cargo to them. But remark, that if they enabled him to do so by furnishing to him articles for his stores, for which he ought, by special bargain, to have paid before he got them, and did not pay, this was in fact answering his drafts on account of his

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LORD JUSTICE-CLERK.—If the practice of merchants is to be considered, it will be necessary to decide whether an investigation into that practice is competent; and if so, whether it should be made by a jury. But, looking to the record closed on summons and defences, I see no averment of the usage of merchants; and the statements since allowed are so contradictory, that I cannot lay any weight on the observations of the Lord Ordinary as to this matter. Before delivering an opinion, therefore, I would wish to hear the Court, if they think it competent to have such an investigation.

LORD MEADOWBANK.—I think it incompetent.

LORD CRINGLETIE.—My opinion was on the general point, not on particular circumstances; and I still continue of the same opinion. The abstract proposition is scarcely disputed, and the general practice of merchants is not in issue.

LORD JUSTICE-CLERK.—Then, on the merits, looking at the letter of the 10th of February, it provides for various matters, and, inter alia, contains the passage in virtue of which these drafts were made—"When your new vessel is nearly ready for sea," &c. There is no intimation to Wedderburn, on the face of this letter, that if he did not pay all that was due by him on former transactions, this permission to draw was to have no effect. But, with reference to this vessel, they make an engagement, "when the vessel is nearly ready for sea"—these are important words—"you may draw," &c. Then the letter of the 10th of May deserves attention, as indicating that the vessel would be made available in regard to the general balance; and, lastly, there is a most

ship, because, beyond all doubt, it left in his hands funds which he ought to have paid to them before stores were furnished to him. If, therefore, he carried the letter, empowering him to draw for two-thirds of the cargo and freight, to any banker or other person, to advance the money, two matters of fact depended entirely on his probity—viz. 1. How much was the value of two-thirds of cargo and freight? and, 2. Whether he had not received that value before he drew for it? The letter, therefore, authorizing him to draw for two-thirds of the cargo and freight, was nothing more than affording him an opportunity of showing that letter to the banker as a reasonable cause for his drawing the bill, but afforded no security but his probity that the bill would be accepted. In short, it was not a letter of credit guaranteeing the payment to a third party of such money as should be advanced on Wedderburn's drafts, but was merely an authority to him to draw for two-thirds of the cargo and freight, which if he drew for, or obtained otherwise, was completely vacated and annulled; so that the pursuers, or any one who advanced the money on Wedderburn's drafts, relied entirely on his honesty that he had not already obtained the money; for, if he had not, the Lord Ordinary has observed that the drafts must be good. If the liability did not depend on the fact whether Wedderburn had got money to the extent of two-thirds of the cargo and freight, he might have discounted bills for it three or four times over, and the defender would be liable for the whole, which is quite absurd. The Lord Ordinary has not trusted to his own ideas upon this matter, which involves a point of mercantile law; and he can inform the parties that they will find the above to be the opinion of the best-informed merchants; and to apply it to the case at issue, we have only to look to the state of accounts and the mode of dealing between the parties. On the 10th of February 1826, when the letter was written authorizing Wedderburn to draw, he was in debt to Robertson, Hunter, and Company £752. 6s. 7d. He was told that he had no objection to furnish him with wine and spirits, provided what he already owed should be paid for before more should be furnished. He was furnished with goods for his stores, in May

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important letter, of the 6th of December, concluding with this passage—"Under existing circumstances, I shall endeavour to keep down, as far as possible, the amount of any drafts it may be necessary to pass before the ship is launched." It is clear to my mind these words have special reference to the letter of the 10th of February. Wedderburn says in substance says, My only way of paying the general balance is by the ship; and therefore I will keep down as much as possible the "drafts," which are just the drafts authorized by the letter of the 10th of February. Then, after receiving this letter, if Hunter had wished to prohibit his letter still being used for credit, should he not have warned Wedderburn, as you have not complied with my directions as to the general balance, you shall have no power to draw on me in respect of the vessel? But he did not do this. On the contrary, when there was a delay in sending the vessel, he wrote to Fiddes and Company to see what was necessary to expedite her, and with power to draw for what was requisite for that purpose. It is clear if these persons had not found the vessel completed, they would have advanced the money, which Hunter of course must have repaid; and then the question is, as the bills here in question were drawn when the vessel was "nearly ready for sea," and little exceeded two-thirds of the freight and cargo, whether the letter of the 10th of February, which was never recalled, was not sufficient ground for Smith relying that if Wedderburn's drafts did not exceed two-thirds, he was entitled to call on Hunter to fulfil the promise contained in the letter? This person was not put in mala fide; and I am of opinion that Smith was warranted to trust to the letter, and is entitled to recover the amount of these bills, to the extent of two-thirds of the cargo and freight, so far as not exhausted; and though with deference to the opinion of the Lord Ordinary, I must differ from his Lordship.

Lord Glenlee.—I think your Lordship's opinion well founded. The party who discounts on a letter of this kind no doubt runs a great risk, if the funds are exhausted by previous drafts; but, so far as the former drafts do not exhaust two-thirds of the proceeds of the freight and cargo, he is entitled to

1827, to the amount of £581. 10s., without paying for them, whereby he was left in possession of that money, which he ought to have paid, and which was more than two-thirds of the cargo and freight—these having only netted £762. 15s. 10d. In addition to this, the defender paid a bill, drawn in virtue of said letter, 10th February 1826, for £100 in July 1827; and, in August after, another for £200. Thus the defender paid in all £881. 10s. for freight and cargo, which only yielded £762. 15s. 10d., and this exclusive of the bills for which this action was brought; and on a final accounting between them and Wedderburn, the latter is in their debt £90. 18s. 9d.

"It has been pleaded for the pursuers, that he was misled to advance the money on the bills pursued for, by the defender having paid one bill, which he discounted for £100, dated more than a year after the letter of 10th February, and by their having paid another for £200, discounted by a Mr. Woodward. But because the defender paid these, that is no reason why they were to pay more, otherwise there would be no bounds to their liability; and the reason for their having paid them appears to have been, that, on 6th December preceding (viz. 1826), Wedderburn wrote them that his ship and cargo, 'at the lowest rates of both, would yield £4000.' If this had proved to be true, the defender would have also paid the bills in question. But the result of the sales having disproved the prospects held out, the defenders have refused to pay; and, on the whole, the Lord Ordinary must assent to the legality and justice of such refusal."

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recover; so that, however, what is paid, and what Smith is now to recover, shall not in all exceed the two-thirds. The real object of Hunter's anxiety for the vessel was, that he might thereby liquidate the general balance; and, by advancing the money necessary to have her sent to this country, he was employing the means, by which he was to get a fund for payment of the general balance; just as people fang a dry pump by pouring water down it, in order to bring up what could not otherwise be obtained. The letter of the 6th of December showed that Wedderburn at least considered that the permission to draw was still in subsistence; and Hunter therefore, had he intended to withdraw the permission, might, in the letter of the 28th of December, have said that, in consequence of the large balance due, we will not let you have the money to send us this ship. But would anybody in his senses have done that? It is clear the parties must have understood that if the commission was not recalled, it must still subsist.

Lord Meadowbank.—Had this case rested on the original letter, without any further correspondence, I would have agreed with the Lord Ordinary, though not exactly on the same grounds; for, on the special terms of the letter, no one was entitled to trust without inquiry as to the state of the balance. But there is a long correspondence; and in consequence of it, and particularly the letter of the 6th of December, and after the procedure on it, I must hold the commission not recalled; therefore I concur with your Lordships.

Lord Cringletie.—It is with great deference that I differ; but the principle of my interlocutor seems admitted, viz. that the drafts cannot be sustained beyond the amount of the two-thirds not exhausted; and so your Lordships concur in the principle that the drafts were not absolutely, and in all events, to be paid. Then, that being conceded, I look to the correspondence, and I found my opinion on it. This man had a store at St. John's; and, in the same letter which authorized the drafts, it is made a condition that there are to be no new furnishings till the price of the old is paid or remitted for. Now, was not making furnishings, without obtaining remittances, just advancing for the ship? If Hunter have sent furnishings &c. to an extent beyond the two-thirds, has not he already advanced what Wedderburn was allowed to draw for, so that the fund is exhausted? It is said he should have recalled the letter; but supposing this had been done, could not Wedderburn have kept that letter recalling the permission in his pocket, and shown only the first? This just demonstrates that the letter was not one on which a banker was entitled implicitly to rely, or he might have drawn the whole by previous drafts. Had Hunter made direct remittances in cash, it might have been equally argued, and just as strongly as here, that the letter was not recalled. On these grounds, I still retain my opinion.

The Court recalled the Lord Ordinary's interlocutor; found that Hunter was bound to have honoured Wedderburn's drafts to the extent of two-thirds of the value of the freight and cargo, so far as not exhausted, and remitted accordingly.

W. Cook, W.S.—Macmillan and Grant, W.S.—Agents.

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2D DIVISION.
Ld. Fullerton.
T.

Reid v. Wilson.

CAPTAIN JAMES REID, Suspender.—*Keay—Marshall.*
GEORGE WILSON, Charger.—*Ivory.*

Special Case, in which the Court refused counter reclaiming notes against the Lord Ordinary's interlocutor.

MACMILLAN and GRANT, W. S.—H. INGLIS and DONALD, W. S.—Agents.

No. 47.

Nov. 26. 1830.
Wyllie v.
Paton's Representatives.

MRS. ELIZABETH WYLLIE, Suspender.—*Cuninghame.*
PATON'S REPRESENTATIVES, Chargers.—*Cowan.*

Oath on Reference—Bill of Exchange.—Circumstances appearing from an oath on a reference made to the drawer of a bill of exchange by the acceptor, as to the furnishings which constituted the alleged value having been made on the order of third parties, held not sufficient to establish non-onerosity.

Nov. 26. 1830.

2D DIVISION.
Ld. Fullerton.
F.

THE suspender Mrs. Wyllie granted to the late John Paton, wright in Stewarton, a bill for £18. 14s., stated to be for "value in wright work." For payment of this bill, under deduction of certain partial payments, an action was brought by Paton before the Sheriff of Ayrshire. Mrs. Wyllie having defended on the ground of no value, Paton stated that the value consisted of furniture ordered either by her or her daughter, who, it was admitted, lived in house with her, and of repairs executed on a house belonging to Mrs. Wyllie's son, of which she had the management. Mrs. Wyllie thereafter referred her allegeance of non-onerosity to the oath of Paton, who emitted a deposition bearing as follows:—"Depones that he rendered an account of wright work to the defender, which account is now shown to him: That the articles in this account were performed by desire of the defender and her daughter, sometimes by the one, and sometimes by the other; but he cannot swear positively that the drawers at £7. 7s., the table at £5. 5s., four chairs at 5s., were ordered by the defender: That the articles, viz. table £5. 5s., chest of drawers £9. 18s, 6d., were, as he thinks, ordered by the defender's daughter Margaret: That he received the £6 credited in said account from the defender's daughter, Margaret, in payment of a bill granted by the defender, and the balance of the said bill is included in said account: That he also received £5 from Margaret, which he believes were to account of the articles she got, and which is also credited in the account: That he also received £6 from the defender's daughter Margaret by the hands of Margaret Paton: That he further received £1. 18s. from the defender's daughter Margaret in goods, and which he is willing to allow credit for from the debt sued for: That at the different times stated in the account, when bills are stated to have been granted, he cannot say whether he rendered any account or not, except as to the first bill, for which he thinks he rendered an account: That the account now exhibited was the only one he rendered, except the one

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when he got the first bill: That he rendered the accounts now shown him, after he got the bill libelled on: That the deponent did not exhibit any account to Mrs. Wyllie at the time he got the bill, but he told her the amount of the account: That when the defender granted the bill for £20 in said account, it was overdrawn £2. 12s. 2d.; and when the defender retired that bill, he deducted that sum, and took a new bill for the nett balance due, and which is the bill libelled on: That when the bill granted was sued for, he did not say that he would retire it when it became due; and a letter, docqueted and signed as relative hereto, was wrote by the deponent: That he considers the granting of the bill as a closing of accounts between the parties; and if this bill is paid by the defender, he has no further claim upon her: That the deponent repaired Cowie's house at the desire of the tenant, who said the defender desired him to do so. Depones that the defender never granted a bill to the deponent, except for value, but the one the £2. 12s. 2d. was put in, for which no work was done; and he said, on granting these bills, that he had much need of money. And being interrogated, whether or not he said to the defender, that to make the bill appear as a value bill, he would say therein 'value in wright work?' depones, That he does not believe he ever said so. All which is truth; and adds, That the £6 he received from Margaret Wyllie, through the hands of Margaret Paton, was paid after this bill was granted, and for which he is willing to allow credit along with the £1. 18s. And this is also truth."

The Sheriff, on considering this oath, found it negative, and decerned against Mrs. Wyllie, who was thereafter charged by the representatives of Paton now deceased. She suspended, on the ground chiefly that the oath did not prove the furniture ordered by her daughter, or the repairs on the house, to have been supplied or executed by her authority, so as to infer liability against her. The Lord Ordinary, however, "in respect the oath of the charger does not prove the non-onerosity of the bill charged on," found the letters orderly proceeded; and the Court adhered.

R. Dunlop, W. S.—W. Patrick, W. S.—Agents.

No. 48.

Charles Ferrier, Suspender.—*Hope.*
James Walker &c., Chargers.—*Skene—Graham Bell.*

Nov. 27. 1830.

1st Division. Bill-Chamber. Lds. Meadowbank, Mackenzie, and Corehouse.

Interdict.—This was a question as to passing a bill of suspension and interdict in regard to certain operations by conterminous proprietors. The Lord Ordinary refused the bill; but the Court altered, passed the bill, and granted interdict.

J. Burness, S. S. C.—Dennistoun and Christian,—Agents.

No. 49.

Nov. 27. 1830.
Hunter v. Napier &c.

JAMES HUNTER, Complainer.—*Keay.*
D. NAPIER and W. M'KENZIE, Respondents.—*D. F. Jeffrey—Cuninghame.*

Interdict—Ferry—Steam-Boat.—Interdict refused against proprietors of steam-boats landing and receiving passengers at a certain point on the Clyde in their passage up and down the river, in alleged violation of a right of ferry,—a bill being passed to try the question.

Nov. 27. 1830.

2D DIVISION.
Bill-Chamber.
Ld. Mackenzie.
T.

THE complainer Hunter is proprietor of a right of ferry on the Frith of Clyde, entitling him to transport passengers from Dunoon on the coast of Argyllshire to the opposite coast of Renfrewshire, distant about six miles. Since the introduction of steam-boats on the Clyde, it has been customary for vessels passing up and down the river to lie off Dunoon, and take in or put out passengers, and also to touch at Gourock, on the opposite coast, both in coming and going. The passengers landing at or leaving Dunoon are chiefly put on board the steam-boats, or taken on shore by the complainer's tacksman of the ferry; but the respondents, Napier and M'Kenzie, owners of steam-boats, having found it convenient to station there a boat of their own for the accommodation of passengers by their vessels, the complainer presented a bill, craving an immediate interdict against their landing and shipping passengers at Dunoon, on the grounds,—1. That this was an encroachment on his right of ferry, in virtue of which he was at least entitled to complete the communication with the opposite shore, by taking passengers to and from the steam-boats;—and, 2. That the landing-place was his private property. This last statement was denied, it being averred that the point in question was a public landing-place, where the high road touched the shore. As to the other ground for obtaining an interdict, it was answered, That the utmost extent of the complainer's right was to ferry passengers from his own shore, having no right to bring them from the opposite coast; that Gourock, the nearest point on the opposite side at which the steam-boat touched, was beyond the limits of his ferry; that even were it otherwise, the landing or shipping of passengers from steam-boats plying up and down the river could not be a privilege included under his right of ferry; and at all events that he could never de plano get an interdict to prevent these vessels from taking any passengers on board, or landing any, because one of these occasionally might perhaps intend to land at Gourock, or might possibly have come from thence.

The Lord Ordinary, while he passed the bill, refused to grant the interdict; and the complainer having reclaimed, the Court adhered.

MACMILLAN and GRANT, W. S.—W. PATRICK, W. S.—Agents.

Mrs. Mackintosh or Fraser, Raiser.—*Cockburn—Cuninghame.*
Mackintosh's Creditors, Claimants.—*A. Wood.*

No. 50.

Nov. 27. 1830.
2d Division.
Ld. Mackenzie.
R.

Fraser v. Mackintosh's Creditors.

Order for consignation in a multiplepoinding recalled by consent,—the raiser finding caution for the fund, subject to the orders of Court.

A. Macbean, W. S.—J. Macdonell, W. S.—Agents.

Glasgow's Trustees, Raisers.—*R. Robertson.*
Mr. and Mrs. Robertson Glasgow, Claimants.—*J. Brown.*
Their Younger Children, Claimants.—*Keay.*

No. 51.

Nov. 30. 1830.
Glasgow's Trustees v. Glasgow &c.

Clause—Legacy—Interest.—Circumstances in which it was found, under the terms of a settlement, that a specific legacy of £30,000 was to be set apart for younger children; and that the interest arising thereon, before it became exigible, accreseed to the capital.

Nov. 30. 1830.

1st Division.
Lord Meadowbank.
S.

This was an amicable suit. The late Mr. Glasgow, besides executing two deeds of entail, one of which embraced Montgreenan in Ayrshire, left a trust-conveyance of his whole unentailed property in Scotland, real and personal,—another trust-conveyance of West India property,—and a testament of the same date with these two last-mentioned deeds. In the first trust-disposition, his daughter Mrs. Robertson Glasgow, and others the trustees, were directed, at the first term beyond a twelvemonth from his death, to make up a state of the trust-estate, and "pay over, yearly and proportionally, to the heir of entail in possession for the time of my said estate of Montgreenan &c., such a sum as shall be equal to the interest upon what shall so appear to be the free residue and amount of my said estate, and that until such residue, to be accumulated and made part of the stock, shall be disposed of in manner after mentioned." This latter part referred to the purchasing and entailing certain lands, after paying debts, legacies, donations, annuities, and provisions. In the conveyance of the West India property, the trustees were directed first "to pay and satisfy thereout all such pecuniary legacies and gross sums of money as are or shall be given or bequeathed by the said Robert Glasgow by any such will, codicil, &c. unto any person," &c. The residue was to be applied in purchasing and entailing as before; and until the purchases should be made, the trustees were to place the money at interest, and to pay the interest to the party who would have drawn the rents, if the capital had been invested in land, and entailed.

The last will and settlement contained the following clauses:—"I do hereby give and bequeath the sum of £30,000 to the younger children of my son-in-law, the said Robert Robertson, Esq., and my daughter Anne, his wife, already born, or hereafter to be born." The deed then directed this sum to be divided among the younger children in such proportions, and to vest in and be paid to them at such ages, and with such 'dispositions over,' as the testator, whom failing, Robert Robertson, whom failing, Mrs. Anne Robertson, might appoint by an attested writ-

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ing. In the partial or total default of such appointment, the sum unappropriated was to be equally divided, and to vest and be payable to the children on their attaining majority, (or being previously married, if daughters,) provided, at that period, both parents were deceased; otherwise such vesting and payment was to be postponed until immediately after the parents' decease. The share of any child predeceasing, or becoming in apparency of the entailed estate, was to accrue to the surviving children, and to vest and be payable at the same time with the original shares. In the event of all the younger children dying "before any of them shall acquire a vested interest in the said sum of £30,000, or any part thereof, then the said sum of £30,000, or so much thereof as shall not have been disposed of under any of the powers herein contained, shall sink into and form part of the residue of my estate and effects, and be paid and applied accordingly." Power was given to the trustees (but requiring the written consent of Mr. Robertson Glasgow if in life, or of Mrs. Robertson Glasgow if surviving him) "to levy any part of the portion or portions intended to be hereby provided for such child or children as aforesaid, not exceeding in the whole, for any one such child, one moiety or equal half part of his or her then expectant portion in the said sum of £30,000, notwithstanding the same shall not have then become vested or payable; and to apply the money so to be raised for the preferment, advancement, or benefit of such child or children, in such manner as the said trustees shall in their discretion, or with such consent as aforesaid, (as the case may be,) think fit." A direction was also given to the trustees, under the qualification of their obtaining the consent of Mr. or Mrs. Robertson Glasgow as above, that they should, "out of the interest, dividends, and annual produce of the said sum of £30,000, pay and apply, for the maintenance and education of the child or children for the time being, who shall be eventually entitled to a provision &c., in the mean time, and until their eventual portions of the said £30,000 shall become vested, such yearly sum, not exceeding the amount of the interest of the same portions, as the said trustees shall think fit."

The trustees, who were also executors of the settlement, found it a matter of doubt whether the interest of the £30,000 accruing during the lives of Mr. and Mrs. Robertson Glasgow fell to the residuary fund, (which was to be applied to the purchase of lands, to be entailed on them and a certain series of heirs); or whether it should be allowed to accumulate, and to increase the capital of £30,000, until the latter vested and became payable to the younger children. They therefore raised a multiplepoinding, and called the parents and the younger children to discuss their respective claims. They stated that they had sufficient funds to pay the annual interest of the £30,000, and to leave a surplus, providing, by accumulation, a capital sum of that value.

The Lord Ordinary reported the question on Cases.

Pleaded for the younger Children—

The trustees were directed, in the first instance, to provide for such

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legacies ' and gross sums of money' as might be disposed of by will. The balance of free residue only was to be appropriated for the ulterior purposes of the trust. There being an absolute bequest of the gross sum of £30,000, the trustees were bound to set it apart for behoof of the younger children without delay; and being so set apart, any interest accruing on it must belong to them, as the parties entitled to the capital, unless express provision were made to the contrary; but there was no such provision. It was plain that the testator intended the segregation of this capital sum before the period when the individual shares became vested, because he had conferred power on the trustees, with consent of Mr. and Mrs. Robertson Glasgow, to advance portions of it to the children by anticipation.

But further, the power expressly given to the trustees, with consent of Mr. or Mrs. Glasgow, to apply the interest of the capital sum for behoof of the children, proved that such interest was not meant to belong to the parents during their lifetime. Had it been so, they could have themselves applied that interest for behoof of their children, without the intervention of the trustees. And as the heir of entail had no claim for any interest, except so far as it accrued from the moveable capital destined for the purchase of land to be entailed, and as the £30,000 was not destined for that end while any of the younger children remained, it followed that the interest of that £30,000 could not be claimed by the heir of entail. But if it was not claimable by him, there was no other party, except the younger children, to whom, as owners of the capital, it could accrue.

Pleaded for Mr. and Mrs. Robertson Glasgow—

On the death of the testator, without dictating as to the distribution or vesting of the children's respective shares in the £30,000, the unlimited power to regulate these matters devolved on their father, whom failing, on their mother. If neither of them made provision as to this, the vesting was wholly suspended until their decease, unless the trustees, with their consent, advanced a portion of the capital to any of the children. In the mean time, so long as no part of the capital vested in or became exigible by the children, they had no right to the accruing interest, which remained a part of the ' free residue' of the testator's estate, to be appropriated to the purchase of entailed lands, in terms of the trust. Besides, it was provided that if all the children died before acquiring a vested interest in the £30,000, " then the said sum of £30,000, or so much thereof as shall not have been disposed of under any of the powers herein contained, shall sink into and form part of the residue of my estate, and be applied accordingly.". By these words the testator, after contemplating the sum as having remained for a lapse of years set apart under his bequest, and while providing for its eventual relapse into his residuary estate, did not view it as having in the mean time sustained any accumulation of interest, but, on the contrary, as still remaining a nett sum of £30,000. Of course, this could only be done by him on the supposition that all the interest in the mean time fell under the residuary

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estate, so far as not excepted therefrom by the special act of the trustees, with consent respectively of Mr. or Mrs. Glasgow, if alive.

The Court "preferred the claimants, the younger children, upon the fund in medio, for payment of the principal sum of £80,000 sterling, and interest accruing thereon."

A. Robertson, W. S.—J. Bennett, W. S.—Agents.

No. 52.

A. Mackinlay and Others, Pursuers.—*Hope.*
W. D. Gillon, Defender.—*Skene—Maconochie.*

Partnership.—Circumstances and evidence relevant to establish partnership. Agreeing to accept a fixed annual sum out of the profits of a concern is sufficient to constitute the party so agreeing a partner of the concern.

Nov. 30. 1830.

2d Division.
Ld. Mackenzie.
T

The late Edinburgh and Leith Shipping Company entered into a contract, in 1809, with the company of Downe, Bell, and Mitchell, carrying on business as wharfingers at Downe's wharf, London, in consequence of which a certain balance arose in favour of the Shipping Company. For payment of this, the Shipping Company, in 1814, raised an action against the company of Downe, Bell, and Mitchell, to which they called as parties four individuals, named Bell, Mitchell, Read, and Atkins, whom they then understood to be the whole partners. In this action they ultimately obtained decree for £843. 8s. 3d. In the course of the proceedings, they discovered grounds for holding that the late Colonel Gillon of Wallhouse was also a partner of the company; and accordingly the pursuers Mackinlay and others, commissioners for winding up the affairs of the Shipping Company, raised a supplementary action against that gentleman, since his death transferred against his son, the present defender.

The defence was, that Colonel Gillon had not been a partner of the company.

The facts regarding this matter appeared to be as follows:—The late Mr. Downe, proprietor of Downe's wharf, was one of the original partners of the company, in which he held a one-third share, and to which he had granted a lease of the wharf at a rent of £900 per annum. Mr. Downe had three daughters,—married, respectively, to Charles Read, George Atkins, and Colonel Gillon. He died in June 1810, leaving a will, whereby he bequeathed the wharf in three shares, one-third to each of Mrs. Atkins and Mrs. Read in liferent, and their children in remainder,—and the other third to Colonel Gillon in liferent, and his son, the defender, in remainder; and he further bequeathed his third of the profits of the business of the company, in equal parts, to his three sons-in-law. On the 7th of June in the following year (1811), a memorandum of agreement was entered into by Read, Atkins, and one Forbes, set forth as acting for Colonel Gillon, as joint legatees of Mr. Downe, on the one part, and Messrs. Bell and Mitchell, the surviving partners, and as such, lessees of the wharf, on the other part, whereby it was agreed that a new partnership should be formed, to be held as having commenced at

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the date of Mr. Downe's death, "the parties thereto being Messrs. Bell and Mitchell, each one-third, and the said three legatees the remaining third, in equal shares." One of the articles of the agreement stipulated that the rent payable to the legatees for the wharf should be reduced from £900 to £600, payable in three equal shares; and another provided that "a deed of lease and partnership shall be prepared with all convenient speed, and a copy thereof sent to Scotland for the approbation of Colonel Gillon and of Mr. Bell." The pursuers failed to recover any special power from Colonel Gillon to Forbes to enter into this agreement for him; but, in a letter written by Colonel Gillon to Mr. Bell on the 23d of May preceding, he, inter alia, states, with reference to these matters—"I wrote Mr. Forbes on the 21st, and requested him to transmit to me a power of attorney, which I will sign, and immediately return to him, giving him full powers to act for me as might occur to him to be most proper, and also to settle the accounts for the past;" and, in subsequent letters, he referred to Forbes, as having acted for him on this occasion. It appeared that, on the 8th of June, Forbes had further made a verbal agreement with Read and Atkins, the co-obligators, which he announced to Colonel Gillon in these terms:—"By a separate unwritten but solemn agreement with the two sons-in-law and executor, I have obtained for you the choice of either continuing the partnership, or accepting, in lieu of one-third of rent, and one-ninth of profits, the nett sum of £500 per annum from 30th June last year." With reference to these arrangements, Colonel Gillon, of date the 13th of June, wrote Mr. Bell as follows:—"As a pledge has been given by all present for the new agreement then entered into, the covenants of which, I presume, you are made acquainted with, Mr. Forbes proposed for me, that, being at such a distance from London, I should be left at liberty to receive a regular payment annually of £500 in lieu of every thing, or continue a partner in the contract, by which I would be entitled to receive one-third of the rent of £600, and one-ninth of the profits of trade. In this situation of matters, I have taken the liberty to request that you will have the goodness to give me your advice upon this subject—1. Whether to remain as a partner; 2. Or to receive the £500 annually." Thereafter Colonel Gillon intimated that he would avail himself of the option allowed him by the subordinate verbal agreement stated to have been entered into with Read and Atkins, and accept the annual payment of £500. These persons, however, disclaimed, or refused to abide by, this agreement; and, after some correspondence, an arrangement was effected on the 21st of August 1812, in virtue of which a contract was executed, of date the 18th of May 1813, by Colonel Gillon on the one part, and Read, Atkins, Bell, and Mitchell on the other. The original of this contract could not be recovered; but two copies were produced, which showed its terms, so far as affecting this question, to have been as follows:—"1. It is hereby covenanted, stipulated, declared, and agreed, that neither the said Andrew Gillon, or his heirs, executors, administra-

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tors, and successors, shall be concerned in, or have any management or control of, the business carried on at Downe's wharf under the firm above mentioned. 2. That, during the period stipulated as the endurance of said partnership, either in virtue of a minute drawn up and signed at London in the month of June 1811, to which the said Andrew Gillon was (proposed to be) a party, or by any subsequent contract to be subscribed by the said Charles Read, George Atkins, William Bell, and Alexander Mitchell, as the sole partners now composing the firm of Downe, Bell, and Mitchell, they or their successors shall, in consideration of the sum of annuity after mentioned, be entitled to occupy and possess the wharf called Downe's wharf, situated in East Smithfield aforesaid, and the buildings thereon, &c., and that without any let, stop, hinderance, or impediment from the said Andrew Gillon or his foresaids. 3. That the aforesaid Downe, Bell, and Mitchell, their executors, administrators, and successors, on the other hand, are and shall be bound and obliged, as they do hereby bind and oblige themselves, and their aforesaids, to pay unto the said Andrew Gillon or his aforesaids the sum of £400 sterling per annum, during the space or period above referred to, in full of all that he or they can ask, claim, or demand, as heritable proprietor or proprietors of the aforesaid wharf and buildings, or any parts thereof, as particularly described in the second clause of this agreement. 7. That the aforesaid minute of agreement, which was entered into in the month of June 1811, shall cease and be void in so far as regards the share of the business thereby (proposed to be) allotted to the said Andrew Gillon; and he shall not have any interest in, or concern with, the business of the said Messrs. Downe, Bell, and Mitchell, or the profits or losses arising therefrom."

On this footing matters remained, without, however, any notification to the public; only it did not in fact appear whether the contract above quoted had been acted on; for although Colonel Gillon never in all obtained more than £406 from the company, he was in their books credited with one-ninth of the profits.

On this state of the circumstances of the case the pursuers contended,

1. That Colonel Gillon was clearly made a partner by the agreement entered into by Forbes on his behalf; and,

2. That at all events, notwithstanding the terms in which the contract last above quoted was framed, it was clearly an agreement whereby Colonel Gillon was to draw a fixed yearly sum, not truly as rent only for the wharf, but, in part at least, as a share of the profits, though not subject to annual fluctuations; and that this constituted the party stipulating for such fixed payment a partner, as had been ruled in England. [1]

The Lord Ordinary found "it proved that the defender's father, Lieutenant-Colonel Andrew Gillon of Wallhouse, was a partner of the company of Downe, Bell, and Mitchell, wharfingers in London, and

[1] Fourdrinnier and Bloxham v. Bell and Brooke, March 7. 1775, (before Lord Mansfield,) 2. Mont. 40.

that the defender represents his father;" and appointed the cause to be enrolled before further procedure.

The Court adhered.

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Dick v. Cuthbertson.

PHIN and PITCAIRN, W. S.—J. IRVING, W. S.—Agents.

JOHN DICK, Suspender.—*D. F. Jeffrey—Skene.*

D. CUTHBERTSON, (CORBET'S TRUSTEE,) Charger.—*More—Hope.*

No. 53.

Sale—More—Process—Suspension—Expenses prior to Appeal.—Where the purchaser of heritable property, part of a sequestrated estate, suspended a charge by the trustee for the price on objections to the title, but offered to pay on getting a good title; and the Court found the trustee bound only to concur in such supplementary title, at the purchaser's expense, as he might think necessary, and the purchaser liable in expenses of process; and the House of Lords reversed this judgment, declaring the trustee bound to give a good title, and remitted to this Court, without any finding as to expenses; and a title, after some further procedure in this Court, was prepared; but the purchaser, who had never hitherto proposed to throw up the bargain, having done so now, on the ground of delay in giving him a title—Held,—1.—That it was competent to plead this abandonment in the suspension;—but,—2.—That, in the circumstances, the plea was inadmissible.—3.—That it was no sufficient objection to the title offered, that the original trustee being dead, the present trustee had been appointed under a remit from the House of Lords, on a petition to the Court at the instance of only one creditor, instead of two, as required by the Bankrupt Statute;—and,—4.—Expenses prior to the appeal awarded to the purchaser.

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2D DIVISION. Ld. Fullerton. R.

IN the month of January 1817, the suspender Dick purchased, with entry at Candlemas thereafter, a villa in the county of Renfrew, which was exposed to sale by public roup by John Donald, trustee on the sequestrated estate of one Corbet, agent in Glasgow, as part of the bankrupt estate. Dick, not being satisfied with the title offered by the trustee, brought a suspension of a charge given him to pay the price, in which he set forth that he had "repeatedly offered to pay the price, and was still ready to do so, on a legal title being produced;" and stated, in his reasons of suspension, "that the charger, before he can call for payment of the price, must produce a legal and valid title to the property which he has taken it upon him to sell;" and that the title offered was invalid. After some procedure in this process, the Court of Session, on the 23d of June 1820, found that, under the articles of roup, the trustee was not bound to make any addition to the title he had offered at the expense of the bankrupt estate, but was merely bound to concur in any supplementary title which Dick might wish to have executed at his own expense; and they further found Dick liable in expenses. Dick appealed against the interlocutor of the Court; and Donald, the trustee, having shortly thereafter died, certain trustees, in right of an heritable security over the villa in question, petitioned the House of Lords to be allowed to sist themselves in his place as respondents in the appeal. On considering their petition, it was ordered by the House, on the 30th of June 1825, that they "be at liberty to apply to

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the Court of Session, notwithstanding the appeal, for permission to take such steps as the Court may think right for the making a new trustee in the room of the late respondent John Donald." In consequence of this, a petition to have a meeting of creditors called for the election of a new trustee was presented to the Court of Session by these parties, who, however, could get no other creditor to join them, so as to bring the application within the provision of the Bankrupt statute (§ 71), which requires such application to be made by *two* creditors. The Court, however, on the 4th of March 1826, "having considered this petition, and the special terms of the order of the House of Lords," appointed a meeting of creditors to be held, at which the charger Cuthbertson was elected trustee, and his nomination was afterwards confirmed by the Court. Thereafter Cuthbertson having sisted himself respondent in the appeal, the House of Lords reversed the interlocutors complained of, so far as above recited,—declared "that the respondent is bound to make to the appellant a good and valid title, and that the title offered to the appellant is not such good and valid title;" and remitted to the Court to review their interlocutors, "and to do therein as is consistent with this reversal, and the practice of the Court in proceedings of the nature of that in which these interlocutors have been pronounced."[1] In the judgment there was no mention made of expenses; but when it came to be applied in this Court, a motion was made by Dick for the expenses prior to the appeal. This the Lord Ordinary refused as incompetent in the circumstances of the case; but, on a reclaiming note, the Court recalled his Lordship's interlocutor, and found that the demand was not incompetent, though the determination on it should be reserved till the final issue of the cause.[2] During all the preceding litigation, Dick never hinted that he considered himself entitled to be free of the contract, in consequence of the delay to furnish a valid title, nor did he do so now till the trustee had produced an amended title. He then, however, pleaded that he was not bound to take it, but was entitled to be free. He also still objected to the validity of the title, chiefly on the ground that Cuthbertson could not be considered a duly elected trustee, seeing that the terms of the Bankrupt statute had not been exactly complied with in his appointment.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:*—"In respect that the title now offered by the charger appears

[1] Dec. 12. 1826, (2. Wilson and Shaw, 522.) [2] Jan. 19. 1828, (ante, VI. 396.)

* "The title now offered to the suspender seems to be good. The ratification and disposition by Corbet and his wife effectually secures the suspender against all challenge at the instance of the wife, or any person succeeding to her right; and in regard to the danger of challenge from another quarter—that of the creditors, in consequence of the supposed informality of the present charger's appointment as trustee, it is to be observed, 1. That his appointment took place under the authority of an interlocutor of the Court, specially founding on an order of the House of Lords, which in-

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to be a good and valid title to the property purchased by the suspender, finds the letters orderly proceeded, and decerns;—finds the suspender entitled to the expenses of the litigation prior to the appeal: In regard to the litigation subsequent to the appeal, finds the charger entitled to expenses from the date of the Lord Ordinary's interlocutor of 14th January 1829; allows accounts thereof to be given in, and when lodged, remits to the Auditor to tax the same, and to report."

Dick reclaimed; and to obviate the objection in point of form mentioned by the Lord Ordinary in his note, he raised a summons, concluding to have it declared that he was liberated by the delay which had taken place; and defences having been given in, avizandum was made with the new action to the Inner House, and it was now put out along with the suspension.

The Court, while they thought that there would have been no objection to Dick's maintaining his plea of liberation in the suspension,

terlocutor could not well admit of a challenge on the part of the creditors; and, 2, which appears to be conclusive, That even on the supposition of such challenge of the charger's appointment being competent, the creditors, and any new trustee they might appoint, could never dispute, but would necessarily be bound to warrant and maintain the sale made to the suspender by Donald, the original trustee, whose appointment was confessedly unobjectionable.

"Holding the title now offered to be good, and considering the nature and grounds of the present suspension, the demand of the suspender to be set free from the bargain, in consequence of the delay in producing that title, does not appear to be admissible. Such a plea may perhaps form a good ground of suspension, as it may form a good defence against an ordinary action for implement. But the present suspension is one of an essentially different character. It proceeds not on the assumed extinction of an original bargain in consequence of the seller's failure to implement, but merely on the incompetency of enforcing its obligations against the suspender, whilst that contracted towards him, of affording a good title, is not implemented on the other side.

"The original bill of suspension recites and proceeds upon a protest made by the suspender, which sets forth 'that the said John Dick had repeatedly offered to pay the price, and was still ready to do so, on a legal title being produced;' and the very first reason of suspension is, 'that the charger, before he can call for payment of the price, must produce a legal and valid title to the property which he has taken it upon him to sell.' A suspension of this kind seems necessarily to imply the competency of supporting the charge, by producing a good title in the course of the process; and the judgment of the House of Lords is perfectly consistent with this view; for although this question seems to have been raised in the appellant's case, the House of Lords, after reversing the findings of the interlocutors of the Court, proceeds to declare, 'that the respondent is bound to make to the representer a good and valid title, and that the title offered to the representer is not such good and valid title.' Whatever grounds, then, there may be for the suspender's plea of mora, and whatever effect it may be entitled to in a separate action founded on the special circumstances of the case, it does not appear to the Lord Ordinary to be admissible in the present process.

"The suspender's claim for the expenses prior to the appeal seems necessarily to follow from the nature of the discussion, in which he was ultimately successful; but the Lord Ordinary has found him liable in the expenses created by his unfounded objections to the title offered to him since the case was remitted by the House of Lords."

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concurred with the Lord Ordinary on the merits; and the parties having closed the record in the ordinary action on the summons and defences, their Lordships conjoined the processes, and pronounced this interlocutor:—"Find that the suspender is not entitled to be freed and relieved of the obligations incumbent on him under the articles of sale of the property in question; and that the charger's title thereto being now complete, a good and valid title has been offered to the suspender;—adhere to the interlocutor reclaimed against in the suspension, and in the declarator and reduction sustain the defences, and assoilzie the defender from the conclusions of the summons, and decern;—of new find the suspender and pursuer liable in the expenses incurred by the charger and defender subsequent to the interlocutor of the 14th of January 1829, (when the new title was received by the Lord Ordinary); and remit to the Lord Ordinary to modify and decern for the same along with the expenses found due to the suspender by the interlocutor reclaimed against, reserving to the suspender all legal action and claim competent to him for damages which may be alleged to arise from the delay in the charger completing his title, and to the charger his defences thereto;" and refused Dick's note; and they, at the same time, also refused a note for Cuthbertson, reclaiming against that part of the interlocutor which found Dick entitled to the expenses prior to appeal.

Lord Glenlee.—This action proceeded all along on the ground, as maintained by the one party, that the title was good; and by the other, that the trustee was bound to give a good title,—thus insisting for full implement or damages. The bargain was never departed from. Donald was therefore entitled to go on in making up a valid title, and to rest on the assumption that the purchase was to stand; consequently there is no ground for now liberating Dick.

Lord Cringletie.—Parties seem agreed that we are to take up the summons along with the suspension; and we may do so by closing the record, and conjoining now. The conclusion in the summons is, that Dick should be declared to be free from the bargain. Now it appears to me that the argument for the trustee is sound, that if Dick had intended to be free, he should have said so at first, and enabled the other party to sell anew, instead of going on with the action, in which he insists for complete implement. The Court here held the title offered by the trustee sufficient, and so he could not claim to be free then. But the House of Lords found it not good, and that it must be made up at the expense of the exposers. Then arose Dick's power, for the first time, of amending his plea in the suspension; but he should have done so at the time, and he cannot now throw up the bargain after hanging on so long, circumstances in the mean time having altered, though perhaps a claim of damages may lie; and therefore I had some doubt as to finding the letters orderly proceeded, and so taking the money out of his hand.

Lord Meadowbank.—I concur in thinking that this party is not entitled to be free.

Lord Justice-Clerk.—I am also for adhering to the effect of finding him

not free. The plea of liberation was never pleaded till now; and it is clear the House of Lords contemplated nothing like an annulment of the sale. Even on petitioning to apply the judgment, there was no hint of this plea, nor until some time afterwards; and this case is totally distinct from that of Hunter. I would not, however, preclude any claim of damages on the part of Dick, if he can make it good.

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As to expenses—

Lord Glenlee.—I do not say that in every case where a judgment is reversed, and a remit made, that we are to give the expenses prior to appeal; but we are just to judge as if we had pronounced at first the interlocutor we must now give in consequence of the judgment of the House of Lords; and as we must have given expenses, had we been formerly of the same opinion as that House, I think it necessarily follows that we must give them now.

The other Judges agreed.

Suspender's Authorities.—Hunter v. Carsewell, Jan. 17. 1822, (ante, I. 287); Fleming and Walker v. Harley's Trustees, June 6. 1823, (ante, II. 374.)

Charger's Authority.—Smith v. Aitken, Nov. 19. 1829, (ante, VIII. 84.)

Cuninghame and Bell, W. S.—W., A. G., and R. Ellis, W. S.—Agents.

William Clark, Suspender.—*Greenshields—Hope.*
Directors of Irvine Academy, Chargers.—*D. F. Jeffrey—Cuninghame.*

No. 54.

Interdict—School.—Interim interdict against the appointment of a schoolmaster.

The Court, in passing a bill of suspension and interdict by a teacher of "English, writing, and arithmetic," in a burgh school which had been incorporated by royal charter into an academy subsequent to his appointment, in order to try the question whether the directors could appoint a new teacher, whom they denominated a "commercial teacher," but who was to teach writing and arithmetic,—also granted interdict in the mean time against the proposed appointment, which would alter the existing state of possession.

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2d Division. Bill Chamber. Ld. Mackenzie.

J. W. M'Kenzie, W. S.—W. Patrick, W. S.—Agents.

Edward Alexander and Others, Petitioners.—*Jameson—Callander.*
John Robertson and Others, Respondents.—*Skene—Crawfurd.*

No. 55.

Interim Execution pending Appeal—Bankrupt—Sequestration.—Creditors having unsuccessfully opposed the approval of a composition-contract under a sequestration, and been found liable in expenses to the trustee and bankrupts, and in the expense of a petition and complaint against the trustee and one of the bankrupts; and the creditors having appealed—Interim execution granted, although the creditors stated that their appeal was to be speedily heard, and that they, as creditors ranked, had considerable funds in the hands of the trustee, so as to afford a security for expenses, if ultimately found due.

Mr. Alexander, of the Stirling Banking Company, with his partners and the trustee on their sequestrated estate, having appplied for discharge or approval of a composition-contract, were opposed by John Robertson

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and others, who were creditors ranked on the estate. The Court granted the discharge, and found Robertson &c. liable in expenses;[1] and their Lordships at the same time dismissed a petition and complaint by them against the trustee and Mr. Alexander, and found them liable in expenses.

Robertson &c. appealed, and the trustee and bankrupts petitioned for interim execution as to the expenses. This was resisted, on the ground that the cause was to be summarily heard, and stood first on the list for hearing after the Christmas recess; and that the trustee had sufficient funds in his hands to secure him in payment of all expenses, if the appeal should ultimately be dismissed.

The Court granted the prayer of the petition.

Petitioners' Authorities.—Keith, March 7. 1822, (ante, I. 428); Smith, July 2. 1822, (ante, I. 572); M'Gavin, July 6. 1822, (ante, I. 589); M'Leod, July 9. 1822, (ante, I. 592); Baillie, Jan. 18. 1823, (ante, II. 128); Brock, March 11. 1823, (ante, II. 291); Lord Medwyn &c., July 7. 1829, (ante, VII. 837.)

Dallas and Innes, W. S.—Greig and Morton, W. S.—Agents.

No. 56.

JOHN LANG, Pursuer.—*Cuninghame—J. W. Dickson.*
MISS ORR and MRS. KENNEDY, Defenders.—*D. F. Jeffrey—A. Wood.*

Passive Title.—Sisters found liable to account to the creditor of a deceased brother, for the value of annuities granted to them, under an arrangement with another creditor, by which they made up titles, and conveyed to him certain foreign property of the deceased, of which the chief part had been previously mortgaged to that creditor.

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S.

THE late Mr. John Orr died in 1803, leaving a deed of settlement, under which his three sisters were confirmed executors testamentary, and gave up an inventory. His affairs were in embarrassment, and his widow was unable to recover payment of a bond of annuity for £50 granted to her by him. Having married Mr. Lang, writer in Glasgow, she raised, in 1807, an action of count and reckoning against the sisters, who exhibited a list of debts paid by them to a greater amount than the inventory; and she then obtained a decree to the effect of subjecting only the means and estate of the deceased.

Mr. Orr, in his settlement, had left, inter alia, certain estates in Tobago to his sisters, and to his natural son Thomas. One-half was given to the sisters, and one-half to Thomas, on the condition that Thomas should add certain negroes, utensils, &c., belonging to himself, on one of these estates, to the property, so as to mass the whole together, as a fund for dividing in halves under the settlement.

In 1810, a Mr. Turner of London, a creditor of Mr. Orr, holding a mortgage over one of the West Indian estates called Kingsbay, (which was the only one of any value,) entered into the following arrangement with the sisters:—They made up titles to the Tobago estates, and conveyed them in his favour. Turner, on the other hand, bound himself to pay

[1] July 10. 1830, (ante, VIII. 1055.)

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each of them an annuity of £100 by a deed in the English form, which set forth that these ladies "were seized for an absolute estate of inheritance in fee-simple in possession of, or were otherwise entitled in perpetuity to, an undivided moiety of and in the estates &c. after mentioned, with the negroes &c;" and "that the said Coll Turner had contracted with the said Esther Orr &c. for the absolute purchase of the said moiety of and in the said estates, slaves &c., free from all encumbrances, in consideration of a clear annuity of £100 to be paid to the said Esther Orr," —and a similar annuity to each of her sisters.

Pursuant to this arrangement, Turner paid the annuity of £100 regularly to each of the ladies. In 1822, the widow, and her husband Mr. Lang, raised an action against the two surviving sisters, Miss Martha Orr and Mrs. Kennedy, for themselves, and as representing their deceased sister, libelling on their intromissions with their brother's effects, and especially with the Tobago property, and concluding for payment of the arrears of Mrs. Lang's annuity of £50, or at least of any balance of their intromissions for which they could not account. During the dependence of the action the widow died, after which it was insisted in by her husband, as her sole executor.

By an interlocutor, [1] the Court found the only question between the parties to be, "How far the defenders have subjected themselves, or become liable in payment of the claims of the pursuer, in consequence of the settlement made with Mr. Turner."

The case having been remitted under that finding to the Lord Ordinary, the defenders stated, in defence, That when they entered into the agreement with Turner, he was just about to foreclose the redemption of his mortgage by a legal process which they could not have prevented, and which would have swept away the whole property from the creditors; and that his inducement to grant the annuity was, that, by the defenders voluntarily giving him a title, he was saved from resorting to an expensive remedy. This, they alleged, they could not have been compelled to do by the creditors; and therefore whatever Turner chose to pay for obtaining this accommodation could not subject them as intromitters. Besides, the bargain could not have been made, had it not been that Mr. Thomas Orr made a considerable sacrifice of his own property in slaves &c.; and therefore, in so far as his property was the consideration for the annuities, the pursuer could have no claim against the defenders in respect of the annuities. They also averred that these proceedings were independent of Mr. Orr's settlement; that the estate made over to Mr. Turner was far inferior to the value of his mortgage; that the annuities were partly granted by him out of regard to the defenders; and that they neither did nor could get any consideration from him for their brother's estate.

The pursuer denied these statements; and the Lord Ordinary directed

[1] Nov. 26. 1823, (ante, II. 528.)

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the opinion of English counsel to be taken, inter alia, on the following query:—"Whether, in consequence of the annuities settled upon them, in the manner stated above, by the mortgagee, who by their means got a title to the mortgaged estate without the necessity of a suit, the defenders are, by the principles of English law, or the law of the colonies, liable to Mrs. Lang and her representatives for the debt due to her, to the extent of the annuities so obtained by them?"

Sir E. B. Sugden and Mr. John Miller returned this answer:—"We think that their liability does not depend upon the comparative value of the debt, and of the estate mortgaged for it; but if it could be shown that other estates were conveyed, not included in the mortgage, that circumstance would affect their liability, and the consideration might be apportioned with reference to the relative values of the mortgaged estate, and of the other property. But the burden of proof would lie on the defenders to show, 1. That there were other estates; and, 2. The value of them; for if they were of no value, we think that they could not be taken into account."

The Lord Ordinary then decerned against the defenders, with expenses. They reclaimed, and contended that they should be allowed a proof of their allegations; but the Court adhered.

Lord Gillies observed, that he saw no cause for having taken the opinion of English counsel on the case. There was clear evidence on the face of the deed of agreement with Turner that the sisters of the deceased Mr. Orr had conveyed their half of the Tobago estates to him, in consideration of which, the annuity was paid them as the price. This half was precisely what had been left them by their brother; and it was admitted that they had made up titles, as his heirs, in order to grant the conveyance. For the value thus obtained, they were liable to account to the pursuer.

J. Lang, W. S.—G. Dunlop, W. S.—Agents.

No. 57.

James Dickson &c., Advocators.—*Skene.*
Alex. Shirreff, Respondent.—*D. F. Jeffrey—Rutherfurd.*

Submission — Title to Pursue. — Where a submission and decree-arbitral involved questions of private feeling and character, besides pecuniary claims, and contained a consent and an order for registration, and were delivered to the party assoilzied, who declined to register them—Held that the other party (who did not allege that his character was affected by the contents of the deeds, and who was offered inspection of the deeds by himself or his counsel) was not entitled to insist for registration, unless he could qualify a substantial interest to put the deeds on record.

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1st Division.
Lord Newton.

Captain James Dickson, and Mr. Alexander Shirreff of Kirklands, being engaged in disputes which involved questions of character, agreed, in March 1824, to submit them to arbitration; and the deed of submission contained the usual clause of registration. Captain Dickson, and certain of his friends, thereby bound themselves to make payment to

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Shirreff of £1000, claimed by him, so far as should be awarded by the arbiter. The whole of this sum, except £100, was paid up in the course of the process. The submission ended in a decree-arbitral, on the 31st of December 1825, assoilzieing Captain Dickson, and decerning in his favour for repayment of certain sums, and the expense of the submission. The decree, inter alia, ordained that it should be registered, conform to the registration clause in the submission. Five days before pronouncing this decree, a draft of it was sent to Shirreff; and after it was signed, the arbiter wrote to him that the decree was precisely in terms of that draft.

In February 1826, Shirreff presented a petition to the Sheriff of Berwickshire, against Captain Dickson and his cautioners, setting forth that the deed of submission and decree-arbitral had been delivered to Captain Dickson, and were withheld; that he had a right to exhibition of them, and to have them put on the public record, in terms of the clause of registration; and therefore concluding for production, that they might be put on record; or, alternatively, for payment of the sum of £100 as the arrear of the £1000.

To this demand it was answered, That the purpose of the submission was to exclude questions of a very delicate nature from the public eye, and that this purpose could not be defeated at the mere caprice or malice of Shirreff; but that he must show a tangible interest, before he could enforce his right of registration; that the clause of registration had only been inserted with a view to execution, in the event of any part of the £1000 being found due by Captain Dickson; but as he had been assoilzied, and decree passed against Shirreff, he had no right to insist for registration.

On the other hand, Shirreff maintained that he had no occasion to qualify any other title or interest, than that he was a party to the submission, and was therefore entitled to be possessed of a valid extract of these documents, so as to be able to prove what claims they reached, and what they did not cover. He also made numerous complaints of the arbiter's irregularity and unfairness; and, inter alia, stated that Captain Dickson and his friends "withhold the documents, in order, if they can, to screen their relative and themselves from the just consequences of their misconduct, and to prevent the exposure of the fraud, injustice, and oppression of which they and the arbiter have been guilty."

Captain Dickson denied that any impropriety had been committed by the arbiter; put a notarial copy of the decree-arbitral into process; offered inspection of the submission and original decree in the hands of his agent to Shirreff, or his counsel or agent, to examine whether it was open to reduction; and, at a subsequent stage of the cause, he also agreed to show the deeds to any counsel named by the Court, to report whether, on the supposition of the decree being valid, there was any legal or equitable ground, or proper interest in Shirreff, to have the submission and decree put on record.

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The Sheriff having ordered production of the deeds for registration in terms of the prayer of the petition, Captain Dickson &c. brought an advocation. The Lord Ordinary advocated, altered, and dismissed the petition, and allowed expenses in both Courts.*

Shirreff reclaimed.

Lord Balgray.—As a submission is a mutual contract, each party, in strict law, has an interest under it, and is entitled to enforce the clause of registration to which both have consented. But this is evidently a peculiar case, and there is something under the real views of one at least of the parties which he does not unveil to the Court. This is a matter in which the peace of families may be compromised; and when Mr. Shirreff does not qualify any intelligible interest to put these deeds on record, I look with much suspicion at his attempt to push an abstract right with so much rigour. However, the clause of registration is there, and I find considerable difficulty in the case; for if Shirreff had possession of the deeds, or if the arbiter still possessed them, and if in either case the holder was about to record them, I doubt if we, on considerations of equity, could interfere to interdict his doing so upon an application by Captain Dickson. But if we could not do that, I do not see how that gentleman has any right to withhold them from the record, in the face of the clause for registration.

Lord Craigie.—This is a case of delicacy. It is not disputed that the subject of the submission was not fit for the public, and the object of one of the parties in agreeing to it was avowedly to exclude the matters in discussion from public observation. In these circumstances, when that party consented to a clause of registration, as there were claims to the amount of about £1000 against him falling under the submission, the only object in his view, and the only object which could then be fairly in the view of the other party, was registration for execution, in the event of a decerniture for sums which were not duly paid up. It was not registration for publication, or preservation on record,

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* Note.—"The Lord Ordinary is of opinion, that to entitle a party to insist that a submission and decree-arbitral be put on record, he must show that he has some interest under these deeds. Now the respondent has failed to show any such interest; for although he has founded on the submission as containing an obligation to pay him £1000, he has not denied that this obligation is there made dependent on the decision of the arbiter, nor that, by the decree which the arbiter pronounced, it has been done away, and the respondent ordained to repeat such part of the sum as he has received; and the notarial copy of the decree in process, which the respondent has had an opportunity of comparing with the original, had he thought proper, proves this to be the case.

"The respondent, though he can take nothing under the submission and decree, may have a right to inspect these deeds, in order to determine whether he shall institute a reduction or not. But he has been offered, by the minute for the advocator, a full inspection of both by himself, his counsel, or his agent, or any or all of them together; and the Lord Ordinary thinks the offer sufficient, and that he has no right to demand liberty to take a full copy of the submission. At all events, as the petition prays for production of the deeds, that they may be put on record, and the Sheriff has found in terms of the prayer, the Lord Ordinary conceives the interlocutors must be altered, and the application dismissed."

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which was then contemplated. But here there is no room for execution at the instance of Mr. Shirreff. The only claims competent under the decree are in favour of Captain Dickson, who opposes registration. In circumstances like these, unless Mr. Shirreff can qualify some reasonable and intelligible interest for putting the submission and decree on record, I think we cannot enforce his demand to that effect against Captain Dickson.

Lord Gillies.—This is a question of great difficulty; but, upon the whole, I concur with Lord Craigie. I think the consent to registration in this case was made solely with a view to execution, if it should be necessary. Here it is apparent that the only party, who has any claims to enforce under the submission, is Captain Dickson, and to him, therefore, the arbiter delivered up the submission and decree; and I see nothing to censure this step of the arbiter, when he gave the custody of the deeds to him who has the sole interest under them. But the effect of this proceeding by him is to place Mr. Shirreff in petitorio, when he would enforce his right of registration; and even this circumstance is not without weight, in point of principle, in disposing of this case: for when a party is in petitorio, he must not only have a title, but must also possess an interest, such as he can qualify, to enable him to call on the Court to enforce his demand. The one without the other is not enough. The title here is good; but how does he qualify the interest? Summum jus summa injuria is a familiar maxim; and if we were to allow Mr. Shirreff to enforce his right of registration here, where he does not instruct any interest either patrimonial, or even of character, I fear we might give room for the application of that maxim to our own proceedings. But, instead of his merely failing to show a legal interest, I think he makes a statement pretty distinctly evincing that his sole object is public exposure. He says that Captain Dickson and others "withhold these documents, in order, if they can, to screen their relative and themselves from the just consequences of their misconduct, and to prevent the exposure of the fraud, injustice, and oppression of which they and the arbiter have been guilty." This is a pretty distinct disclosure of the motive of the petition of Mr. Shirreff, and it is not such an interest as to constrain us to interfere and enforce that petition. If these allegations be true, the proper remedy is a reduction of the decree-arbitral; but if the decree be unimpeachable, I incline, though not quite free from hesitation, to adhere to the interlocutor of the Lord Ordinary.

Lord President.—This is a case of much nicety, and is not likely to form a precedent to any other. I cannot admit the general doctrine, that the losing party in a submission has no legal interest to put the decree on record. He may have a strong interest in its preservation, merely to prove that certain claims are thereby settled. But this is a peculiar case,—the purpose of the submission being privacy, which would be absolutely defeated by putting these deeds on record. A demand to register them for execution could not have been resisted; but, where execution is out of the question, I think Mr. Shirreff should qualify an intelligible interest to insist for registration for any other end, before we can enforce his claim. The statement read by Lord Gillies discloses the true motive to be the public exposure of an adversary; and I concur with his Lordship in opinion, that if the allegations there made be true, the

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proper remedy for Mr. Shirreff is to reduce the decree-arbitral. In the mean time I must adhere to this interlocutor.

THE COURT therefore adhered.

Advocators' Authority.—Ramsay, Dec. 30. 1630, (13544.)

RENNY and HUNTER, W. S.—G. RUTHERFORD,—Agents.

No. 58.

WILLIAM MACDONALD &c., Advocators.—*Skene—More.* JOHN MACINTOSH &c., Respondents.—*Cockburn.*

Process—Advocation.—In an advocation of a Sheriff's judgment, repelling a declinator of his jurisdiction, both parties having made up a record embracing the declinator, and also the merits of the whole matters in dispute; and the Lord Ordinary having pronounced a judgment on the merits, without disposing of the declinator, the Court recalled, and remitted to his Lordship to decide that question.

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1ST DIVISION. Lord Meadowbank. D.

MR. MACDONALD of St. Martin's, being called as a defender in an action before the Sheriff of Perthshire, declined the Sheriff's jurisdiction, ratione privilegii of his status as an Advocate. The declinator was repelled; and Mr. Macdonald presented a bill of advocation, on the ground of the Sheriff's defect of jurisdiction. Under the passed bill a record was made up, setting forth both the plea of declinator and the merits.

The Lord Ordinary pronounced a judgment on the merits, without disposing of the declinator.

Mr. Macdonald reclaimed.

LORD GILLIES — The sole ground on which the bill of advocation was passed, was, that the Sheriff had no jurisdiction, ratione privilegii of the defender. The Lord Ordinary must decide that question in the first place. If he hold the declinator well founded, he can advocate the cause; but if he hold it ill founded, the cause should go back to the Sheriff, to be decided by him.

Cockburn for Respondents.—We shall consent to hold the plea of privilege to be good; that admits the ground of advocation to be well founded, and entitles us to have the cause disposed of here upon the merits.

LORD GILLIES.—That is not enough. The sole ground of advocation is the plea of privilege; and the cause cannot be advocated without sustaining that plea, which I am not at present prepared to do.

The Court then recalled the interlocutor, and remitted to his Lordship to decide the preliminary question.

D. WATSON,—GIBSON-CRAIGS, WARDLAW, and DALZIELL, W. S.—Agents.

ROBERT STEEL, Suspender.—*Jameson.*
MRS. BLACK &c., Chargers.—*Keay—Moir.*

No. 59.

Dec. 1. 1830.
Steel v. Black &c.
Glassford &c. v. Brown &c.

Process—Bill-Chamber—Expenses.—Where, after a suspender had been found liable in the expenses of two refused bills, and a remit made to the Auditor, a bill of suspension and liberation relative to the same debt was passed, before the charger applied to have the Auditor's report approved of, and the suspender consented that the charger's claim for these expenses should be made in the suspension and liberation, the Court refused to approve of the Auditor's report, or decern for the expenses hoc statu.

Dec. 1. 1830.
1st DIVISION.
Bill-Chamber.
Ld. Moncreiff.
H.

Two successive bills of suspension for Robert Steel having been refused in April and May 1829, he reclaimed to the Court, who remitted to pass on caution.[1] He did not find caution; upon which Mrs. Black and others, chargers, took a certificate of no caution, and threw the bills out of Court. They then presented a note to the Lord Ordinary, craving him to find Steel liable in the expenses of both bills, and a remit to the Auditor to tax them. His Lordship, on the 7th of July 1829, found him liable, and remitted as craved.

Considerable delay occurred before further procedure in reference to these expenses; and it appeared from a statement made afterwards at the bar that Steel had been imprisoned by the chargers on the original diligence, and had presented a bill of suspension and liberation, which was passed; that, in the summer session of 1830, the chargers presented the Auditor's report to the Lord Ordinary for approval and decree; and that, upon this, Steel lodged a minute, consenting "that the claim of the chargers for the expenses attending these two bills of suspension, for which decree is now craved, should be open to be made in the process of suspension and liberation now depending at the suspender's instance against the chargers, reserving the suspender's whole objections upon the merits of the cause."

The Lord Ordinary, "in respect of this minute, and that there is considerable doubt on the question of form, in the circumstances into which the case is brought by the delay in applying for the modification of the expenses, refused to approve of the Auditor's report in hoc statu."

The chargers reclaimed; but the Court adhered.

W. DOUGLAS, W. S.—WOTHERSPOON and MACK, W. S.—Agents.

J. GLASSFORD and H. GORDON, Pursuers.—*Cuninghame—Hopkirk.*
MALCOLM BROWN, Defender and Pursuer.—*Skene—Shaw.*
MRS. CECILIA LENNOX or MORRISON, Defender.—*Jameson—Speirs.*

No. 60.

Principal and Agent—Mandate—Relief.—Circumstances in which, with reference to a negotiation for a loan of money conducted on the part of the proposed lenders by a third party who had no special or written authority, expenses having been incurred in consequence of the lenders intempestive resiling—The Court found,—1.—That the intended borrower was entitled to decree for these expenses against the party acting as agent, but not against the principal parties;—and,—2.—That the agent was entitled to full relief against the principals, as having sanctioned his proceedings.

[1] May 23. 1829, (ante, VII. 648.)

No. 60.

Dec. 1. 1830.

2d Division. Lord Medwyn. F.

Glassford &c. v. Brown &c.

The defender Mrs. Morrison and her late husband, persons in an inferior condition, unexpectedly succeeded, at a somewhat advanced period of life, to a considerable fortune (about £20,000) by the death of a son who had returned from India. The funds had been vested by the son in trustees, against whom legal proceedings were necessary for its recovery. In managing these proceedings, Morrison and his wife had recourse to the assistance of Malcolm Brown, a farmer in their neighbourhood, who carried on the requisite correspondence with the agents, and, when the funds were ordered to be transferred, was authorized to receive them from the trustees. Brown was, besides, generally intrusted with the management of their money transactions, receiving from them, when required, special mandates authorizing particular sums of money to be paid on his receipt; but no general written factory was granted to him. In the month of June 1823, a negotiation was opened between Brown and Mr. Henry Gordon, writer in Glasgow, and factor for Mr. Glassford of Dougalstoun, for a loan of £10,000 of Mr. and Mrs. Morrison's money, on a transference of an heritable bond of that amount granted over Glassford's entailed estate of Dougalstoun, by the entailer, prior to the execution of the entail, and then held by a Mr. M'Nair. The terms of the loan were settled with Brown, and the deeds prepared. Mr. M'Nair also, on the faith of the money being paid up, made an arrangement for again investing it; and the 20th of November was fixed by Mr. Gordon for a meeting with Mr. M'Nair's agent and Brown, and the agent who had acted for the Morrisons, in order that the money might be paid over, and the transaction settled. On that day Brown did not appear, but sent the following letter, written the same morning:—"On my way home last night I called at Damside, and was thunderstruck at what I found to be the state of Mrs. Morrison's mind. She had taken into her head, that, by giving the money on the bond as agreed upon, it would be all lost, notwithstanding every thing I could say to her to the contrary, and in the most positive terms refused to allow the money to be paid to you this day; and indeed I thought it had made such an impression on her mind, that she was like to hurt herself. I am, by this transaction, in which I thought to be serving you, and doing them a benefit, and all by their own consent and will, disgraced, and ashamed to see you. Unless a change is therefore made on her mind, the money will not be got, and what will be done I know not. At all events, I shall see you paid the expense incurred. I am, Sir, with the deepest regret and sorrow, your obedient servant."

The Morrisons had, it appeared, taken alarm on hearing that certain legal proceedings had been adopted by the creditors of a previous heir of entail in the estate of Dougalstoun for setting aside the entail;[1] and notwithstanding an opinion of counsel that the issue of these proceedings could not affect the bond, they persisted in refusing to allow their money

[1] Ante, II. 487.

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to be lent to Mr. Glassford. This final determination was communicated to Brown in the following letter, dated 24th November, from Mr. Robertson, who had married a daughter of the Morrisons:—"Since I had the pleasure of seeing you at Meadowbank, Mr. and Mrs. Morrison, in conjunction with the family, have unanimously resolved not to give Mr. Gordon the loan of the sum of money upon no consideration whatever, and have requested me to inform you, to prevent you from going to Glasgow this day according to promise. The harrassing dilemma which you must be put to in settling this unfortunate business will require the utmost circumspection on your part; and I have no hesitation in saying that Mr. Gordon will close this affair amicably, and not insist for damages or expenses, which would be very apt to excite bitter animosity. I am, my dear Sir, yours sincerely."

Thereupon Gordon, on the part of Glassford, served a protest against both Brown and the Morrisons, holding them liable for the expenses and damages occasioned by their refusal to advance the money. Neither of these parties returned any answer to the protest; and Gordon thereafter raised, in Glassford's and his own name, an action before the Sheriff of Stirlingshire, concluding against Brown and the Morrisons, conjunctly and severally, for payment of the expenses of preparing the deeds &c., which had been rendered useless by the refusal to complete the transaction,—resting these conclusions on the general circumstances of the case, and not libelling, quoad Brown, on his letter of the 20th of November above quoted.

The Morrisons pleaded in defence, That they had not authorized Brown to enter into the transaction, and could not be responsible for his actings; and Brown, That they were so responsible; and consequently, that he, as factor acting by their authority, could not be personally liable for the consequences of their having intempestivè resiled, which, as there was no written agreement, they were entitled to do, but that only on repaying the expense occasioned by their not having done so in proper time.

From the documents produced in process it appeared, as already stated, that Brown was intrusted, in a great measure, with the conduct of the Morrisons' affairs; and in regard to this particular transaction, Brown made, on the record, special averments as to conversations with them on the subject of it, in which he stated that he had made them fully aware of the transaction, and that they had approved thereof, or at least led him to believe that they did so. In answer to these specific averments, they admitted that conversations had taken place on the subject; but merely stated generally, "that they never gave him any authority for saying that their money would be lent to Mr. Glassford."

The Sheriff decerned against Brown and the Morrisons, conjunctly and severally, with relief to Brown of the expenses of process only against the Morrisons. All the parties brought advocations; and Brown further

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raised a summons of relief against Mrs. Morrison, whose husband was now dead, she being his representative.

This action having been conjoined with the advocations, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note:*—"Advocates the cause; recalls the interlocutors submitted to review; finds the defender Malcolm Brown liable to the pursuers for the claims concluded for in the Inferior Court; finds him liable in expenses

* "As writing did not intervene in the treaty about this loan, the party was entitled to resile; and if this resolution had been taken and intimated to the pursuers tempestivè, there would have been no claim for indemnification; but the notice that the loan was not to be completed having been first communicated only the day before the money was to be paid, the intended borrower must be entitled to be relieved of the actual expense occasioned to him by this failure of the treaty. From the pleadings of the defender Brown, as well as the letter of 20th November 1823, he is clearly liable, and decree has been given against him, because it is a more doubtful question whether Mrs. Morrison is liable or not. But, upon the whole, the Lord Ordinary is of opinion that she is. If there had been a mandate, either special or general, in favour of Brown to enter into such an important transaction as this, so as to bind his principal, decree would have been given directly against Mrs. Morrison, and Brown assoilzied. But the Lord Ordinary is not satisfied with the argument that in this case there was either a general or special mandate, and the relief has been found competent chiefly from the admission by Mrs. Morrison in answers, article 30, and in so far as she does not there deny the other facts averred in condescendence, article 20, coupled with this, that it is not probable that Brown would, without authority, have bargained for the loan, from which he was to derive no pecuniary advantage, and the presumption arising from the assistance he gave generally to Mr. and Mrs. Morrison in the management of their affairs. The letter by Brown, 20th November 1823, written at the moment, expressly bears that the loan was made by their own consent and will. This is corroborated by the absence of any denial of this in James Robertson's letter (24th November 1823,) by there being no statement at the time that this was the ground of complaint, or that there was any thing but the fear of the security which influenced her, as well as the conduct of the party in paying for the opinions as to the security. Mr. and Mrs. Morrison may not have expressly given Brown authority to say that their money would be lent to Mr. Glassford; but as they talked generally about a loan, and they do not say that they declined to lend the money at all, nor deny the statement that they had 'a good deal of conversation on the subject, both on this occasion (June 1823) and at subsequent meetings,' it is impossible to hold, under all the circumstances, that they did not leave upon Brown's mind, and must have felt that they did so, the impression that his actings in this matter were approved of, as his other transactions for them were.

"By an early interlocutor in the cause, the Sheriff found the claim proveable by witnesses. If it were quite clear that this was well founded, it would have been a most proper appointment to have had a judicial examination of the defenders, which probably would have supplied what may be thought deficient in their admissions on the record; but as it was admitted that there were no witnesses at any of the conversations between Brown and them about the loan, a judicial examination at the present stage of the cause, if otherwise competent, was out of the question. It has been also supposed that the principle of rei interventus applies. There is none, however, to affect Mrs. Morrison, and the claim is not for implement of the bargain against a party barred by a rei interventus from resiling, but for loss arising from its non-implement. Mrs. Morrison will, of course, be entitled to the benefit of spoiled stamps."

of process, and decerns;—further, in the action of relief at the instance of Brown against Mrs. Morrison, decerns at the instance of the pursuer against the defender for payment and relief of the above claims, and the expenses payable to the original pursuers; and finds expenses due."

All parties reclaimed,—Brown and Mrs. Morrison, respectively, in so far as decree was given against them; and Glassford and Gordon, in so far as they had not obtained decree directly against Mrs. Morrison, as well as against Brown. Glassford and Gordon, however, stated that they only wished to insist in their note, in the event of an alteration of the interlocutor as against Brown, and also in so far as the decision assoilzieing Mrs. Morrison from the direct conclusions at their instance might affect the question of expenses; and Brown, that he reclaimed only in case his right of relief should be affected.

Lord Glenlee.—What Brown founds on is—not that he had a direct mandate or authority to lend this money; but what he says is, I was in that general situation or management of your affairs that warranted my proposing to lend it; and you knew what I was about, and you never expressly prohibited me from proceeding. He goes on proposing a particular measure, and they do not stop him, but allow him to go on, reserving to themselves to determine if they shall ultimately complete it. It is plain they should be liable for any loss sustained by him. Not only in the article alluded to by the Lord Ordinary, but in others, various conversations are averred by Brown, which are not denied,—the only answer being, not that they prohibited him, (which is never alleged,) but only that he had no express authority. From Robertson's letter, too, it appears clear that there were frequent conversations on the subject with Mrs. Morrison, and no prohibition till after the meeting when the resolution was come to, not to lend the money to Glassford; and therefore I think the interlocutor well founded. The only thing that occurs to me is, that the interlocutor does not sufficiently guard Brown as to the amount to be paid by him in the question with Glassford.

Lord Cringletie.—This appears to me the simplest case possible, though the parties have managed to make it abominably complicated. Mr. and Mrs. Morrison admit communications with Brown on the subject of the loan, but say they never gave direct authority to make it; and when the deeds are prepared, and the expense incurred, they are rendered useless by the refusal to lend. Brown gives a direct obligation to pay the expenses incurred; and what had Glassford to do, but to raise his action on that document? He, however, brings an action against him and Mr. and Mrs. Morrison, conjointly and severally; and she says she gave no authority, though it is clear she authorized him to commence the transaction. It is also clear Brown acted factorio nomine; and, but for his letter, Glassford could only have brought his action against Mrs. Morrison; and if he insists on decree against her, I think he should have it. As to the question of relief, I have no doubt the interlocutor is right. There is sufficient confessed to establish that the Morrisons authorized Brown to act; and though they did not give an express mandate to lend the money, they gave him reason to believe that it would be advanced, and allowed him to carry on the negotiation on that footing; and therefore I am for adhering.

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Mills v. Hamilton.

LORD MEADOWBANK.—I am of the same opinion. At first I was inclined to revert to the interlocutor of the Sheriff; yet, on consideration, I conceive the note of the Lord Ordinary gives the true view. There certainly can be no difficulty in finding Mrs. Morrison liable in relief. The amount is reserved.

LORD JUSTICE-CLERK.—We cannot decern for any precise sum at present; but I am satisfied, with your Lordships, that the Lord Ordinary has done justice in this case, and that there is no need of further investigation. The only remark I have to make is, that I think it may be a question how far the original pursuers, in not bringing their action on the letter of Brown, have a claim to full expenses.

THE COURT accordingly refused all the notes, and adhered to the Lord Ordinary's interlocutor,—remitting to his Lordship to hear parties as to the pursuers' claim for expenses.

J. G. HOPKIRK, W. S.—J. LIVINGSTON, W. S.—TOD and WRIGHT, W. S.—Agents.

No. 61.

MRS. JANET MILLS, Pursuer.—*Cockburn—Bruce.*
JAMES HAMILTON, Defender.—*Keay—Tait.*

Trust.—A trust, said to have stipulated a supersedere of diligence, having been granted for behoof of creditors; and the trustee having died, and no successor nominated; and the truster having, several years after the date of the trust, granted to one of his creditors a bill for the amount of a debt which had been previously ranked for on the estate—Held that the creditor was not thereby barred from suing the truster for payment of the bill.

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2D DIVISION. Lord Medwyn. T.

SEQUEL of the case mentioned ante, VIII. 570, (which see). After the remit to the Lord Ordinary there made, an investigation was gone into, which showed the whole amount of the bill pursued for, with some trifling exception, to be due. Hamilton thereupon again insisted on a defence, which, though formerly repelled by the Lord Ordinary, was still open, in consequence of his Lordship's interlocutor having been recalled by the Court, hoc statu, when the remit was made. This was, that he had, in the year 1815, executed a trust-deed for behoof of his creditors, containing a stipulation for a supersedere of diligence; and that the late Mr. Henderson had acceded thereto by ranking for this bill under the trust. It appeared, however, that the trustee was now dead—that no new one had been nominated—that no part of the debt in question had been paid out of the estate—and that the bill sued upon had been granted for this debt long subsequent to the date of the trust-deed.

The Lord Ordinary again decerned against Hamilton, under deduction of the trifling items above alluded to; and the Court adhered.

D. TURNBULL, W. S.—A. HAMILTON, W. S.—Agents.

MRS. JANET MILLS, Pursuer.—*Cockburn—Bruce.*
JAMES HAMILTON, Defender.—*Keay—Tait.*

No. 62.

Dec. 1. 1830.
Mills v. Hamilton.

Partnership.—Title to Pursue—Sale—Bill of Exchange.—1.—The executor of an individual who had carried on business under a firm, of which he was sole partner, entitled to recover debts contracted to the firm.—2.—A purchaser of goods furnished, and accompanied with accounts, not entitled to object, after the lapse of a year, that the prices charged were above the market-price at the time.—3.—Circumstances in which a plea of alleged non-notification of the dishonour of a bill was repelled.

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2D DIVISION.
Lord Medwyn.
T.

THIS was another action by Mrs. Mills, relict and executrix of the deceased Alexander Henderson, sole partner of the company of Eagle and Henderson, seedsmen in Edinburgh, for payment of an account for seeds &c. furnished to the defender Hamilton between July 1823 and December 1826; also of a bill, dated May 13. 1823, drawn by Hamilton upon, and accepted by Lord Strathmore, and indorsed by Hamilton to Henderson.

In defence it was pleaded—

1. Mrs. Mills, as executor of the individual Henderson, had no title to pursue for debts due to the company of Eagle and Henderson.

2. The seeds furnished were, in several instances, charged above the market price at the time; and,

3. There was no sufficient evidence that due notice of the dishonour of the bill was made to Hamilton.

To this it was answered—

1. Where an individual is sole partner of a concern which he carries on under a company firm, it is competent to him to sue for debts due to him under the company firm by his individual name; and the late Mr. Henderson having had the sole interest in the debt, his executrix is entitled to insist in an action for payment of it.

2. After such a lapse of time, the seeds having been received, and accounts rendered along with them, without objection or complaint, it is incompetent to go into an investigation as to the alleged overcharge in price; and,

3. The notice of dishonour, or at least the waiver of notice, is proved by a letter from Hamilton to Mr. Henderson, with reference to the bill sued on, in which he states—"I feel quite sorry at the postponement of the payment of your draft so long over due." Besides, the bill was an accommodation between Hamilton and Lord Strathmore.

The Lord Ordinary, "in respect that the account of furnishings, as well as the parcels themselves, were received regularly at the time, and that it is too late to object now that the articles are overcharged, and beyond the market price, repels said objection; repels also the objection, that notice of the dishonour of the bill was not duly intimated to the defender; therefore decerns in terms of the libel,"—under a trifling admitted deduction, and for expenses.

The Court adhered.

D. TURNBULL, W. S.—A. HAMILTON, W. S.—Agents.

No. 63.

Dec. 2. 1830.
Farquhar v. Sloane.

WILLIAM FARQUHAR, Suspender.—*Hope—Neaves.*

WILLIAM SLOANE, Charger.—*Maidment.*

Bill of Exchange—Proof.—Where the acceptor of a promissory note was under diligence for payment of it; and a stranger to the note paid it, and took an assignation to it and the diligence, and gave a charge to an indorser, who alleged that the charger was trustee of the acceptor; and the Lord Ordinary found the non-onerosity provable by the charger's oath only—The Court recalled hoc statu, and allowed the indorser to lodge a condescendence "of the facts offered to be proved, and the manner of proof."

Dec. 2. 1830.

1st DIVISION.
Lord Meadowbank.

WILLIAM FARQUHAR having been charged on a promissory note indorsed by him, of which the acceptor was George Gilbert Thomson, merchant, Leith, brought a suspension, averring that Thomson, having failed, granted the note to him as the travelling agent of two Aberdeen companies, to whom the amount was due, as the composition on their debts; that he had indorsed it to a Mr. Elsmie, manager of the one company, and a partner of the other; and that by Elsmie it was indorsed to a Mr. Rennie, who raised diligence on it against Thomson, the proper debtor; that thereupon Mr. Sloane, merchant in Leith, a stranger to the bill, paid the contents of it; and, having obtained an assignation to the diligence, had given the present charge. He pleaded, inter alia, 1. That as he was merely the agent who had received the note for his constituents, and transmitted it to them by indorsation, he was not personally liable; and, 2. That Sloane was the trustee of Thomson, the proper debtor, and could make no claim which was not competent to Thomson.

Sloane denied that he was Thomson's trustee, or that Farquhar, in point of fact, was different from any other prior indorser, or, in point of law, that he was less liable than any other, even if his allegations were true, as he stood on the note as an unqualified indorser.

The Lord Ordinary "found it competent to the suspender to instruct, by the charger's oath only, that he is not an onerous indorsee to the bill charged on, and allowed the suspender to give in a minute of reference."

Farquhar reclaimed, and craved "a commission and diligence for the recovery and inspection of the charger's and Thomson's books, and other writings."

LORD GILLIES.—The facts of the case afford real evidence in support of the prayer of the suspender's note. Thomson, the proper debtor, is under diligence for payment, when Sloane steps in, pays the bill, and instead of going against his friend Thomson, proceeds to charge one of the indorsers. The indorser suspends, and at present he only asks a diligence for the recovery of certain books of the parties, to disclose the true nature of this unusual transaction. It will be necessary to see a condescendence of the writs called for; but I would recal the Lord Ordinary's interlocutor in hoc statu, and allow a condescendence.

THE COURT then recalled "the interlocutor, and remitted to Lord Newton, Ordinary, to receive a condescendence of the facts offered to be proved, and the manner of proof; and to proceed further as to his Lordship shall seem proper, reserving all questions of expenses."

J. MURDOCH, S. S. C.—W. BROWN, W. S.—Agents.

No. 63.

Dec. 2. 1830.
Farquhar v. Sloane.

Taylor v. Forbes.

WILLIAM TAYLOR, Suspender.—*Hope—Whigham.*
ALEXANDER FORBES, Charger.—*Skene—Moir.*

No. 64.

Ship—Reparation—Compensation.—A cargo of flour being damaged in a carrying vessel, in consequence of improper stowage from want of dunnage, the proprietor held entitled to compensate the claim for freight by the counter claim of damage.

Dec. 2. 1830.
1ST DIVISION.
Admiralty.
Lord Craigie.

THE sloop Star of Perth was freighted there to carry a cargo of flour to Aberdeen for Mr. Alexander Forbes. The hold of the vessel was not sufficiently dunnaged,—i. e. lined with planks of wood &c., to protect a perishable cargo from contact with the bilge-water. In consequence of this, 38 sacks of flour (forming the lowest part of the cargo) were found, on the arrival of the vessel at Aberdeen, to have sustained damage from contact with the bilge-water. On the removal of the cargo out of the vessel, Mr. Forbes proposed to apply to a magistrate to have the damaged part judicially inspected and sold; but the master consented, in order to avoid unnecessary expense, to a survey of the vessel by the harbour-master, a shipmaster, and a seaman of experience, and to the immediate sale of the cargo by Forbes on the best terms he could make. The state of the vessel being ascertained, and the damaged flour sold at the same time with the sound, the diminution of its marketable value was found to be £10. 9s. The freight was £9. 14s. 9d.; and Taylor, the owner of the Star, having pursued Forbes before the Judge Admiral for payment of it, he defended on the ground of compensation.

After a proof, which was directed, inter alia, to averments by the pursuer that it was not the practice of the port of Perth to use dunnage in coasting vessels, and that the damage sustained had arisen from tempestuous weather, the Judge Admiral "found that the flour in question sustained considerable damage from sea-water in the voyage from Perth to Aberbeen;—that the vessel was not sufficiently dunnaged;—that by law, and the general practice even in the coasting trade, it is usual to dunnage vessels when carrying a cargo of grain or flour;—that any deviation from this practice in the trade of Perth (especially when one of the parties lived at another port) is not sufficient to overturn the general law and practice;—that there is sufficient reason to believe that the flour would not have received damage, had the vessel been sufficiently dunnaged;—that it is sufficiently instructed that the damage sustained was equivalent to the freight claimed; and therefore assoilzied," with expenses.

No. 64.

Dec. 2. 1830. Taylor v. Forbes.

Taylor presented a bill of suspension, and raised at the same time a relative reduction.

Pleaded by Taylor—

1. The claim of freight against Forbes, who received delivery of the whole cargo, is liquid, and instantly exigible. If he has any claim of damage, he must constitute it in a separate action. Accordingly, by the law of England, such a counter claim is not admissible against a demand for freight. The master's extrajudicial agreement in a home port cannot bind the owner, to whom it was never communicated.

2. The damage, if any, arose from tempest; and in the coasting trade, especially by the practice of the port of Perth, no dunnage is required to be furnished by the vessel.

Pleaded by Forbes—

1. The claim of freight, being a charge made for safely carrying the cargo, may be compensated by the damage arising from defective carriage, just as a claim for the rent of a mill-stream may be met by retention, if the water be not duly supplied. The English authorities are of no force here, for the Courts of Law and Equity are disjoined; but here the equitable plea of compensation is allowed, in many similar cases, to avoid the multiplication of actions. Independently of this, the amount of damage was liquidated under the agreement with the master. It was a case of urgency, in which he had, by his acts, full power to bind his owners. The damage arose from deficient dunnage, and it lay with the carrying vessel to provide a dry bottom in her hold for a perishable cargo like flour. She was not otherwise sea-worthy; nor was the owner entitled to make or enforce a contract of affreightment—at least without deduction of the damage occasioned by her own defect.

2. The practice of the port of Perth, even if proved, could never derogate from the general law, or be pleadable against a party resident at a different port.

The Court unanimously refused the bill, and allowed the charger his expenses.

Lord President.—There was clearly a deficiency of dunnage here, which occasioned the injury to the cargo. The practice of a single commercial port cannot derogate from a general rule of law.

Suspender's Authorities.—Abbott on Shipping, 293. 299, (5th edit.); Holt, 385, 386, 387, (edit. 1824); 3. Ersk. 4. 16; 2. Bell, 128; Lillie, Nov. 24. 1818, (F. C.); Fisher, June 5. 1829, (ante, VII. 704.)

Charger's Authorities.—1. Bell, 549. 569. 570; Lamont, July 29. 1699, (10109); Abbott, 218; 1. Bell, 486.

J. Macandrew, S. S. C.—Gordon and Barron, W. S.—Agents.

J. and J. MITCHELL, Complainers.—*Hope—Neaves.*
ALEXANDER MEIN, Respondent.—*Keay—Gillies.*

No. 65.

Dec. 2. 1830.
Mitchells v. Mein.

Bankrupt—Sequestration—Acquiescence.—1.—Incompetent for creditors on a sequestrated estate, less than one-fourth in value, to apply for removal of the trustee;—but,—2.—Competent for the Court, on the prayer of such creditors, to inflict on the trustee the penalties of the statute.—3.—Irregularities by a trustee which were held not sufficient to warrant his removal, but sufficient to subject him in modified expenses;—and,—4.—Question raised, whether creditors were barred by acquiescence from complaining of irregularities of the trustee; and whether a judgment of the trustee and commissioners, appointing a sum to be retained from the dividend allotted to a creditor, was final by lapse of thirty days.

Dec. 2. 1830.

1ST DIVISION.
Ld. Moncreiff.

IN September 1825, Alexander Mein, accountant in Glasgow, was elected trustee on the sequestrated estates of John Wilson, grocer there. J. and J. Mitchell claimed at an early stage of the sequestration, and their claim was sustained to the extent of £694. 5s. 5d., on which a dividend of £43. 7s. 10d. was, on the 7th of August 1826, declared due. The bankrupt had fled recently before his sequestration; and on examining his daughter, (who took charge of his shop in the interval between his flight and sequestration,) she stated that, some days after her father's departure, she had made a payment of £20 or £21 to one of the Mitchells, who "threatened her a good deal before she paid him the money." The trustee and commissioners resolved to retain this sum from the amount of dividend payable to the Mitchells; but the minute to this effect, as engrossed in the sederunt-book, was not signed for a considerable time afterwards. Its import was intimated to Mitchells by the trustee in a note subjoined to his circular of the 7th of August, giving notice of the dividend. Mitchells then raised an action against the trustee, before the Magistrates of Glasgow, for the dividend, which was eventually dismissed in this Court as incompetent. [1]

They now presented a petition and complaint against the trustee, under the 71st and 46th sections of the Bankrupt Act, setting forth that the trustee had failed to exhibit a state and valuation of the bankrupt's estate at either of the general meetings held, after the examination of the bankrupt's family, in terms of § 36; that he had not made out quarterly states for the commissioners in terms of § 37; that there was no election of commissioners till November 1825, and it was only on the 17th of July 1826 that any state was exhibited to them, and that even then it was not a comprehensive view of the bankrupt's funds, but merely an account of the trustee's intromissions; that several important minutes, as inserted in the sederunt-book, were not signed by the preses of the meetings, and, among others, the minute allowing the trustee £100 of commission; that the accounts of the 17th of July, as inserted, were not signed by the commissioners, and were not entered till after a meeting

[1] July 7. 1829, (ante, VII. 841.)

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on the 7th of August; that the minutes of the 7th of August, as engrossed in the sederunt-book, were not signed till long after the complainers had raised their first action for the dividend; and that certain minutes of the 16th of October 1826 were not inserted until after other minutes in January 1827; that, on the lapse of sixteen months, there was no audit, or continued scheme and state made up in terms of § 46, although at that time the trustee held £777. 14s. 6d. of divisible funds, which latterly increased to £865; that the next meeting of commissioners was only in August 1827, and no general state was then laid before them; that their next meeting was in July 1829, when they agreed to call a meeting of creditors to consider of the sale of outstanding debts—a measure which should have been adopted two years before, and no state was exhibited to this meeting, but a list of outstanding debts; that the trustee did not, at the end of three years, draw up a report, or convene the creditors in two months thereafter, in terms of the 75th section; that the duplicate of the sederunt-book had not been transmitted to the Court till one year and nine months beyond the time prescribed in § 65, and had not been continued later than the 16th of August 1827; and generally, that the sederunt-book in the trustee's hands had been kept in an imperfect and confused manner. They therefore prayed the Court "to find that the said Alexander Mein has neglected to observe various provisions of the statute 54. Geo. III. c. 137. in the different particulars above mentioned, and to remove the said Alexander Mein from his office as trustee, or to do otherwise as to your Lordships shall seem just; and further to find, that as no judgment was ever pronounced of the said date, 7th August 1826, or any other date, altering the regular and final scheme of division, by which the petitioners were entitled to the sum of £43. 14s. 1d. as the dividend upon the sum for which they were duly ranked upon the said sequestrated estate of the said John Wilson, and as no such judgment was duly subscribed and authenticated, the said trustee had no right to withhold payment of the sum of £21 from the said dividend; and to find that the said Alexander Mein ought now to pay the said sum, with interest from the 8th of September 1826; and further to find, that as the said pretended judgment of the 7th of August 1826 was not subscribed, in terms of the act, of the date it bears, or until long after judicial proceedings had taken place, the said trustee and the said commissioners had no right to adhibit their subscriptions thereto, for the purpose of attempting to give a colour to the conduct of the trustee in withholding payment of the said dividend, or to exclude the right of the complainers to complain of any such judgment, by attempting to make the same appear a regular judgment of the date which it bears; or to do otherwise in the premises, as to your Lordships shall seem proper."

The trustee answered, That there was no allegation of his having made any unwarrantable or false entries of minutes, all of which were originally subscribed as written out on papers apart, though the signatures of the

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copies engrossed in the sederunt-book were occasionally omitted for a considerable time; that where any accidental delay had occurred, so as to prevent the insertion of a minute in its proper place, this was noticed on the face of the sederunt-book, so that no one could be misled; that at the last meeting of creditors, after the examination of the bankrupt's family, he had laid before them the only view of the bankrupt estate which it was then possible to exhibit; that it was necessarily general from the flight of the bankrupt and his irregular books, and from the consequently defective information the trustee then possessed, as he had just dispatched about 500 letters to the debtors of the bankrupt estate, many of which were then unanswered; but that he had stated conjecturally, in round numbers, the supposed claims against the estate, the supposed available assets, and the probable dividend; that his accounts had been duly audited, and he had prepared a state and scheme, and had distributed a dividend of 1s. 3d. per pound, at the expiration of the twelvemonth fixed by the statute; that subsequently new claims, exceeding £2000, were lodged, and it was necessary to keep the alleged fund of £865 in the bank to meet these and certain other disputed claims, which were not adjusted till recently before the date of this petition and complaint; that, subsequently to the first dividend, he had no new intromissions with the estate to any such amount as would have justified the expense of quarterly states, which could have served no useful purpose; and, in particular, that as there did not appear to be a fund for a second dividend to any creditor, it was not imperative to make out the continued state and scheme at the end of sixteen months; that it was impossible to wind up the bankrupt estate at the end of three years, as there were various depending claims besides the lawsuit with the complainers; that the final list of outstanding debts, which was of little value, was submitted to the disposal of the creditors as early as was expedient under all the circumstances, and no injury was alleged to have accrued to the estate from any of his proceedings; and finally, that all the creditors, except the complainers, had recently expressed their approbation of his whole management, and even the complainers had not objected to it for three years after his office began.

He therefore pleaded—

1. That as the complainers did not constitute one-fourth of the creditors in number and value, they had no title to insist for his removal.

2. That they had acquiesced in all the proceedings complained of; and,

3. That the judgment as to the retention of the £21 was final.

To this it was answered—

1. That the complainers were entitled to bring the conduct of the trustee under the consideration of the Court, who might either remove him, or inflict such penalty as they saw fit.

2. That they could not be held to have acquiesced in deviations from statutory rules; and,

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3. That although the judgment awarding to them the dividend was final in their favour, yet the minute by the trustee claiming a right to retain part of that dividend in payment of an illiquid claim, was both incompetent, and liable to review at any time.

The Lord Ordinary pronounced this interlocutor:—"Finds, that in so far as this petition and complaint concludes for removal of the trustee, the complainers have no title to insist in it to that specific effect, except in that part of it which is founded on the 46th section of the statute: But in respect that the trustee is at all times amenable to the Court for his conduct, finds that it is competent to any creditor to bring his conduct under the notice of the Court, and that the Court may, on such complaint, pronounce judgment of removal or censure, as they may think fit;—that, in the present case, certain irregularities and omissions have been condescended on, in regard to the signing of the minutes of the creditors in the sederunt-book, making up periodical states, calling meetings, and a few other points of the statutory regulations;—that though the facts as to these omissions are admitted, it also appears that the complainers, who lodged their claim within six weeks after the sequestration, as well as all the other creditors, acquiesced, without complaint, in the whole proceedings of the trustee; that no loss is shown to have arisen to the estate from any such omissions, and that all the creditors, except the complainers, do still approve of the conduct of the trustee generally;—finds it admitted that no second scheme of division was made up, or second dividend paid, in terms of the 46th section of the statute; but finds that, from the nature of the thing, that provision cannot be construed as practically imperative in all cases, whether there is a fund for division or not, and that it must depend on the circumstances of the case, whether the omission to observe it will afford a just ground of complaint or not;—that, in this case, it appears from the sederunt-book (p. 150) that though, after the first dividend had been made, there was a considerable sum in the trustee's account with the bank, there were large dividends necessarily set apart on account of disputed claims then undisposed of, the most important, if not the whole of which, were only settled recently before this petition and complaint was presented, and new claims were also lodged to a great amount, though the dates at which they were lodged does not appear;—that though the state of the funds in the trustee's hands was open to all the creditors when the first dividend was declared, no creditor required him to proceed to a second dividend, or called on him for explanation;—therefore the Lord Ordinary, with regard to that part of the complaint which relates to the general conduct of the trustee, and calls for his removal, while he is of opinion that there are no circumstances in the case to support such a demand, makes avizandum with the case to the Court, and appoints the record to be printed and boxed, in order that the Court may judge of the conclusion for removal of the trustee, or how far the circumstances

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call for any other mode of animadversion; and with regard to that part of the complaint which relates to the retention by the trustee of £21 of the dividend, corresponding to the debt of the complainers as ranked in the scheme of division, finds, that as the scheme of division was made up at the rate of 1s. 8d. per pound to each creditor, and the debt of the complainers was then ranked with the rest at the full amount, the subsequent notice of the trustee to the complainers, under the resolution of himself and the commissioners that he was to retain £21 from the dividend allotted to it, cannot be considered as a judgment on the ranking, of which it was necessary for the claimants to complain within thirty days, but only as the exercise of a claim of retention till the question as to the legality of the payment objected to should be settled; and that the sum is accordingly stated, in the sederunt-book, as set apart with the other dividends on disputed claims; — therefore repels the objection to the competency of the complaint on this point; and further finds that there are sufficient conclusions to enable the complainers to maintain their claim with regard to it; — that though the statements in the deposition of the daughter of the bankrupt are calculated to raise suspicions that the payment referred to may have been obtained by unfair means, they are not sufficient to justify the retention of a dividend actually declared on a debt ranked, without any measure being adopted by the trustee for reducing the transaction, or proving in competent form that the payment was unduly obtained; — therefore finds that the complainers are entitled to insist for payment of the said sum of £21, unless the respondents will now undertake to prove habili modo that that sum was paid to the complainers through fraud or fear practised by them on the daughter of the bankrupt; but finds that, under this complaint, it is competent to the Court to investigate any such case of fraud alleged in defence to it. Separatim finds, that even supposing it had been ascertained that the complainers were bound to repay the sum of £21 to the bankrupt estate, as unduly obtained, the trustee has retained too much, seeing that as the complainers had deducted that sum from their claim, they were entitled to an equal share with the other creditors on their whole debt without deduction, and consequently to a greater sum than that actually paid; and, with these findings, makes avizandum with the cause to the Court, and reserves all questions of expenses."

Mitchells reclaimed against the findings adverse to them, and the whole case came before the Court by report.

Lord President.—Some irregularities have been committed here. But, before disposing of them, especially in reference to the severe conclusions of this petition, I could wish to see the report of an accountant on the state of the sederunt-book, the regularity of the entries, and the allegation of the trustee, as an individual, retaining an excess of the funds in his own hands.

[It was then intimated from the bar that parties wished judgment as the case stood.]

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Sprot's Trustees v. Mackenzie's Trustees.

LORD GILLIES.—The removal of the trustee is not the penalty annexed by the statute to any of the irregularities proved to have been committed here, though some of them are very blameable.

LORD CRAIGIE.—It is competent for us to remove the trustee on cause shown, even when it is not specifically prayed for. I do not think there is ground for removal in this case; but, in refusing that part of the petition, the Court should guard against any appearance of countenancing the deviations from the statute which have occurred here.

THE COURT therefore "found that there had been irregularities in this case upon the part of the trustee, but that it would be inexpedient to remove him, and therefore in so far assoilzied him from the conclusions of the complaint;—further, found him liable to the petitioners in the expenses of the present application, and proceedings following thereon, subject to modification; with this declaration, that none of said expenses shall affect the complainers."

Petitioners' Authorities.—54. Geo. III. c. 137, § 17. 36. 37. 46. 65. 71. 75.

Respondent's Authorities.— Ewing and Others, Feb. 28. 1826, (2. Wilson and Shaw, 19); 54. Geo. III. c. 137. § 45. 71; Connel, Jan. 16. 1813, (F. C.); 2. Bell, 381. 457, (4th edit.)

J. CULLEN, W. S.—C. FISHER,—Agents.

No. 66.

SPROT'S TRUSTEES, Pursuers.—*Hope.*
MACKENZIE'S TRUSTEES, Defenders.—*H. J. Robertson.*

Inhibition—Sale.—The seller of an estate, which he had derived through a conveyance from a bankrupt and his trustee under a sequestration, not bound to purge the record of an inhibition against the bankrupt, which had not been recorded till after the sequestration.

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1ST DIVISION.
Lord Meadowbank.
H.

ON the 23d of March 1793, the estates of James Dunlop, then of Garnkirk, were sequestrated. On the 5th of April following, inhibition at the instance of James Ralston of Loanhead of Carmyle was recorded against him in the Particular Register of Inhibitions for Lanark. The estate of Garnkirk was subsequently conveyed by Dunlop to his trustee under the sequestration, and was acquired by the late Mr. John Mackenzie, who afterwards sold it to Sprot's trustees. These gentlemen having still a balance of the price on hand, which they alleged to be claimed by various parties, raised a summons of multiplepoinding. They called, among others, the trustees of Mr. Mackenzie, with whom a question arose, whether the latter were bound to purge the record of Ralston's inhibition, before the purchasers could be called on to pay up the balance of the price. The Lord Ordinary "found, that it appears from the record that an inhibition at the instance of James Ralston of Loanhead of Carmyle against James Dunlop of Garnkirk was recorded in the Particular Register of Inhibitions for Lanarkshire on the 5th of April 1793; and that it also appears from the record that the whole real and personal

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estate of the said James Dunlop was previously sequestrated on the 23d of March 1796; and that the trustees of the late John Mackenzie are bound to get the record purged of the said inhibition, by getting a discharge of the same duly marked upon the record; and appointed them to do so accordingly."

Mackenzie's trustees reclaimed, and pleaded, that even had the inhibitions been used before sequestration, it had been decided that this could not affect a conveyance by the bankrupt and trustee under the sequestration; but it was much more evident that no inhibition recorded after sequestration could affect the power of the trustee and bankrupt to give a good title.

The Court unanimously altered.

Lord Gillies.—An inhibition used after sequestration is no inhibition at all.

Claimants' Authority.—2. Bell, 4. 18.

Mowbray and Howden, W.S.—Pearson, Wilkie, and Robertson, W.S.—Agents.

No. 67.

Graham's Trustee, Pursuer.—*Coventry.*
Alexander Boswell, Defender.—*Cockburn.*

Trust—Commonty.—Title to Pursue.—Under a deed conveying an estate to trustees to hold it for a term of years, and then denude in favour of certain parties, with a clause empowering them "to grant tacks of my lands, and appoint factors thereon, and to settle and adjust all accounts, of whatever kind, that may be unsettled at my death, and to do every thing relative to the management of my estate and affairs that I could do myself"—Found that the trustees were not entitled to raise an action of division of commonty.

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1st Division. Lord Newton. D.

The late Thomas Graham of Kinross and Burleigh conveyed his estates, real and personal, in trust to the Reverend George Henry Templer and others. The purposes of the trust were to make certain payments; and then, if the last of a certain series of persons died in minority, to denude of the barony of Kinross and Lochleven in favour of one of the truster's nephews, and of the lands of Burleigh in favour of another. The conveyance then proceeded—"And also in trust to sell all the rest, residue, and remainder of my foresaid real or landed estate," &c. The deed likewise contained this clause—"I empower my said trustees to grant tacks of my lands, and appoint factors thereon, and to settle and adjust all accounts, of whatever kind, that may be unsettled at my death, and to do every thing relative to the management of my estate and affairs that I could do myself."

After the death of Mr. Graham, his trustees, as superiors of the lands of Meikle Balgedie, and proprietors of a considerable portion of them, pursued a division of the adjacent commonty of Forehill of Balgedie. The action was latterly insisted in by the surviving trustee and his mandatory. Mr. Alexander Boswell, W. S., as proprietor of one-eighth of

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Meikle Balgedie, and in right of a proportion of the commonty, objected to the title of the trustees, on the ground that the general powers conferred by the trust-deed were powers of management merely; but they were not entitled to change the condition of the estate on mere views of expediency.

The pursuer answered, That the trust was intended to be of long continuance, and they were expressly empowered to exercise every act of administration which was competent to their author. It was the policy of the Legislature to promote the division of commonties; and they could not be deprived of this right, which it was important to the trust-estate that they should exercise.

The Lord Ordinary "repelled the objection to the title of the pursuers," and also an objection on the merits; found expenses due, and granted a commission of perambulation, &c.*

Mr. Boswell reclaimed.

Lord President.—The objection to the title excludes all consideration of the merits. The general powers conferred are merely to manage the trust-estate—to administer it as conveyed to the trustees. This general power of management is immediately subjoined to the authority to grant tacks and appoint factors, and forms part of the same act of delegation. I do not conceive that it entitled the trustees to institute the present action.

Lord Gillies.—To pursue a division of commonty is not, properly speaking, a mere act of management; and I concur with your Lordship.

The Court accordingly found "that there is no title under the trust-deed in question to institute the present action, and therefore altered, &c.; sustained the objections to the title; and assoilzied the defender from the conclusions of the libel," with expenses.

J. Campbell Jun. W. S.—A. Boswell, W. S.—Agents.

No. 68. J. Waldie and Lord Corehouse, Pursuers.—*D. F. Jeffrey—Jameson.*
F. J. Cuthbert and Sir W. Dickson, Defenders.—*Murray—Henderson—Handyside.*

Teinds—Warrandice—Process.—Where the proprietor of a barony sold part of it with the teinds, obliging himself and his heirs to free the purchaser from stipend and augmentations, and (in respect of doubts as to the validity of the title to the teinds) allowed the purchaser to retain the price, on granting a bond to pay whenever a valid title should be furnished; and the proprietor thereafter sold the remainder of the lands with the teinds, allowing, in like manner, the purchaser to retain the price of the teinds, and assigned to him the above bond, but did not expressly bind himself to relieve the second purchaser of stipend &c.; and that purchaser paid the whole stipend under two several localities, but afterwards reduced them, and obtained a

* Note.—"The terms of the trust do not appear to the Lord Ordinary to incapacitate the pursuers from insisting on a division, which, by 1695, c. 38, is made competent to all having interest in the common."

rateable proportion of stipend laid on the parcel first sold—Held, in an action of relief at the instance of the proprietor of that parcel,—1.—That the second purchaser was not bound to relieve him;—and,—2.—That the grounds on which an alternative conclusion by the heir of the original seller against the purchaser of the second for payment of the retained price of the teinds of his lands, and reconveyance of the bond for the price of those of the other parcel, not being set forth with sufficient distinctness in the summons, must be dismissed.

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2D DIVISION. Ld. Fullerton. T.

IN 1687, Sir Alexander Don of Newton conveyed the barony of Ednam, with the teinds, to Andrew Edmonstone, and Isobel Don his spouse, who were infeft therein. James Edmonstone (the brother of Andrew, and father of the late Miss Anne Edmonstone, who is represented by the pursuer Lord Corehouse) having succeeded to this estate, and entertaining some doubt as to the validity of his right to the teinds, brought a process of sale, to which he called as parties several individuals supposed to have claim to the titularity. He obtained decree of sale on the 9th of February 1715,—the price being fixed at 6345 merks, which he was to pay to such of the parties as might have the best right, on getting a sufficient heritable title. In the course of the same year he sold to one Ormiston part of the lands called Henderside, with the teinds, and granted an obligation to free these lands and teinds from all minister's stipend presently payable, or to be augmented in future. Doubts being still entertained whether Edmonstone had a good right to the teinds, it was agreed that Ormiston should retain 2000 merks, (£111. 2s. 2⅔d. sterling,) being the value of these teinds, till a sufficient right to them should be delivered; and he, on the other hand, granted an obligation to pay this sum to Edmonstone and his heirs, whenever such right should be furnished. Edmonstone was succeeded by his son Andrew, and Andrew by his brother James, who, in 1766, sold the remaining parts of the estate of Ednam to Mr. James Dickson, predecessor of the defender Sir William Dickson. The disposition to Dickson conveyed the teinds; but as the right to them was still considered doubtful, Dickson was allowed to retain in his hands 4345 merks, (£241. 7s. 9⅓d. sterling,) being a proportion of the price in the decree of sale effeiring to the teinds of the lands sold to him. On the other hand, Edmonstone and his sisters (as executors in right of Ormiston's obligation) assigned that obligation to Dickson, subject to the condition, that, on his obtaining a complete right to the teinds, he should deliver to Ormiston an extract thereof. In the conveyance to Dickson, there was no obligation to relieve Ormiston, the proprietor of Henderside, of minister's stipend, so that this obligation never entered into the titles of the estate. In 1787, William Dickson (who had now succeeded James Dickson) conveyed the greater part of his lands of Ednam, with the teinds, to Arthur Cuthbert, grandfather of the defender Cuthbert. In the disposition it was admitted that the price of the teinds had not been paid under the decree of sale, and it was accordingly excepted from the warrandice; but, on the other hand, Cuthbert was allowed

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to retain in his hands £241. 7s. 9⅓d., the price of the teinds effeiring to the lands disponed; and he also obtained from Dickson an assignation to Ormiston's bond. The disposition, however, contained no stipulation that he was to come under the obligation, contained in James Edmonstone's conveyance to Ormiston, to free him from minister's stipend, although the pursuers contended that such obligation might be inferred from the disposition, and the assignation of Ormiston's bond. Under two different localities (the latest in 1811) the whole stipend out of the lands of Ednam had been localled upon the parts sold to Dickson, and by him conveyed to Cuthbert, and none on the lands of Henderside. It had accordingly been paid, first by the Dicksons, and then by Cuthbert and his son, who had respectively drawn from Ormiston the interest on his bond. In 1816, the late Mr. Cuthbert (father of the defender) brought a reduction of these localities—the one in 1794, the other in 1811—in which he obtained decree, and had a rateable proportion of the stipend allocated on the lands of Henderside, now the property of the late George Waldie. Decree for repetition of the amount overpaid since 1792 was also pronounced against Waldie, who thereupon brought an action of relief against the late Miss Edmonstone, as representing her brother, granter of the obligation of relief in the original disposition of the lands of Henderside to Ormiston. Miss Edmonstone, on this, concurred with George Waldie in raising the present action, (since their death carried on by Lord Corehouse and John Waldie, their respective representatives,) wherein the facts above narrated were set forth, followed by alternative conclusions—1. That Cuthbert, as proprietor of the lands retained by James Edmonstone when he sold Henderside, and as assignee to Ormiston's bond for payment of the price of the teinds, and also Sir William Dickson, as representing James Dickson, and having retained part of the lands, were liable to free the proprietor of Henderside from all minister's stipend, in terms of the original disposition to Ormiston; or, 2. Failing success in this, that Cuthbert should be ordained to pay to Miss Edmonstone the sum of £241. 7s. 9⅓d., the retained price of the teinds, and to reconvey to him Ormiston's bond for the remaining £111. 2s. 2⅔d.; but this conclusion seemed from the beginning to have been overlooked, and the record had no special reference to it.

The Lord Ordinary pronounced the following interlocutors:—"Finds that, in the year 1715, the lands of Henderside and others, now the property of the pursuer Mr. Waldie, were sold by James Edmonstone of Ednam to Charles Ormiston;—that, by the disposition granted on that occasion by James Edmonstone to Charles Ormiston, the said James Edmonstone bound himself, his heirs and successors, to relieve the lands sold of the existing minister's stipend and future augmentations;—that the remaining parts of the lands of Ednam were sold in the year 1766 by James Edmonstone, the son of the party above named, to James Dickson, Esq., the predecessor of the defender Sir Archibald Dickson;—that,

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in the year 1787, the greater part of these lands of Ednam, so purchased by James Dickson, were sold by William Dickson to Arthur Cuthbert, Esq., the predecessor of the other defender; but finds that on occasion of these transmissions of the lands of Ednam by James Edmonstone to James Dickson in 1766, and by William Dickson to Arthur Cuthbert in 1787, the deeds granted on the one hand, and accepted on the other, did not transmit against or impose upon the purchasers the obligation originally contracted by James Edmonstone, in 1715, to relieve the lands of Henderside and others of the minister's stipend and augmentation;—and therefore assoilzies the defenders from the whole conclusions of the libel directed against them for the establishment and enforcement of the said claim of relief, and decerns;—and in regard to the alternative conclusion originally maintained by the deceased Anne Edmonstone, and now insisted in by her representative, against the defender Frederick John Cuthbert, for payment of the sum of £241. 7s. 9½d. sterling, and for assignation of the bond for 2000 merks, directs the cause to be enrolled on Thursday next in the roll of motions, that parties may be heard on the disposal of that part of the cause;" and thereafter—"In respect that the summons does not set forth in proper form, and with sufficient distinctness, the grounds upon which these alternative conclusions are maintained, dismisses the action in regard to the said conclusions, reserving to the pursuer the right to bring a new action for the enforcement of these alternative conclusions, if he shall be so advised,—and to the defender Frederick John Cuthbert, Esq., and all other parties, their defences;—finds the pursuer Lord Corehouse liable to the defender Frederick John Cuthbert, Esq., in the expenses incurred in relation to these alternative conclusions of the libel, and decerns;—quoad ultra, finds none of the parties entitled to expenses."

The pursuers reclaimed; but the Court adhered.

A. Douglas, W. S.—Ker and Dickson, W. S.—J. Small,—Agents.

No. 69.

J. R. Dickson, Suspender.—*D. F. Jeffrey—Jardine.*
J. Ker and H. Johnston (for Leith Bank), Chargers.—*Jameson—Anderson.*

Bill of Exchange—Oath.—Question, whether a party was an onerous holder of a bill?

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2d Division.
Ld. Fullerton.
T.

Dickson suspended a charge by Ker and Johnston, managers of the Leith Bank, on a bill accepted by him, and discounted with their branch at Langholm, on the ground that it had been retired with the proceeds of other bills also discounted there, though it had never been delivered up; and this he referred to the oath of their agent at Langholm. On advising the agent's depositions, the Lord Ordinary pronounced this interlocutor, which embodies the substance of them:—"Finds it established by the said depositions that the bill charged for, drawn by Thomas Little upon, and accepted by the suspender,

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was not paid in cash, and that the only consideration granted to the chargers for its retirement was another bill for the same amount, drawn by the said Thomas Little upon, and accepted by James Beattie;—finds it also established by these depositions that the said acceptance by Beattie was received by the chargers, or their agent, on the express condition that the bill now charged on was to be retained by them as a collateral or additional security for the payment of such new acceptance;—finds, therefore, that the chargers were and are entitled to do diligence upon the suspender's bill, in so far as Beattie's acceptance remained or remains unpaid; and therefore, and in respect it is admitted that a payment of £150 has been made on the acceptance by Beattie, suspends the letters to that amount; and, quoad ultra, finds the letters orderly proceeded, and decerns; and finds no expenses due."

The Court adhered, without prejudice to Dickson being heard on a plea of res noviter in reference to some information said to have been received by him as to the Bank having discharged Beattie.

W. Dickson, W. S.—J. Bisset, S. S. C.—Agents.

No. 70.

EARL of MAR, Pursuer.—*Keay—J. Miller.*

LADY F. J. ERSKINE and Others, Defenders.—*D. F. Jeffrey—Skene—Jameson.*

Entail—Clause—Provisions to Children, &c.—Circumstances in which the Court refused to restrict or reduce certain bonds of provision to younger children granted by an heir of entail, under a reserved power to make "reasonable provisions."

Dec. 3. 1830.

1st Division. Ld. Moncreiff. D.

THE entail of the earldom and estate of Mar contains the following clause:—"Excepting and reserving full power and liberty to the heirs of tailzie to provide their younger children to reasonable provisions." In virtue of this clause, the late John Francis Earl of Mar granted certain bonds of provision, besides annuities to the amount of £700, to his six younger children. His Lordship died in 1825, and was succeeded by his eldest son, the late John Thomas Earl of Mar, against whom the younger children raised an action for constituting their provisions. He died during the dependence; and the action being transferred against John Francis Miller Erskine, the present Earl, decree was recovered.[1] The sum of provisions, annuities, and arrears, for which he was then found liable, was £25,000.

Single Bills, &c.

SHAND v. COUSIN &c.

Dec. 3. 1830.

1st Division.

LEAVE asked by pursuer to print a letter for the use of the Court, at advising his reclaiming note; opposed, in respect the letter had not been before the Lord Ordinary. Motion refused.

[1] July 7. 1829, (ante, VII. 844.)

No. 79.

Dec. 3. 1830. Earl of Mar v. Erskine &c.

By contract of marriage in 1795, Earl John Thomas (then Mr. Erskine, younger of Mar) had bound himself, in the event of his succeeding to the earldom and estate of Mar, to provide his younger children, if two or more, in the sum of £10,000. Accordingly, in February 1826, after he succeeded to the earldom and estate, he executed a bond of corroboration and provision to that amount in favour of his younger children, Ladies Jane and Frances Erskine.

Afterwards, in July 1828, his Lordship, on the narrative of the powers reserved to him under the Mar entail, and of any other power which might be competent to him under the statute 5th Geo. IV. c. 87, executed a new bond of provision in favour of the same ladies for £20,000. It was provided that any sum received by them under his contract of marriage, or the former bond, should be imputed in extinction of the new bond; and the provisions were declared to be restrictable, if they exceeded what was lawfully competent to the granter, under the most liberal exercise of his powers to burden.

The gross rental of the estate was £8742; but parties were at issue in regard to the amount of the free rental, whether it was £6181, or £6846, after deducting not only public burdens, but also the annuities, and the interest of the whole provisions, and of the arrears for which decree had been recovered against the present Earl. Before the late Earl's death, the estates of Mar had been put under judicial sequestration, and the judicial factor had raised a multiplepoinding in regard to the disposal of a sum of rents amounting to £6924. 12s. 2d. The present Earl lodged a claim on this fund, as primarily liable to relieve him of the provisions, annuities, &c., for which decree had been recovered against him. The persons entitled to these provisions had also claimed; and any sum which might be drawn to account of these claims would pro tanto diminish the sum contained in the decree, or relieve the Earl to that extent.

In these circumstances, the present Earl raised a reduction of both the bonds granted by Earl John Thomas for £10,000 and £20,000; and concluded that they should either be set aside as in contravention of the entail, or restricted to what was reasonable. He rested this on the ground that they were not reasonable, because the estate was already burdened with provisions granted by Earl John Francis to the extent of £25,000; and the free rental was so much reduced, that there were no means of paying those granted by Earl John Thomas, except by depriving the pursuer for a term of years of any beneficial interest in the estate, which could be adjudged for these debts.

To this it was answered—

1. That each heir was entitled under the entail to execute bonds of provision in favour of younger children; and therefore it was as much in the power of Earl John Thomas to execute those in question, as it was

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competent to Earl John Francis to grant those which had been found binding on the pursuer; and,

2. That whether reference was made to the rental, or to the rank of the defenders, or to the enactments in the above statute, it was impossible for the Court to restrict the bonds to any smaller sums than those for which they were granted.

The Lord Ordinary ordered Cases, and afterwards made avizandum to the Court, explaining his views in the subjoined note.*

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* "NOTE.—It appears to the Lord Ordinary that this case depends, in the first instance, on a question of law, which, though of an arbitrary nature, is not properly a question of discretion; and eventually, in case the first point should be determined in favour of the pursuer, on a question of discretion, which must be decided by the Court. He is of opinion that in considering the question whether the bonds of provision are at all liable to reduction, it is the entail alone which must regulate, and that the Act of Parliament 5th Geo. IV. c. 87. ought to have no influence on any part of the argument; for though that act is referred to, as well as the entail, in the latest of the two bonds, evidently for the general purpose of taking the chance of any advantage it might possibly afford, yet as the act in the 12th section reserves, in the most unqualified terms, all powers already granted by any existing entail, and as it is clear in point of fact that the defenders in this case do not and cannot maintain any enlargement of the power by the statute, the Lord Ordinary thinks that their case must be judged of, on the power reserved by the entail, in the same manner as if it had arisen before the act of the 5th Geo. IV. was passed. The just construction and application of the clause in the entail cannot be affected by a statute which expressly reserves the full force of it, and which was intended for cases where either no power, or a less power than that given, was reserved by the entail.

"The entail gives power to the heirs of tailzie 'to provide their younger children to reasonable provisions.' In this case the last Earl of Mar has exercised the power in all due form, and he was the only person whose act or consent was required, either for making the provisions at all, or for fixing the amount of them in the first instance. The question is, whether his deed is liable to reduction, on the ground that the provisions expressed in it are not reasonable. This is evidently not a simple question of discretion, nor at all the same question which would arise, as in the case of Rothes, if some express condition in the entail had been omitted, or unduly observed, and the Court were called upon, by its own powers of equity, to supply the defect, by supporting the deed to the extent of what they might think reasonable provisions. In the case of Rothes, the Court, after much discussion, found that a consent required by the entail had not been duly obtained, and they then sustained the deed to the extent of provisions modified by themselves. But it is thought that if it had been found that the consent had been duly obtained, the Court would probably not have interfered with the deed actually done, though the provisions exceeded what they afterwards, in the exercise of mere discretion, fixed upon as suitable according to the rental at the death of the granter. Although, therefore, there is no doubt that, in the present case, the terms of the entail imply that if the provisions granted are unreasonable, this is a relevant ground of reduction to some extent; yet, before the Court can be called upon to exercise the discretionary power of determining what would be reasonable, it must be made out clearly by the pursuer that there is such a palpable excess, as to render it the duty of the Court to set aside the legal act of the party to whom the discretionary power was in the first instance committed. But it is possible to determine that a given sum is

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The Court unanimously assoilzied, but allowed no expenses to the defenders.

Lord President.—There is a question of discretion here; but the person entitled to exercise it in the first instance was the heir of entail. It is only in the event of a palpable excess on his part that the discretion of this Court could be let in to modify his provisions; and in the present case the Court are not entitled to interfere.

Defenders' Authority.—Rothes, Jan. 29. 1829, (ante, VII. 339.)

A. Robertson, W. S.—D. Cleghorn, W. S.—Agents.

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excessive, without previously fixing an absolute measure of what would be reasonable, or not excessive.

"This is necessarily an arbitrary question. To resolve it, all circumstances must be considered,—the rental, the existing burdens, the condition of the heir, and the condition of the daughters of such a family. The pursuer rests his argument very much on the rules of the act 5th Geo. IV., as affording a guide in this matter. The Lord Ordinary humbly thinks that those rules ought to have no influence on the question. If they were admitted, the consequence would be, that the defenders would receive no provisions at all, because the provisions made by the former Earl are not paid off, and they amount to, or rather exceed considerably, the whole amount permitted by the statute; and the Lord Ordinary cannot think that when the Court sustained those provisions, amounting to £25,200, as made under this entail, it could be the meaning that the Earl then in possession, having two daughters grown to women's estate, should, in the event, which happened, of his dying before it was possible to pay off these previous provisions, have no power to provide a shilling to these daughters. The pursuer does not maintain this; and it would be the more difficult to maintain it, because, to the extent of £10,000, the bond executed by the Earl after his succession was in implement of an onerous obligation long before undertaken by marriage contract.

"The question then is, Whether the provision of £10,000 to each of the daughters is, on general principles, so plainly unreasonable, that it must be set aside as not warranted by the entail? The gross rental of the estate is agreed upon at £8742, subject to some questions by which it may be increased or diminished to the extent of a few hundred pounds. After all deductions, including annuities, taken simply at their yearly amount, and the interest of former provisions, but without deducting the expense of management, the rental is £6683, which will be increased to the extent of about £194, if it should be found that the annuities ought to be valued. If the provisions of the defenders be sustained, there will be an additional burden thrown on the pursuer to the extent of the interest of £20,000 annually, and his free rental will then amount to about £5600, subject to increase or diminution, according as the points referred to in the notes to the rental may be judged of. But there was also an arrear of £1400 of interest and annuities due at the death of the last Earl.

"The heir in possession is not subject to a personal obligation for payment of the principal of the provisions. But it is strongly urged by him that adjudications may be led, whereby he might be deprived of possession of the estate for a length of time; to which it is answered, that as the bonds of provision afford complete securities, he could easily raise the money on assignations of the bonds.

"In this state of the case, the Lord Ordinary thinks that the question is attended with difficulty. On the one hand, the burden is heavy upon the heir, arising from two sets of provisions coming into operation at one time; and his condition as Earl of Mar must be considered. But, on the other, it would be unjust that the defenders should

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Grahame v. Alison &c.

FRANCIS GRAHAME, Pursuer.—*Buchanan—Hope.*
JOHN ALISON and Others, Defenders.—*More—Cuninghame.*

Reparation—Agent and Client.—Where a law-agent was employed to expede an adjudication at the instance of a creditor of an heir of entail in possession, and in place of obtaining a decree adjudging the lands, took one of the liferent right of the heir, on which charter and sasine were expede, and the title so constituted was found, in competition with another creditor, to be inept—Held that the agent, having followed the usual practice in such cases, was not liable for the debt, but only to repeat the amount of the account paid to him.

Dec. 3. 1830.

1st DIVISION.
Ld. Corehouse.
H.

THIS was a question as to the liability of law-agents, arising out of the decision Graham v. Hunter.[1] Mr. Graham of Morphie, as a creditor of Mr. Charles Gray, the heir in possession of the entailed estate of Carse, alleged that he had employed Mr. Colin Alison, writer, Montrose, to obtain and execute an adjudication of Mr. Gray's right as heir of entail; that Mr. Alison had employed his son John, a writer to the signet; and he, Mr. Brown, writer in Edinburgh, brought an action against them, jointly and severally, for payment of his debt, and repetition of all sums paid by him to them, on the ground that in the above case it had been found that the adjudication was unavailing, and the charter and sasine expede thereon inept, seeing that they embraced only Mr. Gray's liferent, whereas they ought to have included the lands themselves.

It was stated by the pursuer, that, in leading the adjudication, he had had advised and corresponded directly with Mr. John Alison, W. S.; but he also alleged that Mr. Colin Alison was occasionally the medium of communication.

Mr. John Alison admitted that he was directly employed by the pursuer; that he deduced the decree, and had prepared a signature for a Crown charter of confirmation, when ill health obliged him to leave town; and he stated that Mr. Brown then took charge of the business, expede the signature, and prepared the relative charter. He also admitted that he had drawn the scroll of the instrument of sasine, which was engrossed

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be left without proper provisions; and their condition as the daughters of the Earl of Mar must also be taken into consideration. The interest of the provisions, as they stand, taken at four per cent., will only yield an income of £400 to each, and they were both unmarried at their father's death. The question is, Whether such provisions are, in the circumstances of the case, so plainly excessive and unreasonable as to call for reduction. The Lord Ordinary has only further to observe, that when the Court, in the simple exercise of equitable discretion, in the case of Rothes, sustained the bonds to the extent of a provision of £6000 to the daughter, (though she had succeeded to a separate sum of £3000,) and an annuity of £800 to the widow, the heir, who was also an Earl, was left in a much worse condition, even making allowance for his minority, than the pursuer in the present case would be, if the provisions should stand; and if they shall be reduced to any considerable extent, one of the defenders, who is still unmarried, would not possess the means of living with any decent respectability in her proper rank and condition."

[1] Nov. 14. 1828, (ante, VII. 13.)

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by a clerk of his father Mr. Colin Alison, and transmitted to a notary, who took infeftment. Mr. Brown admitted that he was paid £75 for the charter and sasine, part of which was charged as due to Mr. John Alison; and he stated that the payment was made by Mr. Colin Alison, acting for Mr. Grahame, on one of whose estates he was factor; but he pleaded that he was not responsible, as his employment did not commence until the decree had been obtained, and the signature prepared, which were the warrants of the charter; and he concurred with Mr. John Alison in maintaining that the adjudication was in the form and express terms uniformly observed in adjudications of the right and interest of a debtor in possession of an entailed estate; that no man of business was entitled to depart from established forms; and as the decreet of adjudication alone, had it been duly libelled, would have been a good title to the pursuer in the action against Hunter, and was a valid assignation to the maills and duties of the Carse estate, the relative charter and sasine, even if inept, were merely superfluous. Mr. Colin Alison denied employment by the pursuer, and pleaded that he was not responsible, as he had not been professionally employed to lead the adjudication, or procure the charter and sasine.

The Lord Ordinary "found the defenders liable to the pursuer in repetition of the expense of expeding the charter and sasine on the decreet of adjudication mentioned in the pleadings, in so far as it has been paid to them, or to Mr. Colin Alison for behoof of them, or any of them; assoilzied them from all the other conclusions of the action, and found no expenses due."*

Both parties reclaimed.

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* NOTE.—"If the law laid down in Lord Newton's interlocutor of 29th January 1828 had been perfectly settled previous to that interlocutor, there might perhaps have been some ground for the claim of damages raised by the pursuer. But that is not the case, as appears from the judgment of the First Division, where his Lordship's interlocutor was reviewed, and still more from the deliberations of the Court on that occasion. It seems to have been held then that the adjudication itself, independently of the charter and infeftment which followed upon it, was a sufficient title to insist in the reduction brought by the pursuer, in which view the charter and infeftment, at the worst, were only superfluous. But further, till that time, the law with regard to a feudal title of the nature in question was by no means clear. It is certain that a liferent, meaning thereby a usufruct—for example, the courtesy, terce, or a liferent granted in liferent use allenarly—cannot pass to the effect of being feudalized in the person of the disponee or adjudger; in law language, inhæret ossibus of the liferenter. But it is equally certain that the right of an heir in possession under a strict entail (which, though often termed a liferent, is not a usufruct) may be adjudged to that effect; and the question is, what is the proper mode of doing so? Previous to the decision in Sir William Nairne's case in 1810, the practice generally if not universally followed was to adjudge, not the lands themselves, but the interest of the heir in the lands, exactly as the defenders did in the present case. This appears from the form prescribed in the Juridical Styles; and the fact is well known to every person who practised at that period. Lawyers seem to have been apprehensive that if an adjudication of the lands themselves were made real, though limited in endurance and ex-

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LORD GILLIES.—The responsibility of agents would indeed be tremendous, if we were to go all the length to which the pursuer would carry it. There are many deeds of entail which eventually have been found to be ineffectually constructed. It is true, the writer who was employed was told to make the entail strict and effectual in all its parts, and believed he did so, just as the agents here were directed to make this diligence effectual. But what consequences would follow, if agents and their representatives were held liable for every such error, though committed by them under circumstances which show that it was owing to the imperfect state of the law at the time, rather than to any neglect or unskilfulness? Yet that is the plea of the pursuer. The agent here was placed in difficult circumstances; there were various opinions entertained by lawyers as to the steps which it was best and safest for him to adopt; and how can we blame or subject him for following the common course of practice?

LORD CRAIGIE.—The decree of adjudication was a perfectly good title to the pursuer to insist in his former action against General Hunter; but the charter and sasine which followed on it were inept. The question is, whether the agents have been so ignorant and inattentive as to subject them personally. If we adhere to the interlocutor of Lord Corehouse on the main point, we should still distinguish between the case of the different defenders as to the liability for the expense of the charter and sasine. With the exception of Mr. John Alison, I think that all the rest ought to be assoilzied.

LORD PRESIDENT.—I think the interlocutor right. The case of Nairne[1] is too much rested on; it affords no rule for leading the adjudication of the liferent interest of an heir of entail. It is plain that the charter was in terms of the decree of adjudication; but it was absurd to attempt to feudalize a liferent within a liferent. A proper liferent inhæret ossibus of the individual.

LORD GILLIES.—I have much doubt as to the repetition of the account paid to Mr. Brown for expeding the charter and sasine. The decree being obtained, and the signature prepared, before he is employed, his office was merely ministerial in

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tent in the same manner as the heir's fee, it would infer an irritancy, and consequently defeat the whole proceeding. In Sir William Nairne's case, the point raised was—not whether the disposition granted by the heir of entail, and followed by infeftment, was an irritancy—but whether, under the limitations introduced, it was or was not a real right in competition with personal creditors. Since that case, indeed, there has been an understanding that the fee of an entailed estate may be disponed or adjudged, and the right of the disponee or adjudger feudalized without risk, the restrictions of the entail being inserted in his investiture. But it is thought that this has not yet been the subject of express decision; nor, until the judgment of the Court in 1828, has it been found that the heir's right, which is not of the nature of a usufruct, might not be adjudged, and a feudal title so completed, according to the old practice, without including the lands themselves in the adjudication; for, according to feudal principles, there is no right connected with land, except a usufruct, that may not be made real by infeftment, and in that form conveyed to a third party. Taking into view, therefore, the circumstances of this case, namely, the danger of an irritancy on the one hand, and the admitted practice on the other, it can hardly be maintained that Mr. John Alison was to blame in following the course he did in a matter in apicibus juris; but if he was, there was no such culpa lata, or gross professional ignorance, as ought to subject him in damages to the pursuer."

[1] Feb. 15. 1810, (F. C.)

expeding a charter in terms of the signature. What else could he do? His account has been paid, and I cannot find him liable in repetition. No. 71.

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Elder &c. v. Marshall.

Lord Craigie.—Mr. John Alison alone is liable for the expense of the charter and sasine.

Hope for Pursuer.—But Mr. Colin Alison is also liable, being the country agent who employed him.

Lord Gillies.—It is out of the question to lay down that as a general principle of a country agent's liability.

Lord President.—The client knew that his country agent could not transact that business. We cannot subject any one except Mr. John Alison.

The Court therefore altered in so far as to assoilzie all the defenders except John Alison, who was found liable to indemnify the pursuer of the expense of the charter and sasine.

J. J. Fraser, W. S.—J. Brown,—Agents.

William Elder and Others, Pursuers.—*Jameson—Marshall.*
David Marshall, Defender.—*Hope—W. Bell.* No. 72.

Bill of Exchange—Confirmation—Title to Pursue.—1.—A bill having been specially assigned by a testator, and new vouchers of the debt granted by the debtor to the assignee, who died without confirming to the testator, found that his executors confirmed may sue for the debt.—2.—Action sustained for the contents of bills, where the debt was proved scripto beyond the years of prescription, and the drawer's name was not filled up.

Marshall was indebted to the late Miss Ann Granger in a bill for £600, dated the 18th of February 1803, payable one day after date, and a considerable arrear of interest. She died in 1808, and by her will she specially assigned the bill to her nephew, the late John Granger, W. S., whom she named her sole executor. He did not expede a confirmation; but, in 1809, Marshall granted to him two new bills—the one for the principal, and the other for arrears of interest. By a further settlement in 1815, Marshall granted a third bill for £113. 7s. 6d. of additional interest, and wrote a relative holograph letter, admitting the subsistence of part of the debt. Again, in February 1824, in a second holograph letter addressed to Granger, he mentioned a business account then due by him to Granger, as "another debt" owing. At this time no other debt was owing, except the one arising out of Miss Granger's bill. None of these bills were filled up with the name of a drawer. Granger died in December 1828; and William Elder and others, being confirmed his executors, raised an action of payment against Marshall, concluding for the above sums, under certain deductions.

Dec. 3. 1830.

1st Division. Lord Meadowbank. D.

Marshall pleaded in defence—

1. That as Granger had never been confirmed executor to Miss Granger, the original bill of £600 was still in ejus bonis, and therefore any sum due under it was not exigible by his executors; and,

2. That the bills were all prescribed; that the holograph documents did not instruct the existence of the debt, and that these documents

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and the new bills had reference to a proposed arrangement with Granger, which was never completed, as appeared from the circumstance that Granger never had inserted his name as a drawer.

To this it was answered—

1. That as the debt was specially conveyed to Granger, and new and corroborative vouchers had been granted to him by Marshall, a confirmation was not necessary; and,

2. That as the debts pursued for were proved scripto, independently of the bills, there was no room for the plea of prescription; and that the want of the drawer's signature was immaterial, as the accepted bills were in the custody of Granger as creditor.

The Lord Ordinary decerned in terms of the libel, with expenses; and the Court unanimously adhered.

Pursuers' Authorities.—(1.)—1690, c. 26; 3. Erak. 9. 30; Gordon, Jan. 1729, (14384); Lyall, March 11. 1823, (ante, III. 288); Spence, Feb. 20. 1751, (14399); Watson, June 19. 1782, (7009.)—(2.)—Fair, July 11. 1801, (1677); Ogilvie, June 28. 1804, (M. App. to Bill of Exchange, 21); Macdonald's Trustee, June 13. 1817, (F. C.)

Defender's Authority.—Thomson on Bills, p. 680.

J. Hannay, W. S.—Hunter and Whitehead, W. S.—Agents.

No. 73.

J. Lockhart and Sons, Pursuers.—*Hope—A. M'Neill.*

John Wighton, Defender.—*Jameson—J. Paterson.*

Agent and Client.—Circumstances in which a client was found not liable to pay his agent an account of expenses incurred in a process conducted by him in this Court, in respect of these expenses having chiefly arisen from the agent misconducting the cause.

Dec. 3. 1830.

2d Division.
Lord Medwyn.
T.

The late David Wighton having, on the 21st of April 1825, sold some cattle to one Blair, received from Dunlop, a friend of his, a holograph obligation in these terms:—"As I oundertak that John Blar has bowght 5 cattell of yow Daved Wathon, and if John Blar does not pay them, I will pay them may sellf thes day uek." To recover the price of the cattle, (said to be £61,) Wighton employed Grant, a writer in Glasgow, who, on the 3d of May 1825, wrote to John Lockhart, writer in Edinburgh, in these terms:—"Please send me summons at the instance of David Wighton, cattle-dealer near Forfar, against John Dunlop, cattle-dealer in Stewarton, for £61 sterling, 'conform to account and holograph obligation by the defender, herewith produced.' As the matter will likely be settled, you can annex me a note of fees. I am," &c. The obligation by Dunlop was not transmitted along with this letter; and Lockhart immediately, without making any further inquiry of Grant, raised a summons in Wighton's name against Dunlop, simply setting forth, in terms of Grant's letter, that Dunlop was "justly indebted and owing to him the sum of £61 sterling, conform to account and holograph obligation herewith produced and referred to," and concluding for payment. This summons, having been transmitted for execution, was re-

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turned on the 1st of June, accompanied by the obligation founded on, and a letter from Grant, directing it to be called. Before the defences were given in, Dunlop's agent wrote to Lockhart, stating that his client was ready to pay whatever sum Wighton could satisfy him, by a writing under Blair's hand, was the price of the cattle, which he thought was less than £61; and proposed in the mean time that he should not print his defences. It did not appear that any answer was given to this; and accordingly the defences were printed and lodged, to the effect that, as the document founded on constituted merely a cautionary obligation, the action was incompetent without calling the principal. This being obviously hoc statu a good defence, the Lord Ordinary, on the 9th of July, sisted process till a supplementary action should be brought against Blair. Accordingly, in the November following, Lockhart raised a summons against Blair; but, instead of being laid on the sale of cattle to him, it libelled that he was justly indebted to Wighton "the sum of £61, conform to holograph obligation by John Dunlop, cattle-dealer, Stewarton, for the said John Blair." After a debate on this summons, an amendment was allowed; and an amended summons was accordingly prepared in January 1826, concluding against Dunlop alone, on the alleged ground that he had truly purchased the cattle, and had fraudulently granted the obligation in question as cautioner for Blair, and passed it on Wighton as an obligation in his own name as principal—this being the substance of a statement made to Lockhart by Grant in a letter of June preceding. The record was thereafter, on the 3d of February, closed on summons and defences; and on the 5th Lockhart received a letter from Grant, telling him that Dunlop had just left his acceptance for the principal sum, and had said that he would pay the expenses in cash when they were ascertained; and adding, "You will of course lose no time in having this done, and I shall forward you a note of my charges, should you desire it." Lockhart took no steps to have the expenses decerned for and audited, but rendered his own account to Grant in April thereafter. A duplicate was rendered a year afterwards; and, after a further lapse of two years, the pursuers Lockhart and Sons, as in right of Lockhart, raised this action for payment of his account of expenses. David Wighton (and afterwards his brother and representative, the present defender) pleaded that these expenses were almost entirely occasioned by the negligence and ignorance of Lockhart. The Lord Ordinary pronounced this interlocutor:—"In respect that, from incorrect or insufficient information communicated to the cedent of the pursuers by his immediate employer in Glasgow, much unnecessary expense was incurred in prosecuting Dunlop and Blair, which was of no use to the creditor, and that there is no offer to instruct that either the express instructions of David Wighton, or the true facts of the case, justified the form of the action, sustains the defences, assoilzies the defender, and decerns;—finds expenses due."

Lockhart and Sons reclaimed, and contended, that in a question be-

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tween the Edinburgh agent and the client, the latter is necessarily identified with, and must be responsible for, the information given by the country agent; and consequently that the unnecessary procedure being, in the view of the Lord Ordinary, occasioned by incorrect or insufficient information from Grant, Lockhart could not be held responsible for it. But the Court, considering that Lockhart's own conduct exhibited great ignorance and negligence, and that, but for his omission, after the bill for the principal sum had been granted, and a promise obtained to pay the expenses, to follow out the directions of Grant in having the amount of expenses ascertained, payment of these also might probably have been obtained, adhered to the Lord Ordinary's interlocutor.

J. Campbell,—A. P. Henderson,—Agents.

No. 74.

Mrs. G. Brown or Smith and Husband, Suspenders.—*Hope—Shaw.*
Bedwell and Yates, Respondents.—*Keay—Pyper.*

Right in Security—Bankrupt—Act 1696, *c.* 5—*Husband and Wife—Stamp.*—1.—The act 1696, as to heritable securities to cover debts to be contracted, cannot be founded on by the granter of the bond as a defence against payment.—2.—An heritable bond by a wife over her separate estate, though in security of advances to be made to her husband, is effectual.—3.—Powers of sale under a bond for a specified sum, or such part thereof as shall be due on a current account, cannot be exercised without a previous constitution of the amount due, there being no provision for its liquidation in the bond.—4.—A bond containing a personal obligation by one party, and an heritable security by another, is subject only to the single stamp-duty imposed on heritable bonds.

Dec. 3. 1830.

2d Division.
Ld. Fullerton.
F.

Thomas Smith, carrying on business in Glasgow as a grocer under the firm of William Smith and Company, entered into an arrangement with the respondents Bedwell and Yates, merchants in London, whereby they were to supply him with teas and other goods, he granting them security to a certain extent. His wife, the suspender Mrs. Smith, was proprietrix of an heritable subject which had been conveyed to her by her father under an exclusion of her husband's jus mariti, and a declaration that it should not be liable for his debts. On the 10th of May 1820, she joined her husband in a bond granted to Bedwell and Yates, which proceeded on the narrative that they "had agreed to allow William Smith and Company credit for teas and other articles to be furnished by them to us, William Smith and Company, upon a current account to be kept in the books of the said company, in our name, to the amount of £198., on these presents being granted;" and Smith bound himself personally to pay this sum of £198, or such part thereof as might appear to be due in the current account. Mrs. Smith then, with his consent, and by the same deed, conveyed her property to them "in real security and for payment to my said disponees, and their foresaids, of the foresaid principal sum of £198 sterling, or such part or parts thereof as may be due on the current account aforesaid, with the lawful interest thereof when due until pay-

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ment and a fifth part more of said principal sum of liquidate penalty, if incurred; and all expenses to be disbursed by them in levying the said rents, paying the public burdens, or in any other necessary way, in relation to the premises." This bond contained a power of sale, but without, any provision for liquidating the amount of the balance for which the property might be sold; and it was written on the stamp usual for heritable bonds, containing a personal obligation on the granter. In 1827, Bedwell and Yates, having threatened to sell the property in payment of a balance alleged to be due on their account, which was then stated at £293. 4s. 11d., (for £143. 18s. whereof bills had been granted by Smith, but failed to be retired,) Mrs. Smith brought a suspension and interdict on these grounds:—

1. The bond not being for a definite sum due at its date, but to cover debts to be contracted, is null under the act 1696; and the nullity, being ex facie, is pleadable by exception.[1] Nor is it protected by the Bankrupt statute, which refers only to bonds for cash advances—not for furnishings in goods, and which requires that the amount for interest shall be included in one definite sum not exceeding the principal, and three years interest thereon; while here the bond is in security of all the interest which might fall due, till payment.

2. The bond by Mrs. Smith is, in fact, in security of a cautionary obligation come under by her for her husband; and as such obligations by a married woman are null, the heritable security, as accessory thereto, must be so likewise.[2]

3. The stamp chargeable for deeds such as this, under the 55. Geo. III. c. 154, must be the same as that imposed on two separate bonds of the same date, and referable to the same debt, the one heritable, and the other moveable, which includes a deed stamp of £1 in addition to the usual ad valorem stamp on the heritable bond, seeing the personal bond by the husband, and the heritable bond by the wife, are truly separate deeds; and,

4. No debt has been constituted; and no provision being made in the bond for liquidating the amount, it is incompetent to sell till that be done.

To this it was answered—

1. The act 1696 is not pleadable by the party granter of the bond against payment of a just debt, but only in a competition among his creditors.[3] But further, the bond in question is protected by the provision of the Bankrupt statute;[4] and, at any rate, the objection is only pleadable in a reduction.

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[1] 1696, c. 5; 2. Bell, 246. [2] Harvie and Fawell, Feb. 21. 1791, (5980); Lennox and Co. v. Auchinclose, May 19. 1821, (ante, I. 19.); Stair, 1. 4. 16, (note B., Brodie's edit.) [3] Maxwell v. Drummond's Trustees, Jan. 21. 1823, (ante, II. 130,) and July 1. 1825, (ante, V. 137.) [4] 2. Bell, 253.

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2. Deeds by a married woman, conveying her separate heritable estate, whether absolutely or in security, are valid and effectual.[1]

3. The Stamp Acts only impose a single ad valorem duty on heritable bonds, which always contain a personal obligation; and no different or additional duty is any where imposed, in respect of the personal obligation contained in one and the same deed, by another party different from the granter of the heritable security; and,

4. The security was granted with reference to an account-current to be kept by Bedwell and Yates, and for payment of the balance there appearing.[2] It is sufficient, therefore, to show that the balance on this account exceeds the £198; and, at all events, to the extent of the two bills, the amount claimed is liquidated.

The Lord Ordinary pronounced this interlocutor:—"Repels the objection to the stamp; but in respect that the disposition in security contains no provision for liquidating the amount of the debt, in regard to which the power of sale is to be exercised, and that the amount has not been constituted by action, or in any other competent form, in hoc statu suspends the sale, and continues the interdict."

Both parties reclaimed,—Bedwell and Yates in so far as they were prevented from selling hoc statu; and Mrs. Smith in so far as the reasons of suspension were not sustained, and the interdict was not declared perpetual.

The Court refused both reclaiming notes, and adhered.

A. P. Henderson,—Macmillan and Grant, W. S.—Agents.

No. 75.

John Gardner, Pursuer.—*Christison.*
G. O. Gardner, Defender.

Homologation—Deathbed.—Circumstances in which an heir at law who had made up titles under an entail executed by his father on deathbed, was (by a judgment of the Lord Ordinary acquiesced in) held not to be barred by homologation from setting aside the entail.

Dec. 3. 1830. 2d Division. Ld. Moncreiff. H.

In an action of reduction, ex capite lecti, of a deed of entail executed by the father of the pursuer Gardner, who made up titles under the entail, it was pleaded by the defender (a substitute heir) that the pursuer was barred by homologation from insisting in the action. The facts on which this plea was founded, are fully set forth in the following interlocutor of the Lord Ordinary:—"Finds it admitted that the deed of entail, of date the 15th of March 1808, brought under reduction, was executed on deathbed, and was therefore liable to reduction at the instance of the pursuer, as the heir of the previous investitures;—that the said deed was to the prejudice of the pursuer, in so far as it imposed upon him the fetters o

[1] Stair, 1. 4. 16. and 17; Elcis v. Keith, Dec. 1605; Marshall v. Fergusson Dec. 1683, (5990); Somerville v. Paton, Feb. 2. and 3. 1686, (ib.); Ker, June 14 1715, (5991); Menzies, Dec. 8. 1761, (5974); Watson, Dec. 10. 1772, (5976.

[2] Brown v. Storry, June 11. 1790. (14125.)

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a strict entail, whereas he was entitled, as heir at law, to take up the estate by titles in fee-simple; and that the said deed conferred no benefits on the pursuer, whereby he might be induced to accept of the title under it;—finds it admitted, or not denied, that at the time of the death of the testator, the pursuer's father, the said pursuer had only attained the age of 21, and that, during several years preceding, he had been in service in the army, and resident with his regiment in England;—finds it admitted by the pursuer, that having come to Glasgow soon after his father's death, he did subscribe a certain mandate on the back of the said deed of entail, authorizing Mr. Thomas Graham, writer in Glasgow, to record that deed in the Register of Tailzies;—that the said mandate is not holograph of the pursuer, nor tested in terms of the act 1681, and is in the handwriting of the said Thomas Graham, by whom the deed of entail is also written, and who was a trustee under a separate deed of trust executed by the testator;—finds it averred by the pursuer, negatively, that at the time when he so subscribed the said mandate, it was not explained to him by the said Thomas Graham, or by any other person, that he was entitled to challenge the said deed of entail as executed on deathbed, and that he did not know that he had such right;—finds, that though a general denial of these averments is made by the defender, he has not put on the record any averment on his part that Mr. Thomas Graham (he being still alive) did give such information, or that the pursuer was, by any other means, informed of the state of his legal rights;—finds that the said deed of entail was thereafter recorded in virtue of said mandate;—finds that, on the 30th of August 1810, the pursuer took infeftment on the precept of sasine in the said deed of entail, and that he was personally present on that occasion;—finds that, on the said 30th of August 1810, infeftment was also taken on the precept, in a contract of marriage previously entered into by the pursuer with Mrs. Janet Ewing, by which contract, and the instrument of sasine thereon, the said entail was recognised as the pursuer's title in the lands;—finds it averred negatively, and offered to be proved by the pursuer, that the agent who drew the said marriage contract was not aware that the entail was liable to be reduced on the head of deathbed, and further averred that the pursuer was still in ignorance that it was reducible;—finds that the pursuer has possessed the estate since that time on the title so made up by him in 1810, and that, *though it is admitted that he became aware of his rights as heir in* 1817, *no reduction was brought till November* 1828;—finds it admitted that there is no issue of the pursuer's said marriage; and that as no party has appeared entitled to found on the said marriage contract, and as it is not alleged that any other onerous transaction has been entered into on the faith of the acts and deeds of the pursuer, as confirmatory of the said entail, the question between the present parties depends on the effect of gratuitous acts of the pursuer, in regard to his own titles, to bar him, in the circumstances of this case, from still challenging the said deed of entail as having been executed on deathbed;—that it must be pre-

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sumed that when the pursuer gave authority for recording the said entail, he was acquainted with the nature and contents of that deed;—that upon the admitted facts, that the deed was executed on the 15th of March, that the testator died on the 16th of the same month, and that the pursuer came to Glasgow immediately thereafter, there is clear ground for inferring that he was aware, at the date of the mandate, that the testator died within 60 days after the date of the said deed, and also sufficient ground for presuming, in the absence of any offer of proof to the contrary, that he was in the knowledge that the deceased was, on the 15th of March, ill of the disease of which he died on the 16th;—but that the acts and deeds founded on for establishing homologation are not of such a nature as necessarily to infer or presume, as matter of fact, that the pursuer was acquainted with the law of deathbed, or aware of his right to reduce the entail on that ground;—that the law of homologation proceeds on the principle of presumed consent by the party who does the acts, to pass from grounds of challenge known by him to exist, and sciens et prudens to adopt the challengeable deed as his own;—that though in general, where onerous contracts have been entered into, or important rights have been established to third parties, rei interventu following on acts approbatory of particular deeds, the law will presume knowledge of the whole rights of the party, both in fact and law, unless positive deception be proved, the same presumption does not apply to acts done without any onerous consideration, and on which nothing has followed to alter the condition of third parties;—therefore finds that, in the circumstances of the present case, the acts founded on by the defender are not sufficient to infer a deliberate consent by the pursuer to abandon his preferable title as heir at law, so as to establish against him the defence, by personal objection, of homologation of the deathbed deed; repels the defences, and reduces, decerns, and declares in terms of the first conclusion of the libel; finds no expenses due."*

* "NOTE.—The Lord Ordinary thinks this case nice and difficult. On the facts of it, however, it appears to him that the circumstances are such as not only not to raise a presumptio facti that the pursuer was aware of his right, but rather to produce a conviction that he did act sub errore juris; for it is not easily conceivable that, without any motive assigned on this record, he should have voluntarily put himself under the fetters of such an entail, when he had so easy a course for establishing a right in fee-simple; and when it is observed that the defender does not state that either Mr. Thomas Graham, or any one else, explained to the pursuer the right competent to him, and does not even aver that it was in fact known to him, there seems to be no real doubt that he acted in ignorance. Although, therefore, there is no allegation or insinuation of any fraud having been intended or committed, the Lord Ordinary finds himself unable to decide the case on an assumption of knowledge which he fully believes not to have existed. On the law of the case, after examining all the authorities, he has come to the opinion, that in such a case of gratuitous acts, not implying, as matter of fact, any knowledge of the right surrendered, and not leading to any involvement of the rights or interests of third parties, the legal bar of homologation cannot be established where the circumstances do not admit of the assump-

No. 75.

Dec. 3. 1830.
Gardner v. Gardner.

Cameron v. Fraser and Co.

Both parties reclaimed,—the pursuer merely as to the finding in fact printed in italics, which he craved to be varied so as to find that he did institute a reduction in 1817, and was only prevented from proceeding with it by absence and embarrassment of his affairs, and the defender on the merits. Before the cause was put out for advising, the judgment of this Court in the Ascog case[1] was reversed; and the entail in question being liable to the same defect as the Ascog entail, the defender had no interest further to defend, and accordingly no appearance was made for him. The Court thereupon, in respect of no appearance on his part, refused his reclaiming note, varied as craved in that of the pursuer, and quoad ultra adhered.

W. Renny, W. S.—J. Whitehead, S. S. C.—Agents.

No. 76.

James Cameron, Suspender.—*Thomson.*
William Fraser and Co., Charger.—*Stoddart.*

Forgery—Process.—Question whether a bill was forged; and Observed, that a genuine signature, written after the date of a charge, is inadmissible with a view to comparison.

Dec. 4. 1830.

1st Division.
Bill-Chamber.
Ld. Moncreiff.
H.

James Cameron was charged, as the drawer and indorser of a bill for £45. 15s., by Fraser and Company. He presented a bill of suspension on caution, alleging forgery; and producing a genuine signature, for the purpose of comparison, which had been written soon after the date of the charge, he craved a remit to engravers. On answers, the Lord Ordinary refused the bill, with expenses.*

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tion of an actual knowledge of the right, both in fact and law. If there had been issue of the marriage, the case would have been essentially different in respect of the marriage, because, in a question on an onerous contract, it must be held that a man is bound to know his own rights before he transacts with third parties, and is barred by personal exception from pleading ignorance. This was the precise nature of the case of Mackenzie in 1768, (Hailes, p. 252.) But it is impossible to read the opinions delivered in that case without seeing that the distinction is pointedly recognised, and that the judgment would have been different, if it had not been for the consideration that the party defender was the heir of the marriage contract. In the case of Cunningham v. Cunningham, Feb. 20. 1823, affirmed April 15. 1825, (which was not mentioned in the debate,) the decision also essentially depended on onerosity in the ratification, and representation by the party challenging.

"The cases chiefly founded on by the pursuer are—Colquhoun, Dec. 16. 1828; Lord Reay, Nov. 25. 1823, affirmed June 7. 1825; Murray, Jan. 21. 1826; Bayne v. Belshes, 1795, (Bell on Testing of Deeds, p. 205, &c.); July 9. 1822, Leiper v. Cochrane; July 5. 1827, Brodie; August 5. 1778, Carrick v. Carse; July 16. 1733, Stirling v. Lauderdale, (Mor. 2930); Feb. 13. 1810, Munro; Nov. 29. 1825, Johnstone v. Paterson.

"Those relied on by the defender are—Feb. 8. 1706, Bertram; 1768, Mackenzie, (Hailes); July 15. 1760, Anderson; Jan. 13. 1774, Steele v. Steel, (Hailes.)

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[1] Stewart v. Fullerton, Feb. 23. 1827, (ante, VI. 418.)

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* "Note.—The suspender avers forgery; and as caution is found, the Lord Ordinary at first thought it would be his duty to pass the bill, though his impression is strong that

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Cameron v. Fraser and Co.

Falconer.

Cameron reclaimed, and produced subscriptions dated before the charge. The chargers then consented that the bill should be passed.

Suspender's Authorities.—Kinnear, June 17. 1825, (ante, IV. 102); Wilson, Feb. 25. 1826, (ante, IV. 504.)

CARNEGY and SHEPHERD, W. S.—MACMILLAN and GRANT, W. S.—Agents.

No. 77.

COSMO FALCONER, Petitioner.—*Forbes.*

Mortification—Trust.—On the failure of the trustees under a mortification, the Court appointed a kirk-session factors to execute the trust,—refusing, however, specially to find them entitled to make an allowance to their clerk for management, and leaving them to act in that, as in other matters, according to the rules of law.

Dec. 4. 1830.

2D DIVISION.

By the last will of Dugald Campbell, sometime of London, executed in the year 1718, there was left, inter alia, a certain sum for the poor of the family of Inveraw; and three individuals were nominated trustees, with power to settle the fund perpetually by Act of Parliament, or otherwise. These gentlemen died without taking steps for this purpose; but it appeared that £300 of the fund in question had been lent to the late Mr. Campbell of Silvercraigs, and so came into the hands of the petitioner Mr. Falconer, as trustee for Campbell's creditors, under a deed executed by him. Falconer, for the purpose of being exonered, raised a multiplepoinding, in which a great many claims were given in for alleged relations of the Inveraw family. The Lord Ordinary suggested that the best mode of proceeding would be to apply to the Court for the nomination of trustees to execute the will, who might be preferred to the fund, and distribute it, or manage it out of Court. Falconer accordingly presented this petition, praying for the appointment, as trustees, of the kirk-session of Ardchattan, in which parish Inveraw is situated,—they having agreed to undertake the trust, on condition of a reasonable sum being allowed to the clerk for his trouble in the management. The

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the subscriptions are genuine. But, on reflection, he thinks that it would be unjust to involve the respondent in the proceedings necessarily following on a passed bill, without some better and more probable grounds laid for the allegation of forgery. The writing produced by the complainer as his genuine writing is a paper made for the purpose of comparison, not a previously existing writ; and yet, so far as the Lord Ordinary can judge, after carefully examining all the subscriptions with strong glasses, the subscriptions appear to him (allowing for difference of ink) to be the work of the same hand. The complainer offers no other proof in his bill; but, at the bar, he proposed a remit to engravers. This has been frequently done by the Court before passing a bill. But, in the present case, besides a doubt he feels as to the powers of a Lord Ordinary, he thinks that the writ exhibited by the complainer is not such a writing as could fairly be sent to engravers, except of consent of the respondent. He therefore saw no option but to pass or refuse the bill; and the respondent insisting for a refusal, he has found himself bound to decide according to the opinion he entertains of the grounds shown in support of the reason of suspension; but as the Court may see cause to deal otherwise with the cause, he has allowed ten days for reclaiming.

Court refused to appoint trustees, but nominated the kirk-session factors to execute the will, declining to find them specially entitled to make an allowance to the clerk, but leaving them to act, in regard to that and other matters, according to the ordinary powers of factors.

J. A. CAMPBELL, W. S. Agent.

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Falconer.

M'Laine v. M'Gillivray&c.

Hamilton &c. v. Murray & Co.

MURDOCH M'LAINE, Raiser.—*Hope—W. Bell.*
UNA M'GILLIVRAY or M'KINNON &c., Claimants.—*Graham Bell.*

No. 78.

Multiplepoinding.—In a process of multiplepoinding raised in name of M'Laine of Lochbuy, the Lord Ordinary having appointed him to consign the fund admitted to be in his hands, "upon a receipt to be taken payable to the party or parties who may be preferred thereto in the course of this process," M'Laine reclaimed, on the ground that the parties claiming were not in titulo to discharge him. The Court, while they held that all objections to the discharge which might be offered to him were open as against decree of preference going out, inserted a special reservation to that effect in their interlocutor refusing his reclaiming note.

Dec. 4. 1830.

2D DIVISION.
Ld. Fullerton.
R.

MACLEAN and GIFFEN, W. S.—J. B. FERRIE, W. S.—Agents.

MATTHEW HAMILTON and WILLIAM CLUNIS, Advocators.—*Jameson.*
JAMES MURRAY and COMPANY, Respondents.—*Monteith—Hope.*

No. 79.

Process—Citation—Expenses.—1.—Action dismissed in respect the execution of citation was dated prior to the summons, although not pleaded by the party, who objected to the citation on a separate ground.—2.—No expenses allowed to either party.

JAMES MURRAY and COMPANY raised an action before the Magistrates of Glasgow against Hamilton and Clunis. The defenders pleaded that the defender William Clunis had not been legally summoned, either personally or at his dwelling-place, the service copy having, as appeared from the execution, been delivered to a servant "within the place of business in Glasgow of the said Clunis;" whereas he had no place of business in Glasgow, and in fact the copy had been left in the counting-room of the other defender Hamilton. The Magistrates decerned against the defenders, who brought an advocation, in which the Lord Ordinary remitted simpliciter. The advocators reclaimed. During the discussion of the regularity of the citation, the Court examined the principal execution of citation;* and it having been observed that it bore a date anterior to the summons, and was therefore without a warrant,

Dec. 7. 1830.

1ST DIVISION.
Lord Meadowbank.
D.

* LORD GILLIES took occasion to animadvert strongly on the frequent omission to print the *dates* of those documentary productions which are appended to reclaiming notes. His Lordship complained of this as a grievance for which an effectual remedy must be provided by the Court, unless agents removed it of their own accord.

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the Court, "in respect the citation and execution thereof are altogether irregular, altered, advocated, and dismissed the action;" but allowed no expenses to either party.

Trotter &c. v. Farnie &c.

T. Megget, W. S.—J. Pattison, W. S.—Agents.

No. 80.

W. Trotter and Others, Complainers.—*Ld. Adv. Jeffrey*—Neaves.*
J. Farnie &c., Respondents.—*Sol.-Gen. Cockburn*—Rutherfurd.*

Nuisance—Interdict—Process—Bill-Chamber.—1.—A bill of suspension being passed to try whether a whale-blubber boiling establishment, about to be set agoing in the neighbourhood of a sea-port, was a nuisance, the Court at the same time granted interim interdict de plano, although no operations had commenced, so as to show, by actual experience, whether it really was a nuisance in the situation proposed.—2.—A bill of suspension and interdict, presented during vacation, having been passed, but the interdict refused, a new bill held competent to the next succeeding Ordinary, although not presented.

Dec. 7. 1830.

2d Division. Bill-Chamber. Ld. Cringletie.

In the course of last vacation, a bill of suspension and interdict was presented by Trotter and others, proprietors of houses in Burntisland, against Farnie and others, partners of the Burntisland Whale Fishery Company, to have them interdicted from boiling whale blubber in certain premises recently erected by them on the shore at Burntisland, in the vicinity of their residences, but in which premises no boiling had as yet commenced. This bill was passed, but the interdict refused; whereupon Trotter &c. presented a new bill, (dropping the first,) but not to the next succeeding Lord Ordinary. On this second bill interim interdict was granted by the Lord Ordinary, and the bill, with answers, reported to the Court.

It was admitted that the bill should be passed to try the question of nuisance; but, in regard to the continuance of the interdict, Farnie &c. pleaded—

1. The first bill, so far as regarded the interdict, was a refused bill; and consequently, under the 12th section of A. S. 11th July 1828, any appeal against such refusal by a second bill ought to have been made to the next succeeding Ordinary; and this not having been done, the present bill, so far as regards the interdict, is incompetent.

2. On the merits—Whether a whale-boiling establishment, or any other disagreeable manufactory, be a nuisance, depends entirely on its locality; as the very same thing which will constitute a nuisance in one neighbourhoood, may not be liable to be abated as such in another. It cannot therefore be absolutely assumed that such an establishment must, in all situations and circumstances, prove a nuisance; and so, although in the case of Dowie v. Oliphant,[1] such a manufactory was found to be a nui-

* His Lordship and Mr. Cockburn this day took their seats within the bar, on their respective appointments as His Majesty's Advocate and Solicitor-General.

[1] Dec. 11. 1813, (F. C.)

sance in one part of Kirkaldy, it was (on the suggestion of the Lord Ordinary) removed, without question, to a situation on the shore of the same place, similar to that occupied by the respondents' premises. Then, in this view, it is impossible to predicate beforehand that the respondents' manufactory will be injurious to the neighbourhood; and in order that the question may be fairly tried, a prospective interdict ought not to be granted, as the effect of this will be to preclude any proof as to its actual effects being led before the Jury, who will consequently decide on vague general notions of the annoyance of such an establishment, without reference to its peculiar situation. Indeed, it is incompetent in any case to have an issue, whether such and such a thing, if established, will be a nuisance;[1] and the interdict is the less necessary here, as the respondents have this season only a single fish, the boiling of which would not occupy above six or seven hours, and as a great many of the neighbouring inhabitants have, by certificates produced, declared their conviction that it will be no nuisance, and will otherwise be most advantageous to the place.

To this it was answered—

1. The first bill is dropped, and this is a new process.

2. The case of Dowie fixes the general point, that, by the law of Scotland, a whale-boiling establishment is a nuisance. The nature and character of it are sufficiently known without further experiment; and the neighbouring proprietors are not bound to submit for a day to the injury arising from what the law declares to be a nuisance. The circumstance, too, of the respondents having only one fish prevents any hardship which might otherwise have been sustained by them, while, if allowed to boil it, they would seize a favourable day when the wind would carry the effluvia away from the houses; and the case would thus go to the Jury with evidence unduly favourable to themselves, and not representing the degree of nuisance, such as in general it would prove.

At the first advising, the Judges, after overruling the objection in form, delivered the following opinions:—

Lord Cringletie.—Every nuisance depends on locality and degree. Many would be obvious to common sense, in which case interdict would be granted at once. Now boiling of blubber may be a nuisance, and so it was found in the case of Dowie. Since that decision, however, all manufactures have increased to a great extent, and great improvements been made in the modes of manufacturing, to correct what would be nuisances. In the case of Dowie, the manufactory was in the middle of the town, but was afterwards allowed to be removed to the seashore; and in the present case the situation is similar, where in general the effluvia will be blown towards the sea. But it may be so constructed as not to be at all a nuisance, and many of the inhabitants do not object to it. How, then, can we at once say here, that it cannot be so constructed as not to be a nuisance? That

[1] Young v. Bowie, Nov. 24. 1824, (ante, IV. 307); Scott v. Leith Commissioners of Police, May 29. 1830, (ante, VIII. 845.)

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is my difficulty, particularly when we see so many certificates in favour of it. I would not therefore prevent the experiment necessary to ascertain whether it be really a nuisance or not.

Lord Glenlee.—It is settled law that boiling whale blubber in the neighbourhood of a town is a nuisance, and it seems to me to stand this way:—If these people had specified such precautions as rendered it clear that there would be no nuisance, we might have refused the interdict. That was the case of Scott, and on that ground the interdict was there refused hoc statu till the nuisance was created, there being a disclaimer of an intention to do what was alleged would be a nuisance. But, in the answers here, there is no specification of the mode of boiling, or that the respondents will render it impossible that any injury should result. If they would do so, we might allow them to boil; but in the mean time the law being, that boiling blubber in a town is a nuisance, they must take it out of the general rule, or an interdict must be granted.

Lord Justice-Clerk.—I feel great difficulty from the case of Dowie, as it is there decided that boiling blubber in the situation there attempted is a nuisance. But then there is great difference of averment as to the local situation here. So far as we see, it appears the best fitted for such manufactures, and it is alleged that there are other nuisances in the immediate neighbourhood; and as every thing depends on local situation, and the vicinity of other nuisances, I feel the greatest difficulty in consenting to preclude the possibility of seeing how the fact is; for, if the interdict be continued, the case must be wholly tried upon hypothetical guesses as to what the result will be; whereas, on the other hand, if the respondents were allowed to proceed, one day's operations would enable persons to give more satisfactory evidence than 500 hypothetical opinions. I therefore incline to refuse the interdict under a qualification similar to that adopted in Scott's case, viz. that the complainers should have liberty to apply for an interdict de plano to the Judge Ordinary, or to this Court, if it really prove a nuisance. In regard to the case of Dowie, we see that the manufactory was afterwards, on the recommendation of the Lord Ordinary, put down near the harbour, and that it was not objected to in that situation, which is similar to that of the premises here; and therefore, unless we had complete evidence that the situation here would be as bad as that in Dowie's case, I would hesitate to interdict.

Lord Glenlee.—If the respondents will specify the manner in which they mean to remove the annoying consequences of boiling, and show that this could be effected, I would not object to their going on.

In consequence of this suggestion, Farnie &c. were allowed to give in a minute, "stating in detail in what manner they propose carrying on the operation of boiling whale-blubber, and what plan they mean to adopt, by which a nuisance may not be created by them." A minute was accordingly given in, specifying certain contrivances and improvements for preventing or lessening the escape or dispersion of the effluvia, to which it is unnecessary particularly to advert. Answers were given in, disputing the efficacy of the alleged improvements; and, on the cause being again put out, the following opinions were delivered:—

Lord Justice-Clerk.—Seeing that it has been positively decided by the Court, in the case of Dowie, that boiling whale blubber is a nuisance, I am now

satisfied that we cannot recal this interlocutor, notwithstanding the disadvantage of a trial without experience. No. 80.

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Lord Glenlee.—I am entirely of that opinion.

Lord Cringletie.—Had the facts stated in the minute been admitted, it might have been right to refuse the interdict hoc statu; but as they are disputed, with the case of Dowie before us, I do not think that we can do so.

Lord Meadowbank.—In obedience to that judgment, but to that only, I concur in the continuing of the interdict.

The Court accordingly passed the bill, and continued the interdict. Leave was subsequently given to appeal against this judgment.

J. Leves, W. S.—A. P. Henderson,—Agents.

W. B. K. Lawrie, Pursuer.—*Ld. Adv. Jeffrey—Thomson—Cowan.* No. 81.
J. Donald and G. C. Jones, Defenders.—*Greenshields—A. Bell.*

Entail—Prescription—Confusion—Expenses—Appeal.—1.—The proprietor of two estates having entailed them with destinations, which, in a certain event, might send them to a different series of heirs—Held that, in a question inter hæredes, the entailer's debts must be allocated rateably on the two estates, according to their respective value.—2.—An obligation on heirs to purge diligences done against the estate does not lay the burden of debts on the heirs, as contradistinguished from the lands.—3.—An heir in possession having paid and taken assignations to the entailer's debts, and vested them in a trustee, held to have kept them up, and that they were not extinguished confusione.—4.—Circumstances constituting such non valentia agere as to prevent the currency of prescription.—5.—A judgment by the Court, on the primary conclusion of a summons, having been pronounced without any mention of expenses, when this, by the practice of the Court, precluded a demand for them afterwards—Held that a subsequent interlocutor, awarding all expenses 'competent' to be awarded, did not include those prior to this judgment.—6.—The intervention of an appeal, in which the judgment of this Court is affirmed without mention of expenses, leaves the question regarding them just as if there had been no appeal;—and,—7.—Incompetent for this Court to award the expenses of an appeal not awarded by the House of Lords.

Dec. 7. 1830.

2d Division. Lord Glenlee.

The Rev. William Lawrie, proprietor of the lands of Redcastle and Bargattan, executed, in the years 1727 and 1733 respectively, deeds of entail of these two estates. The destinations were the same in both deeds down to the tenth substitution, at which certain heirs then called to the succession of Redcastle were omitted in the entail of Bargattan, so that, in a certain event, the substitutions as to the latter would come to an end, while there were still heirs of entail entitled, as such, to succeed to the former. In both deeds the entailer reserved power "to burden the said lands, or heirs of tailzie succeeding therein," with such legacies, debts, or sums of money as he should appoint; and it was declared in common form, that in the event of diligence being used against the lands for debts already contracted, or to be contracted, the heirs of tailzie should be bound to purge them three years before the expiry of the legal reversion thereof, or within six months after their succession, if there were not that time then to run, otherwise to incur an irritancy. The entailer died in 1742, leaving legacies and debts to the amount of upwards of £1800, the deed having the legacies proceeding on a narrative of his reserved powers. He

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was succeeded by his nephew James Lawrie, the institute, on whose death in 1757, the succession opened to his sister Mrs. Sloan Lawrie, whose husband, Andrew Sloan Lawrie, paid the legacies and debts, and took assignations thereto, conveying the same to a trustee. In 1790, Mrs. Sloan Lawrie died, having previously, in 1766, propelled the fee of the entailed estates to her son, Walter Sloan Lawrie, who, on the death of his father in 1785, succeeded, inter alia, to the entailer's debts, to which his father had taken assignations. In 1799, Walter Sloan Lawrie presented an application for the sale of the farm of Edgarton, part of the estate of Bargattan, for the purpose of redeeming the land-tax of both estates; and under it he had this farm exposed, and bought in by a trustee, for himself, at the price of £1690, whereof £383 was paid into Exchequer for the redemption of the land-tax of both properties. In 1800, the trustee, by whom the farm had been purchased, presented a petition to the Court, with reference to the application of the balance of the price, which, it was proposed, should go to the extinction of the debts of the entailer, as kept up by Mr. Sloan Lawrie's father. The Court allowed the petition to be seen by the next heir of entail (then abroad) and all concerned, and ordered intimation in the minute-book and Edinburgh Gazette. No appearance was made, except by the sisters of Mr. Sloan Lawrie, who were not called to the succession of Bargattan; and, on the report of an accountant, the Court found that the entailer's debts, to the amount of £1323, were subsisting debts, and might be made burdens on the entailed estate; and thereupon the Court allowed the balance of the price, after deduction of the redemption money, and the expenses of the proceedings, to be applied to the extinction of these debts in their order, whereby the amount was more than exhausted. In the mean while, Walter Sloan Lawrie died, and was succeeded by his cousin, William Kennedy Lawrie, who was the last substitute under the Bargattan entail, and who, after making up titles as heir of entail in both estates, raised an action of reduction against Misses Lawrie, sisters and representatives of Walter Sloan Lawrie, and who are now represented by the present defenders, Donald and Jones, for setting aside the proceedings and sale under the Land-Tax Acts. The grounds were fraud &c. on the part of Walter Sloan Lawrie, and that it was incompetent to sell part of one entailed estate for the redemption of the land-tax of another, of which the destination was different. In this action the Court, on the 31st of January 1806, reduced in terms of the libel, under reservation to the defenders of all claims of relief competent to them, and to the pursuer his objections thereto, and remitted to the Lord Ordinary to proceed accordingly,—the interlocutor being silent as to expenses. An appeal was taken against it by the defenders, during the dependence of which Mr. Kennedy Lawrie died, having conveyed the estate of Bargattan in fee-simple to trustees for behoof of the present pursuer. The cause did not come out for judgment in the House of Lords till 1814, when the interlocutors of this

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Court were affirmed, reserving for the consideration of the Court any new objections to the title of the late Mr. Kennedy Lawrie and his trustees.[1] In the judgment of the House, nothing was said as to expenses. When the cause returned to this Court, certain objections to the title were stated and repelled; and thereafter the pursuer raised a supplementary summons, concluding against the defenders for decree of removal from the lands of Edgarton, and for an accounting as to the rents drawn by them since the sale, there being in the original summons merely a general conclusion for £500 of damages. This summons having been conjoined with the previous action, the Court, with reference to the pleas there maintained, found that the pursuer was entitled to the rents, with interest, from the death of Walter Sloan Lawrie in 1801, and to the expenses of process, "so far as the same are competent to be found due," with exception as to certain points on which the defenders had been successful; and also found, as to the claims of the defenders to be allowed retention out of the rents to the extent of the entailer's debts paid by their predecessor, "that the proceedings in the sale are to be considered as noways affecting the interest of parties."[2]

Some further procedure took place as to the amount of the rent of Edgarton, to which it is unnecessary to advert; and thereafter the cause went back to the Lord Ordinary, to hear parties on their several claims. Of these, the only one which falls now to be noticed is that advanced by the defenders, to retain out of the rents of Edgarton, drawn by them, the amount of the entailer's debts, said to have been kept up against the estate by Andrew Sloan Lawrie, the husband of the entailer's niece, and the right to which had been transmitted to Walter Sloan Lawrie, and was now vested in the defenders as his representatives.

To this claim it was objected by the pursuer—

1. The terms of the entail import that the estates were not to be burdened with the entailer's debts, but only the heirs; so that no heir could keep up these debts against the estates, as he only implemented obligations incumbent on himself by discharging them.

2. The debts were extinguished confusione in the person of Walter Sloan Lawrie; for, though vested in trustees, the beneficial interest was still in him, who, as heir of entail in possession, was liable in the obligation.

3. If not extinguished confusione, they must be cut off by prescription. The entailer died in 1742, and there was no proper non valentia after his death. At all events, the interests falling due during the lifetime of the institute are undoubtedly prescribed; and as to the principal sums, any non valentia ceased in 1766, when Mrs. Sloan Lawrie propelled the estate to her son, and made him the debtor; and subsequent to that there was no interruption, for the null proceedings as to the sale could not have the effect of stopping the currency of prescription.

4. At all events, the debts must be allocated rateably on the two estates, according to their respective values.

[1] 2. Dow, 556. [2] June 1. 1825, (antc, IV. 56.)

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Further, the pursuer, besides objecting as above to the defenders' claims, demanded the whole expenses in the parts of the litigations in which he had succeeded, including those prior to the appeal, and of the appeal itself, on the ground that the interlocutor of the 14th of November 1823 found him entitled to all expenses which it was 'competent' to award him; and that it was 'competent' to award him these expenses.

The defenders answered—

1. The terms of the entail, which merely impose an obligation on the heirs to prevent the estates being carried away by diligence, cannot affect questions of relief inter hæredes, in regard to the payment of debts which were necessarily burdens on the estate.

2. An heir of entail can always keep up the debts burdening the entailed estate, by taking an assignation thereto; and this was accordingly done in the present case by the assignation to the heir, and the conveyance to a trustee.

3. There was at no time room for prescription, as, from the date of the entailer's death, there almost constantly existed a non valentia agere cum effectu. Thus, while Mrs. Sloan Lawrie possessed the estate, her husband could not sue her cum effectu; and after her death, and that of her husband, the same person was in right of the estate, and of the debts. Then the proceedings in 1801, even if they be not held to have interrupted prescription, necessarily induced a non valentia, the debts having, in the mean while, been paid out of the price of the farm.

4. A creditor might have attached part of either of the estates, and in like manner the heir of entail in possession of both was entitled to sell part of either, to clear off the whole debts of the entailer; and,

5. As to the claim for expenses—That for the expenses of the appeal itself is undoubtedly incompetent, unless perhaps in the solitary case of an action of damages, and even there it is very doubtful; and although it may not be absolutely incompetent to award expenses in this Court prior to appeal, when the judgment of the House of Lords is silent on that matter, it is so here, because the interlocutor of this Court appealed from was silent as to expenses; and, according to the then practice, it would have been incompetent afterwards to have awarded them, had there been no appeal; and the interlocutor being affirmed leaves matters just as they would have been, had it been acquiesced in.

The Court pronounced this interlocutor:—"Find that, under the conception of the entails of Redcastle and Bargattan, the debts of the entailer might be effectually kept up against the future heirs of entail by assignation in favour of such heir in possession as might have paid the same;—that in fact these debts were effectually kept up by assignation;—that, in the circumstances of the case, the plea of confusio debit et crediti is not applicable;—that the plea of prescription is also inapplicable to the claim for the entailer's debts, with the exception of the claim of interest for the period of fifteen years prior to the succession of Mar-

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garet Lawrie in the year 1757; and therefore sustain the claim for the entailer's debts, with the exception of the arrears of interest as at Whitsunday 1757, as to which repel the defender's claim;—find that the proprietors of Redcastle and Bargattan are liable pro rata of the respective values of these estates, and that the pursuer is only bound to pay his proportion effeiring to the estate of Bargattan;—find that the expenses of litigation in this Court, prior to the appeal of the cause to the House of Lords, and the expenses of said appeal, are not due, and repel the claim for the same;—but find the pursuer entitled to the expenses in the litigation on the points remitted by the judgment of the House of Lords, awarded by interlocutor of this Court, November 14. 1823;—and, with these explanations, approve of the Auditor's report of June 20. 1828, and modify the pursuer's expenses to £237. 17s., and the expenses attending the sale of Edgarton, and redemption of the land-tax claimed by the defenders, to £5, as taxed by the Auditor;—find each party liable equally in payment of the expenses of process since the 14th of November 1823, in so far as they have been respectively successful; and remit to the Auditor to tax the accounts when given in, and report; and, quoad ultra, remit to the Lord Ordinary to adjust the mutual claims of parties in their condescendences under these findings and former interlocutors of Court, and under the reports of the accountant and of the Auditor; and to do further therein as his Lordship shall see cause."

Lord Glenlee.—It rather appeared to me that there was no serious allegation by the pursuer that Mrs. Sloan Lawrie was the general representative of, or had incurred a passive title to the entailer. If she had, the case might have been different; but assuming her to have been only heir of entail, it appears pretty plain that the doctrine of confusion does not apply. As to prescription, if it is to be held affected by the proceedings in 1801, there is only one debt which could come under it. Now, by these proceedings, a document was taken on the debts, and a claim made in the proper way; and therefore 1801 is the period up to which prescription ran, and none has run since. I certainly cannot think that the defenders mean to go so far as to say that it was impossible for Andrew Sloan Lawrie to bring an action against his wife to have his rights ascertained; but it is enough to say there was a non valentia agere cum effectu, which was the case, as he could get nothing by it, if she did not represent, except as heir of entail. But though there was a non valentia as to his wife, was there not a valentia as against others in regard to some of the debt here in question, viz. the interests prior to her accession? An heir of entail who succeeds, and finds that the interest of debts has not been paid by the former heir, has an immediate claim of relief against his representatives; and therefore such a claim for interest may prescribe. Here it has been lost; and there is no pretence for claiming the interest for the fifteen years of James's incumbency; for it began to run in 1757, and so was cut off even before 1801. With respect to the division between the two estates, in a question of relief, the debts must be divided pro rata. There is nothing imposing this particular burden on the one or the other, arising from the general words in the entail; and the obligation being divisible, it must be divided pro rata.

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Lord Cringletie.—I am satisfied that the objection on the clause of the entail is not good, and that it does not cut off relief. It does not say that the heir is to pay the debts, but only that he is to prevent the lands being carried off by adjudication, if diligence was done; and therefore, if not prescribed, they may be kept up against the estate. On one point, however, I have some doubt. Post tantum temporis, we cannot know whether Mrs. Sloan Lawrie did not represent the entailer. On the whole, I am inclined to think the debts were lost before 1801; but, besides, I do not think that the informal proceedings now set aside could interrupt prescription.

Lord Meadowbank.—I agree generally with Lord Glenlee.

Lord Justice-Clerk.—Nothing has hitherto taken place in the cause that can preclude this question. All is entire and open. The result of my opinion is, as has been stated by Lord Glenlee, that confusion does not apply; and it is also clear, taking it for granted that the debts were paid, and regular assignations taken, that they are not cut off by prescription. Then how are they to be liquidated? I am satisfied the clause in the entail did not preclude the heirs from their relief; for if that had been meant, it would have been provided for clearly, as is done in many other entails. But there is no indication of this in the entail, and the heir is only bound to purge when adjudication is led. Thinking, therefore, that the debts could be kept up, and have been kept up, and there being a fund of rents, not the proceeds of the sale, I am of opinion that that is the proper fund for clearing not one but both estates, as the debts must affect both estates pro rata, according to their respective value. As to the interests, there is a great deal in the observation of Lord Glenlee, and I think that his Lordship's conclusion as to the fifteen years interest is correct.

Lord Meadowbank.—I agree. The only point that occurred to me was, how far, in a claim of equitable retention, we can allow the whole of the debts to be paid out of the rents payable to the last heir, instead of dividing it among all the heirs since the entailer, and laying the burden on each, proportioned to the years of his possession.

J. Dunlop, W. S.—Vans Hathorn, W. S.—Agents.

Single Bills.

Hopkirk v. Shotts Iron Company.

Process—Reclaiming Note.—Incompetent for parties by consent to dispense with the rules prescribed by the statute as to reclaiming notes.

Dec. 8. 1830. 2d Division.

The Lord Ordinary having in this case, after the record was made up, pronounced an interlocutory judgment which it was wished to keep open till the whole cause should be decided by his Lordship, and brought into the Inner House, both parties, by a minute, agreed to dispense with the record being printed and appended to the reclaiming note to be presented against it by the party dissatisfied. A note, without the record, was accordingly presented; but, at moving it, the Lord Justice-Clerk called the attention of the Court to this attempt to dispense with the provisions of the Act of Parliament; and the Court concurring in holding that parties could not dispense with any thing required by the statute, refused to write on the note in its present shape.

DAVID KINNIBURGH, Advocator.—*Macallan.*
ADAM DICKSON, Respondent.—*W. Bell.*

No. 82.

Dec. 8. 1830.
Kinniburgh v. Dickson.

Restitution.—A party having assumed the charge of a pocket-book belonging to a person who had fallen into a canal, and having delivered it to a party in whose service they both were—Held that he was not relieved thereby from the obligation to make restitution.

Dec. 8. 1830.
2D DIVISION.
Lord Medwyn.

THE advocator Kinniburgh was master of a passage-boat on the Union Canal, in the service of a company of which Mr. Strachan at Port Hopetoun was manager. One night, as he was about to leave lock No. 16 with his boat for Edinburgh, the respondent Dickson, a clerk or apprentice also in the service of Mr. Strachan, attempting to come on board, fell into the canal, and, on being taken out, was put to bed in an adjoining inn. His clothes having been carried into the kitchen to be dried, the landlady took from his coat a pocket-book containing £13 and some odd shillings. This she gave to Kinniburgh, who carried it with him to Edinburgh, and deposited it with Mr. Strachan,—Dickson being, as he alleged, in a state of intoxication, and he being unwilling to leave the money in the custody of strangers. He also averred (though of this there was no proof) that the money in question consisted of sums collected by Dickson in the employment of Mr. Strachan. Dickson thereupon presented a petition to the Sheriff of Edinburgh, praying to have Kinniburgh ordained to deliver up the pocket-book and its contents; or failing this, to have him found liable in damages. The Sheriff having ordained Kinniburgh to deliver up the book and its contents accordingly, reserving all relief competent to him, and, on his failure, having decerned against him for the value, with expenses, he brought an advocation, in which the Lord Ordinary pronounced this interlocutor:—"Finds that the case appears to rest upon the allegations and admissions of the parties, no proof being offered on either side;—that it appears, on these allegations and admissions, that the advocator, at the time when he took the pocket-book and money in question, did so with intent to deliver the same to Mr. Strachan, which it was legal for him to do in the circumstances, and finds that he did deliver the same accordingly;—that, in these circumstances, it is not competent for the

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Single Bills.

M'KIRDY v. GLASS.

Jurisdiction—Stat. 1. *Wm. IV. c.* 69.—*Admiralty.*—A bill of advocation and answers in the Admiralty Court ordered to be transmitted to the Lord Ordinary on the Bills.

Dec. 8. 1830.
2D DIVISION.

A bill of advocation against a judgment of the Water Bailie of Glasgow in a maritime cause having been presented to the Court of Admiralty, and answers having been put in immediately upon the abolition of the Court, so that no judgment was pronounced; and the advocator having refused to concur in a transmission of the bill and answers to this Court, the respondent applied to the Lord Ordinary on the Bills, who reported the application—The Court directed the bill and answers to be transmitted, and thereafter to be advised by the Lord Ordinary.

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respondent, instead of demanding the said articles from Mr. Strachan, who, so far as appears, would not have refused to deliver them, if he had been asked to do so by the respondent, to come against the advocator; therefore advocates the cause, assoilzies the advocator, and decerns; finds the advocator entitled to expenses."

On a reclaiming note by Dickson, however, the Court altered, and affirmed the interlocutor of the Sheriff.

D. Gray, S. S. C.—J. Gray, W. S.—Agents.

No. 83.

CHARLES HUNTER, Advocator.—*Skene—A. Murray.*
LORD KINNAIRD'S TRUSTEE, Respondent.—*Murray—Jameson.*

Oath on Reference.—It being admitted, on a reference to oath of resting owing, that certain balances of rent were unpaid, but alleged that they had been extinguished by an agreement to allow counter claims; and it appearing from the oath that no positive agreement had been made, but merely that the tenant understood that it had been so agreed—The tenant found liable for the balance claimed, reserving to him his counter claims.

Dec. 9. 1830.

1st Division. Lord Newton. D.

LORD KINNAIRD granted a 19 years lease, from 1802, to Mr. Charles Hunter of Glencarse; and, after the expiry of the tack, his Lordship's trustee raised an action for payment of an outstanding balance consisting of rents, and certain annual per-centages on a sum expended by his Lordship in improvements at the beginning of the tack. An arrear was alleged to be due on every year of the tack from 1806 to 1821 inclusive. With regard to the two last twelvemonths, Hunter did not resist the trustee's claim; but, for the year 1819 and previous years, he denied that any thing remained due, alleging, that though he never paid the full rent in money, he had counter claims which were allowed by his Lordship and factor. He produced consecutive discharges in full for five years prior to 1820, and each discharge bore to be 'for the balance' of the year's rent. The Court therefore assoilzied as to all arrears prior to the crop 1820, but thereafter allowed a reference of the whole cause to the defender's oath.[1]

Mr. Hunter, in his deposition, admitted the existence of a balance on every year's rent from 1806 to 1819 inclusive; and that he did not pay it up, because, as he alleged, he had counter claims against Lord Kinnaird, which he understood to be allowed as a set-off; and that, accordingly, he had always got from the factor receipts as for 'the balance' of each successive year's rent. He further deponed, "that in settling with Mr. Chambers, the factor, for crop 1806, he (the deponent) showed an account of counter claims; and that he did generally show the like claims at the times of settling; that Mr. Chambers said he had received no authority to allow the same, and refused to allow them;" that he suspected Mr. Chambers "was in a mistake regarding the amount of rent due" by the deponent, and remained in error till about 1810 or 1811;

[1] March 5. 1829, (ante VII. 548.)

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"that he never had any conversation with Mr. Chambers regarding the sums left unpaid of each year's rent; but, in a conversation with Lord Kinnaird," a good many years before the lease expired, "he informed his Lordship that he had not paid the full rent, and that there were some balances due." He also deponed, that he had then suggested to Lord Kinnaird that his past counter claims should be held as a set-off against the past balances of rent and per-centages; in reply to which, his Lordship first proposed to postpone the whole counter claims till the end of the lease, and afterwards said "he would give instructions to his man of business; and the deponent understood that Lord Kinnaird acceded to his proposal;"—"that the deponent urged his claims on Lord Kinnaird, but without presenting him with any specific account thereof; but the deponent understood his claims were allowed and settled, and he never heard more of the matter till the demands were made on him by Mr. Small, the factor succeeding to Mr. Chambers; that the deponent understood that Mr. Small passed from the claims against the deponent, on his explanation of what had passed between the deponent and Lord Kinnaird; and that the deponent thinks that Mr. Small granted him receipts in full subsequent to this."

The Lord Ordinary found it "admitted that there are certain balances of rent and per-centages on sums laid out on improvements due under the lease for the years 1806, 1807, 1808, and certain per-centages due for each year from 1809 to 1819 inclusive, which the advocator has not paid;—that it is not established by the oath that the late Lord Kinnaird agreed that the advocator should be relieved of his obligation to pay these sums as a set-off against his counter claims, or that the factors granted the receipts in process in consequence of instructions to that effect; therefore found the advocator liable in payment of the foresaid sums, in so far as concluded for in the actions which are the subject of this advocation, with interest, and appointed a state of the same to be given in; reserving to the advocator to be heard on the subject of his counter claims, and the evidence by which he proposes to establish the same." *

Hunter reclaimed; but the Court unanimously adhered, and allowed the expenses of opposing the note.

* "NOTE.—It does not appear to the Lord Ordinary that the advocator had any sufficient reason, from the circumstances which he states, to suppose that Lord Kinnaird had acceded to his proposal of a set-off. It is admitted that the advocator neither acquainted his Lordship, on the one hand, with the amount of the rents and per-centages which he was keeping back, nor, on the other, with the amount of his counter claims; in which circumstances it is not to be supposed that any man of ordinary prudence would, without further inquiry, have concluded a bargain. Accordingly it is not said that his Lordship gave any consent, but merely that he said he would give instructions to his men of business—words which cannot reasonably be held to mean more than that he would instruct them to inquire into the matter. Neither does it appear from any thing in the oath that the factors subsequently granted receipts without exacting the per-centages, in consequence of instructions to that effect. The advocator admits it to be his opinion that Mr. Chambers, until 1810 or 1811, remained ignorant that he

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Dec. 9. 1830. Hunter v. Ld. Kinnaird's Trustee.

Marquis of Queensberry v. Duke of Queensberry's Executors.

LORD CRAIGIE.—The oath is very clear and accurate; but it instructs the arrears claimed by Lord Kinnaird's trustee, and does not establish any agreement by his Lordship to relieve the deponent of these arrears in respect of his alleged counter claims. We must therefore adhere.

LORD GILLIES.—It is a case extremely clear.

LORD PRESIDENT.—It would just appear that the advocator is a sanguine man, who has drawn unfounded inferences in favour of his own views from a conversation with Lord Kinnaird, which certainly did not warrant him in holding that any agreement was made to acknowledge his counter claims, as he seems to have supposed.

J. FERGUSSON, W. S.—TOD and HILL, W. S.—Agents.

No. 84.

MARQUIS of QUEENSBERRY, Pursuer.—*Sandford.*
DUKE of QUEENSBERRY'S EXECUTORS, Defenders.—*Murray.*

Expenses.—Circumstances in which the Court allowed expenses to neither party, the judgment of this Court having been reversed on appeal.

Dec. 9. 1830.

1ST DIVISION.

THE judgment noticed ante, VI. 706, sustaining the competency of an action of damages by the Marquis of Queensberry, having been reversed on the 22d of July 1830, and there being a remit to the Jury Court in another relative case which fell by the reversal, the defenders applied to have that remit recalled, to be assoilzied, and expenses found due to them. To this latter proposition the pursuer answered, That as the questions in issue did not arise from rash litigation on their part, but involved patrimonial interests of great importance to the parties, and legal principles of great moment to the country; and as the judgment of this Court had been in favour of the pursuer, and the plea of incompetency, under which the reversal was obtained, was not taken up by the defenders in the outset, but only at an advanced stage of the cause, they should not be found liable in expenses.

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was not receiving the full rent; and as to the subsequent period, there seems to have been no explanation between them on the matter, as he admits generally that he never had any conversation with Mr. Chambers on the subject of the sums left unpaid. Yet it is impossible to account for this silence, had Chambers, subsequent to 1809, adopted a new mode of settlement, in consequence of instructions from Lord Kinnaird.

"Mr. Small, who succeeded Chambers in the factory, had evidently received no such instructions, as it is stated in the oath that he demanded the per-centages, but passed from them, not in consequence of directions from the landlord, but on the advocator explaining to him what had passed betwixt himself and Lord Kinnaird. But this is just to say, in other words, that Small took the advocator's word for it that his Lordship had agreed to the set-off,—a thing which the advocator took it into his head to understand, but certainly without sufficient ground.

"On the whole, the Lord Ordinary is of opinion that the oath sufficiently establishes the existence of the arrears claimed; and that as the circumstances stated there afford no ground to justify the advocator in his understanding that Lord Kinnaird agreed to give them up, they must still be held to be resting owing."

The Court recalled the remit; and, in respect of the judgment of the House of Lords, sustained the objections to the competency of the action, and assoilzied the defenders; but found no expenses due.

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Dec. 9. 1830.

Marquis of Queensberry v. Duke of Queensberry's Executors.

Shand v. Cousin &c.

Lord Craigie.—We cannot allow expenses here. Our judgment was in favour of the pursuer, though subsequently reversed in the House of Lords. As to that reversal I would observe, that no single decision here, or in the House of Lords, makes the law of the country. It is a precedent, and no more.

W. Stewart, W. S.—Lamont and Newton, W. S.—Agents.

John Shand, Pursuer.—*Skene—Buchanan.*
John Cousin and Others, Defenders.—*Keay—Russell.*

No. 85.

Mutual Contract—Expenses.—1.—Circumstances in which the Court refused, hoc statu, to enforce specific implement of a claim under a contract, to the full extent demanded by the party in whose favour it was stipulated, but reserving the rights of parties in the event of a change of circumstances;—and,—2.—Neither party found entitled to expenses.

Dec. 9. 1830.

1st Division.

By a feu-contract entered into between John Lauder and the defenders, Lauder conveyed to them certain building areas in East Fettes row, Edinburgh; and they, inter alia, bound themselves "to erect a strong and sufficient ruble parapet and retaining wall, and an iron rail, on the north side of Fettes row, similar in dimensions and quality to that lately erected in Prince's street, and agreeably to the directions of Mr. Robert Brown, architect in Edinburgh."

The defenders having built houses, sold one of them to the pursuer at the price of £1462. 10s., payable, £500 at Whitsunday 1827, and the balance at Whitsunday 1828; and they bound themselves, inter alia, to implement the above stipulation as to the parapet wall.

The property immediately to the north belongs to Mrs. Little Gilmour, and is situated much lower than Fettes row. With the view of building on it, and having a communication with that street, she formed a mound, the one end of which was in contact with the northern boundary of Fettes row, and where the wall ought to be built. The wall was, to a certain extent erected, and the mound entirely formed, when the pursuer purchased his house; but thereafter the wall bulged out at different places, and the only barrier constructed at the mound was a wooden paling on the top of it. The pursuer insisted that he was entitled to have a wall built similar to the one in Prince's street, in continuation of that already built, and across the mound from its foundation; while the defenders maintained that this was out of their power, without the consent of Mrs. Little Gilmour, who would not permit this to be done, and that the mound was equivalent to a retaining wall. The pursuer then raised an action, concluding to have the defenders ordained, inter alia, "to bank and erect a strong and sufficient ruble parapet and retaining wall, and iron rail, on the north side of the said street of Fettes row, similar in dimen-

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sions and quality to that lately erected in Prince's street, Edinburgh, and agreeably to the directions of the said Robert Brown, or any other person whom our said Lords may appoint;" and to be allowed to retain a part of the price till implement, or to erect the wall at the expense of the defenders. The Lord Ordinary remitted to Mr. Dobson, builder, "to inspect the part of Fettes row opposite to the house of the pursuer, and to report what has been done by the defenders, and what is still necessary to be done by them, in order to a proper fulfilment of the obligations incumbent upon them in the feu-contract, and in their disposition to the pursuer." He reported that "the retaining wall on the north side of the street has been carried along west Fettes row, until it joins the little mound entering upon Mrs. Little Gilmour's property at or about a point eighteen feet west from the east gable of the pursuer's house, where it terminates, the street opposite the pursuer's house being sufficiently supported or retained by the said mound, without the aid of any retaining wall; and the said retaining wall, so far as it goes, appears to be sufficient for retaining the earth and supporting the street: That a strong cope-stone and iron railing has been put upon the top of the said retaining wall, as far as the retaining wall extends westward itself, but no further; and that opposite to the pursuer's house, and right across the said mound where it joins Fettes row, there has been put up a wooden paling, of equal height, or thereabout, with the iron railing, but which paling does not appear to be in conformity with the terms of the disposition to the pursuer, No. 6 of process. The reporter is humbly of opinion that a parapet wall ought to be carried across the top of the mound, and cope-stones and iron railing put thereon, in a line and on a level with those to the east, which parapet, cope-stones, and railing, however, will be unnecessary, if the said mound shall be converted into a street, and will fall in that event to be removed. This appears to the reporter to be the only point where the defenders have not fulfilled the obligations incumbent on them in the feu-contract, and in their disposition to the pursuer."

The Lord Ordinary thereupon pronounced this interlocutor:—"Finds that the defenders are bound to complete the parapet wall in terms of said report, and finds, decerns, and declares accordingly,—reserving the rights and interests of the parties, in the event of the mound referred to in the pleadings being removed, or of a street being formed thereon;—quoad ultra, assoilzies the defenders from the conclusions of the libel, and decerns;—finds the defenders entitled to expenses, subject to considerable modification; and remits the account," &c.

The pursuer reclaimed, praying the Court "to decern and declare in terms of the libel; or otherwise, to find that the defenders are bound to erect a retaining wall, with a suitable parapet, cope-stones, and railing, in terms of the feu-contract, sufficient to support the street of Fettes row, opposite to the subjects belonging to the pursuer; at least, that if the mound of earth mentioned in the pleadings be held as a support to the street in place of the retaining wall, that the defenders are bound to up-

hold the said street, and also the parapet, cope-stones, and iron railing proposed to be erected on the top of the mound; and in the event of the same being removed, to indemnify the pursuer of all loss to be thereby occasioned; and, in either case, to find the pursuer entitled to his expenses."

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Hunter v. Evans &c.

The Court adhered on the merits; but altered as to expenses, and found none due to either party.

J. Shand, W. S.—A. and J. Patrason, S. S. C.—Agents.

William Hunter, Complainer.—*Ld. Adv. Jeffrey—Ivory.*
Evans, Foster, and Langton, Respondents.—*Jameson—Murdoch.*

No. 86.

Bill of Exchange—Partnership.—The partner of a company in Scotland having had a commission of bankrupt issued against him in England, under which he obtained a certificate, and no notice having been given that he was not to continue thereafter a partner of the company; but, on the contrary, he having thereafter written letters in the company's name—The Court refused to pass, without caution, a bill of suspension of a charge given him, as a partner of the company, on a bill of exchange granted by the company subsequent to his bankruptcy and discharge.

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2d Division. Bill-Chamber. Ld. Cringletie. F.

The complainer William Hunter was, in the month of May 1829, debtor by bill to the respondents, Evans, Foster, and Langton, in the sum of £1000. In August thereafter, the respondents obtained, as a further security, a bill for the debt from the company of William and Malcolm Hunter, merchants in Glasgow, of which the complainer was a partner. In September, a commission of bankrupt was issued against Hunter in England, where he carried on business as partner of James Hunter and Company of London, and he obtained his certificate of discharge in November thereafter, the chargers having signed his discharge in respect of the £1000 in question. William and Malcolm Hunter continued to carry on business under the same firm, and in January 1830 granted a renewal of their bill. The complainer, so far as appeared, continued a partner of the company, and had written a letter to the chargers, which he signed by the company firm; but, on being charged for payment of the renewed bill as a partner of the company, he presented a bill of suspension without caution or consignation, on the ground that the commission of bankrupt operated ipso facto a dissolution of the company, so that their renewal in January 1830, after his bankruptcy and discharge, could not bind him. The Lord Ordinary refused the bill, in respect it was offered without caution or consignation, adding this note:—"When the Lord Ordinary sees that the discharge of the complainer is dated the 12th of November 1829 by the chargers; that, on the 22d of January 1830, the complainer William Hunter, or at least the company of William and Malcolm Hunter, wrote to the chargers a letter, signed by the social firm "W. and M. Hunter,' acknowledging a debt due to the chargers, and sending their acceptance for the same; and that an acceptance, though not the same with that sent in the letter, was

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actually afterwards sent and received by the chargers, which is the foundation of the charge of which this bill has been offered, the Lord Ordinary cannot grant any sist without caution or consignation. Perhaps there may be objections to the legality of that acceptance; and if caution be found, they may be tried. But, primâ facie, the document is good, and dated months after the date of the discharge."

Hunter reclaimed; and the Court concurring with the Lord Ordinary, he then offered caution, whereupon the Court remitted to sist on caution.

LORD GLENLEE.—It is impossible to pass without caution. It is said that the commission dissolved the company. No doubt, the partners might have dissolved in consequence; but if they did not, it continued. The commission is said to be equivalent to our sequestration. Now, so far as I see, it did not sequestrate Hunter's interest in this company; at least it is not clear that it did so. The reason why sequestration dissolves is, because it transfers the whole interest to the trustee; but no other bankruptcy does so without notification. If an objection to summary diligence be plain and obvious, I would pass without caution, but not when it is dubious. In such cases, the discussion should not be allowed to go on without security.

LORD CRINGLETIE.—A company, though dissolved by a sequestration or commission, may re-assemble again, and go on. Here we see this very man, after his discharge, writing a letter which he signs by the company firm. The primâ facie evidence is, that the company is subsisting, and we cannot pass without caution.

LORDS JUSTICE-CLERK and MEADOWBANK concurred.

A. HAMILTON, W.S.—A. CLASON, W.S.—Agents.

No. 87.

A. WILLISON and Others, Pursuers.—*Boswell.*
C. M'QUARIE and Others, Defenders.—*M'Neill—J. Paterson.*

Parent and Child.—Trustees ordained to pay certain interests bequeathed to children in minority, on the discharge of their father as administrator at law; but the latter not allowed to apply these interests (which were bequeathed to the children equally) towards the education &c. of one preferably to the others.

Dec. 9. 1830.

2D DIVISION.
Lord Medwyn.
F.

QUESTION chiefly on the construction of a will, whether certain children had a vested right in the annual proceeds of a trust-fund. The Court found that they had, and appointed the trustees to pay the same on a discharge by their father as administrator at law; but refused a claim by the father to be allowed to apply these proceeds, at his discretion, for the education &c. of one child preferably to another—all having an equal right under the will.

H. CANNAN, W.S.—H. SCHENIMAN, W.S.—Agents.

JOHN LIVINGSTON, W. S.—*Buchanan.*
JOHN MURRAY, W. S.—*Murray.*
MRS. MURRAY.—*M'Neill.*

No. 88

Dec. 10. 1830.
Livingston v. Murrays.

Proof.—After a precognition has been taken by the procurator-fiscal, and a party committed, in order to trial, on a charge of the felonious abstraction of writs—Incompetent to examine the accused under a diligence against havers, granted in a relative civil process incidentally for the recovery of the same writs.

Dec. 10. 1830.
1ST DIVISION.
Lord Newton. D.

M'LARTY raised an action against Borland, in which an imputation of fraud was made against John Murray, W. S. The process was borrowed by a clerk of Mr. Livingston, W. S., who granted the usual receipt for it; and a Court caption having been taken out against Mr. Livingston, he presented a bill of suspension, and lodged a minute in the process, stating that Murray had prevailed on his (Livingston's) clerk, during his indisposition, to borrow the process; that afterwards Mrs. Murray had called at his house, and carried off the summons and productions without his knowledge; and that as she was in possession of them, he craved diligence against havers to recover them.

Diligence was granted, and a remit made to a commissioner to take the depositions of the havers. On the same day Murray appeared before the commissioner, and offered to submit to examination; but a medical certificate was produced, stating that Mrs. Murray was unable to appear. Livingston declined to take Murray's examination, when Mrs. Murray could only appear ex intervallo; and on this being reported to the Lord Ordinary, he prorogated the time for reporting the diligence.

Thereafter the examination of Mr. and Mrs. Murray was delayed from the same cause. In the mean time, the bill of suspension having been passed by the Lord Ordinary on caution, M'Larty (the pursuer) reclaimed to the Second Division; and when the cause came before them on the 20th of November, they superseded judgment, that Livingston might have an opportunity of endeavouring, by summary proceedings against Mrs. Murray, to recover the process; and it was suggested by one of the Judges that application should be made to the procurator-fiscal. This was done accordingly; in consequence of which the procurator-fiscal of the Sheriff Court of Edinburgh took a procognition, and Mr. and Mrs. Murray, after being committed in order to trial, were liberated on bail.

On the 1st of December, they were cited under Livingston's diligence, and appeared before the commissioner, but declined to be examined as havers, in respect that they had been committed for trial on a charge of feloniously abstracting the writs in question. This being reported to the Lord Ordinary, his Lordship reported the proceedings to the Court.

Murray for Mr. Murray.—My client is now willing to waive the objection which he stated before the commissioner, and will submit to the examination. He was always ready to do so until a criminal pro se-

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cution was raised, after which he was advised to make an objection, from which he, now, of his own motion, departs.

Buchanan for Mr. Livingston. — Mr. Livingstone has been obliged to follow the present course, as the only mode to escape incarceration. At the advising in the Second Division, it was recommended to him to use every exertion for the recovery of the writs, as his only means of personal safety; and it was at the suggestion of one of their Lordships of that Division that the procurator-fiscal was applied to.

M'Neill for Mrs. Murray. — It is illegal to examine this lady under the diligence against havers, after the raising of the criminal prosecution. She has been committed for trial, and the criminal charge against her being the felonious abstraction or destruction of the writs in question, she cannot be examined as a haver of these writs, because the first questions put to her must be, whether she now has the writs? and if not, whether she has wilfully put away or destroyed them? The answers which she make to these questions may be used as evidence against her on the criminal trial.[1]

Lord President.—The common and necessary questions at the examination of a haver embrace the subject-matter of the criminal charge.

Lord Balgray.—I think this case has got into a wrong shape. The process and the writs were in the custody and protection of this Court. The original jurisdiction relative to their recovery lies here. When Livingston could not get the papers which he alleges have been carried away, he should have presented a petition and complaint to this Court, and we would have given him a remedy. Our sederunt-books record many instances where the Court ordered an examination, in our own presence, of parties accused of abstracting papers, in order that these papers might be traced. At present we have no evidence before us. All that is before us is the receipt of Mr. Livingston's clerk for the process, and an allegation that Mrs. Murray carried it away. We should, ante omnia, have an examination of that gentleman's clerks, to show whether Mrs. Murray got the documents at all. When that is proved, we shall then say whether she is examinable or not. But, after a criminal prosecution is raised, I would pause before holding her bound to answer the questions which must be put to her as a haver.

Lord Gillies.—She lies under no obligation to answer. It is a sacred and inviolable principle of the criminal jurisprudence of Scotland, that no man is bound to criminate himself. Here the offence alleged is not merely a contempt of Court, calling on us to make inquiry, and to vindicate our authority; there is a criminal charge of felonious acts preferred against the parties; and we cannot allow them to be subjected to the examination that is proposed. Not even with Mr. Murray's consent would I allow his deposition to be taken.

M'Neill.—Besides, it would require the special consent of Mrs. Murray before her husband could be examined. They are both implicated in the same accusation, and she is entitled to object to her husband's emitting a deposition which might be used in evidence against her at the criminal trial.

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[1] Tait on Evid. 504; Macivor and Macallum, (2. Hume, 326.)

LORD PRESIDENT.—If the criminal prosecution be dropped, and a petition and complaint brought before us, we shall know how to dispose of the liability of these parties to examination; but it cannot be permitted in the mean time. No. 88. Dec. 10. 1830. Livingston v. Murrays. Russell v. Douglas &c.

THE COURT then, "in respect of the criminal proceedings now going on before the Sheriff of Edinburgh at the instance of the procurator-fiscal against the havers, Mr. and Mrs. Murray, found that they are not bound to answer any question under the diligence in this process."

HUNTER, CAMPBELL, and CATHCART, W. S.—H. MACQUEEN, W. S.—Agents.

JOHN RUSSELL, Pursuer.—*Ld. Adv. Jeffrey—Greenshields.* No. 89.
JOHN DOUGLAS and Others, Defenders.—*Hope.*

Bill of Exchange—Relief.—One of four co-acceptors of a bill having become bankrupt; and the drawer having ranked on his estate, and agreed to a composition, and discharged him; but not having received the composition; and another co-acceptor having paid the bill to the drawer—Found, in a question between these two acceptors, that the one on whose estate the bill had been ranked was not entitled, on the allegation that a third party (also an acceptor) had gotthe contents of the bill, to refuse payment of the composition to the other who had paid the bill.

ON the 14th of December 1825, John Murdoch, writer in Leith, drew a bill for £600, at twelve months, on James Tait, John Douglas, William Neilson, and John Russell, which they accepted. During its currency, Douglas's estates were sequestrated, and Murdoch was ranked on them for the bill, discounting the interest. Douglas was discharged on a composition-contract; and on applying to the Court for approval, and exhibiting a state of the statutory concurrence, he gave up Murdoch as a creditor for the above sum. Dec. 10. 1830. 1ST DIVISION. Lord Newton. H.

Thereafter Russell, alleging that he had paid the bill to Murdoch, raised an action against Douglas and his cautioners for payment of the composition. In evidence of the payment, he produced two retired bills —one for £300, and the other £140, both of which were granted by him and Neilson, and his own retired acceptances for £147. 11s. and £44. 8s.

In defence, it was alleged that the contents of the original bill had been advanced to Tait; that Douglas therefore was only liable pro rata, and not for the full debt; and that, as in a question between him and Russell, the latter could prove only by the writ or oath of Douglas that the contents of the bill had been paid to him.

To this it was answered, that as the bill had been ranked on the estate of Douglas, and the composition-contract made and approved of on the footing that the bill was due by him, and as Russell was in right of Murdoch, the original creditor, he was entitled to payment of the composition.

The Lord Ordinary "found it sufficiently instructed that the pursuer (Russell) paid £300, £147. 11s., and £44. 8s., in part of the bill of £600; —that the bill granted for £140, in part of the above bill, has been pro-

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duced by the pursuer, as retired by him; and that the pursuer, on finding sufficient caution to relieve the defenders of all claims at the instance of William Neilson, the joint acceptor of the said bill for £140 paid in part of the said bill for £600, is entitled to decree in terms of the conclusions of the libel; and appointed him to lodge a bond of caution accordingly, if he see cause, within ten days."

Douglas and his cautioners reclaimed. The Court adhered; but allowed a reference to Russell's oath.

T. Johnstone, S. S. C.—J. Murdoch, S. S. C.—Agents.

No. 90.

George Pentland, Pursuer.—*Buchanan—Hope.*
Royal Exchange Assurance Company, Claimants.—*Jardine.*
Patrick Campbell, Claimant.—*J. W. Dickson.*

Process—Multiplepoinding—1.—Under an action of maills and duties relative to rents, an interim decree having been pronounced as to those for crop 1827, and that judgment being under appeal—Competent to raise a summons of multiplepoinding as to the rents of crop 1828, although it was alleged that the parties to the multiplepoinding, and also its merits, were the same as those in the process of maills and duties.—Observed,—2.—Incompetent to raise a process of muitiplepoinding as to rents yet "to become due."

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1st Division. Lord Meadowbank. S.

In 1829, Campbell raised a summons of multiplepoinding in name of Pentland, setting forth that Pentland was tenant under a current lease, by which he was liable to pay a certain rent to Lady Elibank and her husband, and that the pursuer (Pentland) was indebted "to Lady Elibank and her husband in a certain sum of money, being the rents due, and to become due, under the said tack," &c.—"which sum the pursuer is ready and willing to pay to Lady Elibank and her husband, or to any others," &c.

Pentland lodged objections, maintaining,

1. That it was incompetent to make future rents the subject of a multiplepoinding, since they could not form a divisible fund in medio which he could consign, or which he was either "ready or willing to pay;" and,

2. That the Royal Exchange Assurance Company, as annuity creditors of Lord and Lady Elibank, had, some years ago, raised an action of maills and duties against him, concluding for the rents due under the same tack; that a competition then took place between Campbell and the Assurance Company, in which the latter was preferred; that he (Pentland) had there disputed his liability for the rents, but interim decree had been pronounced against him, which was under appeal; that as the judgment of the House of Lords would determine the question of liability for the rents of 1828, equally with those of 1827, and as it was decided that the Assurance Company was preferable, Campbell could make no claim, and therefore this process should be dismissed. To obviate

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the first objection, Campbell consented to restrict the conclusions of the libel to the rents already due. To the second he answered, that the judgment under appeal only embraced the rent of crop 1827; and as another year's rent had since fallen due, it might competently be made the subject of a multiplepoinding, which process was indeed necessary for the protection of the interests of the parties having right to that last year's rent.

The Lord Ordinary "sustained the minute of restriction of the libel," and pronounced the usual interlocutor.

Pentland reclaimed; and Campbell, at the bar, restricted the summons specially to the rents of 1828.

Lord Balgray.—The only question before us is, whether this process of multiplepoinding is competent? If it be so, the first stage of it must be for the raiser to condescend on the fund in his hands; when that is done, the Court will decide on the claims preferred against it. The restriction to the rents of 1828 is very proper; and as to them, I can see no difficulty in sustaining the competency of the process. It is said that the real raiser is a postponed creditor. That may be very true; but a creditor of any sort has an interest in ascertaining and securing the fund in medio; and the circumstance of his being postponed may make it of more importance to him to do so than it is to the others.

Lord President.—Let the nominal raiser be also a claimant on the fund in medio, if he see fit; but in the mean time we must repel the objections, and sustain the competency.

The Court adhered.

J. J. Fraser, W. S.—J. Young, S. S. C.—W. Dickson, W. S.—Agents.

No. 91.

Captain John M'Donnell, Pursuer.—*Keay.*
Mrs. Helen Rankin, Defender.—*M'Donald.*

Dec. 10. 1830.

2d Division. Lord Medwyn. F.

Reclaiming Note by Mrs. Rankin against the interlocutor pronounced by the Lord Ordinary, after consulting with the Court, as mentioned ante, VIII. 815. The Court adhered.

Stewart and M'Intosh,—Coll M'Donald, W. S.—Agents.

No. 92.

D. H. M'Neill Hamilton, Pursuer.—*Jameson—Baxter.*
Major-Gen. William Millar, Defender.—*Jardine.*

Entail—Land-Tax—Sale.—Relevant to infer reduction of a sale of part of an entailed estate for redemption of the land-tax, that the property sold had previously been let to the intended purchaser collusively, and with a view to the sale, for a long period, and at an inadequate rent, in contravention of the entail; and that the proceedings had been carried through in consideration of a sum of money paid by the purchaser to the proprietor, over and above the price publicly offered.

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Ld. Moncreiff.
T.

Hamilton
v. Millar.

The late Mr. Hamilton M'Neill of Raploch having, in 1803, applied to the Court for the sale of certain portions of his entailed estate of Raploch for redemption of the land-tax, a mill, with some land forming part of the estate, was exposed to sale, and purchased in name of one Anderson, who obtained a disposition, which he assigned to the late Mr. Archibald Millar, W. S., brother to the defendet. On the accession of the present pursuer as heir of entail to the estate of Raploch, he raised an action of reduction of the sale and titles made up under it against General Millar, who had succeeded to his brother Archibald, now dead, on several grounds, of which the only one requiring notice was, That the mill and lands sold had, some time before, been collusively, and with a view to the sale, let by the late Mr. M'Neill to Mr. Millar, in violation of the entail, for a long term of years, and at an inadequate rent; and that the whole proceedings had been instituted and carried through in consideration of a sum of money paid to Mr. M'Neill, over and above the price publicly offered by Mr. Millar, for whose behoof the property was bought. The relevancy of this averment having been disputed, the Lord Ordinary reported the cause to the Court, stating his own views in the subjoined note.* The Court, holding that the averment in question afforded a relevant ground of challenge, remitted to allow an issue in regard to it.

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* "Note.—The Lord Ordinary would have no difficulty in repelling the whole grounds of reduction, if it were not for the fact averred and offered to be proved, that the proceedings under reduction were entered into "in consideration of a sum of money privately paid by him (Mr. Millar), or by some one for his behoof, over and above the price at which the subjects were purchased," &c. He is of opinion, that if Mr. Millar is to be regarded as a bona fide purchaser at the public sale under the act of Parliament, all the objections, except some that are too critical to require notice, are met by the judgment of Lord Eldon in the House of Lords, in the case of the Earl of Wemyss against Sir James Montgomery, February 25. 1824.[1] In particular, in that case, as in this, there was a lease liable to reduction; and though Sir James was not the tenant, the tenant was an offerer at the sale; and the very case of the tenant having become the purchaser being put in argument, Lord Eldon answers to it decidedly, that the sale would be good, if there was no collusion. But the averment that a sum of money was privately paid in order to induce the heir of entail to institute the proceedings, may very materially affect the whole state of the case. The fact is at present denied; but if it be true, it must be difficult to say that the sale was without collusion, or that the sum apparently fixed as the value in the public sale was really believed by either party to be the full and fair value of the lands. As the point, however, bears a close analogy to that which occurs in the two cases of excambion between the same parties, (though there is some shade of difference in the application of the principle,) the Lord Ordinary thinks that the case should be under the view of the Court before any proof should be allowed."

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[1] 2. Shaw's Ap. Ca. 1.

Lord Cringletie.—The case of Montgomery was toto cœlo different from this; for there the lease, though reducible, had been granted bonâ fide twenty years previous to the date of the Land-Tax Redemption Acts. But this averment is clearly relevant.

The other Judges concurred.

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Dec. 10. 1830.

Hamilton v. Millar.

W. Murray, W. S.—R. Rutherford, W. S.—Agents

William Key and Others, Complainers.—*More—Hope.*
Stirling & Drymen Bridge Road Trustees, Respondents.—*Brown.*

No. 93.

Road Acts—Jurisdiction.—Question raised, whether competent for the Court of Session to review the decision of Justices under a Road Act declaring their decision final.

Bill of suspension of a judgment of Justices of Peace, as under a local Road Act, passed to try the question whether an appeal to this Court was competent, notwithstanding words of exclusion in the statute, and a provision for review by application to the Quarter Sessions, which had not been resorted to, it being alleged that the Justices had committed excess of power.

Dec. 11. 1830.

2d Division. Bill-Chamber. Ld. Fullerton. F.

Key &c. v. Stirling & Drymen Bridge Trustees.

Campbell and Mack, W. S.—J. and W. Home, W. S.—Agents.

W. F. Campbell and Others, Suspenders.—*Ld. Adv. Jeffrey—Walker.*
A. Jack and Others, Chargers.—*Jardine—Cuninghame.*

No. 94.

Church.—A remit made, before answer, to a person of skill to report as to the best place to build additions to a church.

The expede letters on the bill relative to the church of Bothwell[1] having come before Lord Mackenzie, his Lordship, after a record had been closed, remitted, "before answer, to Mr. David Hamilton, architect in Glasgow, to visit and inspect the church of Bothwell, and to take into his consideration the various plans of the proposed addition to the church produced in process, with reference to the interlocutor of the Court in the former proceedings, dated the 15th of November 1827;[2] and to report his opinion to the Lord Ordinary which of the said places is best adapted to carry into execution the said final interlocutor of the Court at the least expense, and in a manner most consistent with the convenience and comfort of the congregation; or if any alteration on the said plans ought to be made, to suggest the same; and also to report on any individual points, and with any observations, which appear material for the information of the Court." Against this interlocutor Campbell &c. presented a reclaiming note, which the Court refused, without calling on the other party to answer.

Dec. 11. 1830.

2d Division. Ld. Mackenzie. F.

Campbell &c. v. Jack &c.

Stibbart and Spror, W. S.—R. Rutherford, W. S.—Agents.

[1] Ante, VIII. 196. [2] Hamilton v. Presbytery of Hamilton, Nov. 15. 1827, (ante, VI. 47.)

No. 95.

Dec. 11. 1830. Thomson v. Jameson.

THOMAS THOMSON, Suspender.—*Hope.*
ROBERT JAMESON, Charger.—*Jameson.*

Landlord and Tenant—Sequestration of Land Estate.—A landlord and his trustee having agreed to allow a tenant to retain a proportion of his rent in liquidation of a debt—Held, in a question with a judicial factor appointed under a sequestration of the estate, that the tenant was entitled to retain, as agreed upon, from the term's rent fallen due prior to the sequestration.

Dec. 11. 1830.

2D DIVISION. Ld. Mackenzie. R.

THE suspender Thomson held a lease of Alloa mills, part of the entailed estate of Mar, at a rent of £300. Having lent money to the late Earl of Mar, his Lordship, in spring 1827, entered into an agreement with Thomson, whereby, besides allowing him a deduction of £40 a year, he consented that the debt should be gradually extinguished by retention of £100 of the rent each year, to commence at Whitsunday 1827. This agreement was sanctioned by the late Mr. Inglis, W. S., then Lord Mar's trustee, under a deed conveying his Lordship's life interest in the entailed estate to him in trust; and, in conformity with it, the charger Jameson (who was factor on the estate, and had got Thomson to consent to postpone the first retention till Whitsunday 1828) wrote him, of date July 1827, narrating the agreement, and subjoining this state of the rents:—

"Abated rent - - - -	£260
"Payable at Martinmas 1827, - - -	130
"Remains payable at Whitsunday 1828, - -	£130
"Deduct instalment then due, - - -	100
"Balance then payable, - - - -	£30"

A probative minute was thereafter entered into between Lord Mar and Thomson, embodying this agreement; but the rents of the estate having been sequestrated, and Jameson appointed judicial factor in June 1828, he gave Thomson a charge for the full amount of £150 as due at the preceding Whitsunday, allowing him neither the benefit of the abatement of rent, nor of the agreement as to retention in payment of his debt.

Thomson brought a suspension, on the ground that the agreement with Lord Mar and his trustee was sufficient to entitle him to the abatement and retention, in a question with creditors, even in time to come; but that there could not be the slightest doubt as to the rent here charged for, and payable at Whitsunday 1828; for the sequestration, and appointment of Jameson as judicial factor, did not take place till after that term, when the instalment and abatement must be held to have been actually received by Thomson, with consent of the Earl and his trustee.

The Lord Ordinary suspended, except as to the admitted balance of £30; and the Court adhered.

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Dec. 11. 1830.
Thomson v. Jameson.

Christie v. A. B.

Lord Cringletie.—I thought the interlocutor right. It is true that Inglis was trustee for Lord Mar's creditors, and was infeft; and consequently, without his consent, an assignation of rents by Lord Mar would not do. But we see that Lord Mar incurred a debt to this man, and, as it seems, made an agreement to allow him to retain it out of his rents. Inglis and Weir (Inglis being the trustee) write in April, consenting to this; and Jameson's letter explains the terms of it, and puts the agreement beyond doubt. Now, what is the charge given?—just for the £100 mentioned, in the account contained in Jameson's own letter, as to be retained at Whitsunday; and the appointment of Jameson as judicial factor was not till June after that Whitsunday. This sum was then in the pocket of the tenant, with consent of the trustee, before the sequestration, he having previously retained it.

Lord Justice-Clerk.—I am of the same opinion. This was an agreement, not only with Lord Mar, who was divested, but with consent of the trustee; and this person Jameson was himself a party to the arrangement; and we cannot allow him, under the character of judicial factor, to get rid of a transaction all completed and over before the sequestration.

The other Judges agreed.

Horne and Rose, W. S.—A. Robertson, W. S.—Agents.

No. 96.

Christie, Petitioner.—*W. Bell.*
A. B. Respondent.—*Hope.*

Poor's Roll.— A man with one child, having a house rent free, with the use of coals and candles, and an income of £46. 16s. per annum, refused the benefit of the poor's roll.

Dec. 14. 1830.
1st Division.

Christie, keeper of the Lock-up-house, petitioned for the benefit of the poor's roll. He had one child to provide for. His salary was 25s. per week, or £65 per annum; but he alleged there was deducted 7s. per week for certain necessary disbursements, which left him free 18s. per week, or £46. 16s. He had a house rent free, with the use of coals and candles; but, on the occasion of any capital execution, he was obliged to provide a night's lodging for himself and his child.

Hope, for the party opposing the application, contended, That, even on the statement of the petitioner, he was clearly not entitled to the benefit, as he was above that degree of destitution which alone could give him right to the poor's roll. [1]

Lord President.—It is impossible to grant this application.

Lord Gillies.—I am of the same opinion. It is of the greatest moment to prevent an abuse of the poor's roll. It is not enough that it should be inconvenient, or even highly inconvenient, for a party to bear the expense of litigation; he must make out a case of necessity, or we cannot listen to his petition.

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[1] Hunter, Dec. 11. 1829, (ante, VIII. 223); Drysdale, Dec. 19. 1829, (ante, VIII. 276.)

No. 97.

Dec. 14. 1830.
Girdwood &c. v. Campbell.

CLAUD GIRDWOOD and Co., Suspenders.—*Skene—Pyper.*
JOHN CAMPBELL, Charger.—*Hope—Connell.*

Harbour—Statute—Usage.—An ambiguous clause in a statute, as to the amount of harbour-dues authorized to be levied, interpreted consistently with the usage of levying, as established on a proof.

Dec. 14. 1830.

1ST DIVISION.
Ld. Corehouse.

MACALLESTER of East Tarbert obtained, in 1708, an Act of Parliament authorizing the erection of a harbour, and the levying of certain dues. Mr. Campbell of Stonefield, having afterwards acquired the lands of East Tarbert from Macallester, proceeded, in virtue of the statute, to exact harbour-dues. On the arrival in harbour of the Maid of Islay steam-boat in the year 1827, her owners resisted the demand of the harbour-master appointed by Campbell. They afterwards presented a bill of suspension and interdict, which was refused by Lord Newton, but passed by the Court "in order to try the question of right,"—an account of the dues claimed being appointed to be kept in the mean time.[1]

The clause which chiefly gave rise to discussion was the following:—It was made lawful to Macallester and his assignees to levy "for every ship, vessel, bark, hoy, or boat, the sum of one halfpenny per ton, and for every ship, vessel, bark, hoy, or boat under eight tons, the sum of 15d. per annum, upon their first anchoring," &c. Campbell maintained that as the Maid of Islay exceeded eight tons burden, he was entitled to harbour-dues, at the rate of a halfpenny per ton, every time she entered the harbour; and he averred that the practice of levying dues for upwards of half a century supported this construction of the clause, if it were otherwise doubtful. Girdwood and Company, the owners of the vessel, contended, on the other hand, that the statute of 1708 was a private act, and in desuetude; and that it was only after a certain inspection and sanction of the harbour by three Justices of the Peace and the Sheriff of the county that any dues were to be levied, which inspection, they averred, had never taken place; but that if the statute could be enforced, the true meaning of the clause was, that a halfpenny per ton was not leviable from large vessels oftener than once a year.

The Lord Ordinary, "in respect the clause in the Act of Parliament, with regard to the amount of the duties in question, is ambiguously expressed, and may competently be explained by usage, and that various aged witnesses have been already examined on that subject by the authority of the Court, allowed both parties a proof of their respective averments as to the possession had by the respondent and his predecessors of levying the said dues."

Messrs. Girdwood and Company reclaimed; but the Court adhered.[2]

A proof having been led, which established the general use of levying the harbour-dues, though with occasional partial interruptions, according to the construction put upon the statute by the harbour-master of Camp-

[1] Nov. 24. 1827, (ante, VI. 124.)
[2] July 7. 1829, (ante, VII. 840.)

bell, the Lord Ordinary "found the letters orderly proceeded, and the suspenders liable in expenses."

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Girdwood and Company reclaimed; but the Court adhered.

Lord President.—The proof of the usage supports the Lord Ordinary's interlocutor.

Munro v. Hogg.

Macmillaan and Grant, W. S.—A. Connell, W. S.—Agents.

John Munro, Pursuer.—*Skene—Neaves.*
John Hogg, Defender.—*Ld. Adv. Jeffrey—Moir.*

No. 98.

Sale—Poinding.—1.—Circumstances in which a party who had executed a poinding of the furniture of a person by whom a disposition omnium bonorum was granted to a trustee for behoof of creditors, having purchased them from the trustee, keeping the poinding concealed, was found not entitled to withhold payment, and apply the price in satisfaction of his debt;—and,—2.—A poinding proceeding on a bill which had been extinguished by a partial payment, and a renewal quoad ultra, and where the poinding had not been reported for nine months, found unavailing to confer a preference.

Dec. 14. 1830.

1st Division. Lord Meadowbank.

Lieutenant J. B. Ford was the tenant of a house in George street, Edinburgh, of which Mr. John Hogg, his brother-in-law, was landlord. Ford granted a bill to Hogg for £350, which fell due the 16-19th of May 1827. Before the 16th of May, partial payments to account had reduced its amount to £90; and on that day Ford granted a new bill to Hogg, at four months, for £90. Hogg discounted this bill on the 8th of June. During its currency, and on or about the 16th of July, Hogg protested the old bill, gave a charge on it, and executed a poinding of Ford's furniture. About a fortnight afterwards, John Munro, messenger at arms, being also a creditor of Ford to a considerable amount, incarcerated him. Ford then took the benefit of the Act of Grace, and executed a disposition omnium bonorum in favour of Munro, as trustee for his creditors. On the 24th and 25th of September, Munro caused an inventory to be made of Ford's furniture, which was allowed to remain in the house as before.

In April 1828, Munro proposed to bring the furniture to sale, and advertised it in one of the city newspapers; and also intimated this to Deuchar and Knox, solicitors, acting on the part of Ford and his family. These gentlemen, on the 8th, addressed the following letter to Munro:—"On behalf of a friend of Mr. Ford's, we, as suggested in your letter on the subject, offer to pay you, for the furniture in Mr. Ford's house in George street, the price that shall be fixed by two appraisers mutually chosen, one by each—the price to be payable as soon as the assignation by you, as Mr. Ford's disponee, is executed, which shall be done at the expense of you and the buyer equally. On receiving your acceptance of this offer, we shall fix the appraiser on our part." This offer was accepted; and, on the 10th, Deuchar and Knox again wrote to Munro:—"We received yours, accepting our offer for

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Mr. Ford's furniture. The purchaser is Mr. John Hogg, Mr. Ford's brother-in-law; and we have, on his account, named Mr. Forrest as the auctioneer," &c. Another appraiser having been named by Munro, the furniture was valued, on the 12th, at £85. 7s. 11d. Deuchar and Knox then prepared the draft of an assignation of the furniture, "in consideration of the sum of £85. 7s. 11d. instantly paid to me, the said John Munro," &c. The original draft bound Munro to warrant the furniture free "from all cess, ministers' stipend, rent, taxes, and other preferable claims." Munro, on revising, struck out the words "other preferable claims;" and made the warrandice clause to run, "from all cess, ministers' stipend, rent, taxes from Whitsunday last to Whitsunday next, and from all facts or deeds done or to be done by me." On the 25th, Deuchar and Knox wrote Munro:—"It is impossible to arrange the terms of the assignation so quickly as you mention. You are aware that the bargain is already completed; and although we see no harm in adopting the draft as altered by you, we cannot, without incurring more responsibility than we wish, extend the assignation without Mr. Hogg's concurrence." They again wrote Munro next day:—"We now send the assignation, together with the draft... We shall get it signed by Mr. Ford, either before or after you do so; and we have written Mr. Hogg's agent to send a note of the rent, and to fix a time for settling." The assignation thus sent contained the alterations proposed by Munro, but no allusion to any claim in virtue of the poinding. A few days afterwards, Hogg, being applied to for a settlement of the transaction, drew up a state of preferable claims under the poinding for £98, and relative expenses, and of £30 as for house-rent. These claims more than exhausted the agreed on price of the furniture; and Hogg insisted that he was entitled to the furniture without paying over any thing whatever to Munro, but merely imputing its value in extinction of his own debt. This was resisted by Munro, who brought an action for implement of the agreement, and payment of the balance, after deducting rent and taxes.

In defence, Hogg alleged—

1. That Munro was in the full knowledge of the poinding, and that the bargain was made on the footing that it was to receive effect; and,

2. That at all events, as Hogg had contracted on that assumption, he was entitled, if his preference were not sustained, to resile from the bargain.

To this it was answered—

1. That Munro had not contracted on the alleged footing, but, on the contrary, had excluded from the warrandice all claims, except those arising from public burdens and the rent; and the claim in virtue of the poinding had been kept in the back ground. But,

2. That the poinding was unavailing to give a preference, because it proceeded on a bill which had been extinguished by a partial payment, and a renewal for the balance; and besides, it had not been reported till more than nine months from its date.

The Lord Ordinary "decerned against the defender in terms of the libel," with expenses. *

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Hogg reclaimed.

LORD BALGRAY.—This is a very clear case. The pursuer Munro is possessed of a good title to sell the furniture for the general body of creditors for whom he acts. He is proceeding, for their behoof, to take steps for effecting a public sale of the bankrupt's furniture, when he is induced to desist by the interference of Hogg. And what is it that Hogg holds forth on this occasion to Munro? There is a distinct offer on his part to pay for the furniture to Munro "the price that shall be fixed by two appraisers mutually chosen, one by each—the price to be payable as soon as the assignation by you, as Ford's trustee, is executed," &c. This offer is accepted, and the bargain is made, which was just to this effect—If Munro would desist from his intended sale, Hogg was to become the purchaser, and immediately to pay over the value to him. If he at that time had any intention to insist in a special right of his own, absorbing the whole fund in medio, and leaving nothing to Munro and the other creditors, he was bound then to speak to

* "NOTE.—It is admitted that Deuchar and Knox, in the employment of Ford, the common debtor, and with the knowledge and authority of the defender, made the offer contained in the letter dated the 8th of April 1828, for the purchase of the furniture in question; and the Lord Ordinary is of opinion, that from the terms of the offer, as well as from the circumstance of the name of the person offering being concealed, the pursuer was entitled to transact upon the footing, and in the belief, that after retaining the amount of those debts for which, by the operation of the law, the subject was avowedly and primarily liable—namely, the taxes due to the Crown, and the rent due to the proprietor of the tenement in which the furniture was placed, the surplus of the price was to be paid over in money to him for behoof of himself and the other creditors; and that, in point of fact, when the name of the person in whose behalf the offer was made was communicated to the pursuer, he was aware that the defender, as proprietor of the said tenement, had a preferable right of hypothec for the amount of the rent thereof, and that the same was then due; but that it does not appear, and is not alleged, that the pursuer was at that time actually in the knowledge of any other right or claim of a preferable kind, which the defender had, or was entitled to maintain, to or over the said subject. In these circumstances, the Lord Ordinary thinks it was particularly incumbent upon the defender, and upon the agents acting under his authority, and for whose proceedings he is responsible in the first instance, and on communicating that he was the person in whose behalf the offer aforesaid was tendered, to have stated, in explicit terms, the claim of preference in virtue of his alleged poinding, on which it is now averred the defender had it always in contemplation to insist; and that this obligation was rendered still more imperative by the delay which is admitted to have taken place in following out the diligence on which he intended to rest, and when the corrections made upon the terms of the assignation clearly demonstrated the ignorance under which the pursuer laboured of any such grounds of preference being in existence. It must therefore be held that the defender, either from want of reliance upon the validity of the diligence aforesaid, or from considerations arising from his wish to grant accommodation to the common debtor, with whom it appears he was connected, or otherwise, entered into the transaction in question upon the implied condition of only insisting upon his preference over the price of the furniture to the extent of the rent of the tenement in which it was placed."

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it. Instead of this, he leads Munro to close an agreement with him, the terms of which imply that there is to be a considerable reversion to the general creditors, after the deduction only of certain rent and taxes. When Munro, acting on this faith, makes the alterations on the warrandice clause in the assignation, of such a nature as to meet his understanding that neither Hogg nor any one else had any preferable claims, except as there specified, Hogg assents to these alterations. Even on the 25th of April, before the extended deed of assignation is prepared with Munro's alterations on it, Deuchar and Knox wrote to the pursuer, in reference to that previous offer, the import of which I have just considered, "You are aware that the bargain is completed;" and next day they forward an assignation prepared on Munro's terms. This should have closed the transaction, and substantially it did so; but then Mr. Hogg comes forward, and says he has kept a poinding in his pocket all the while, which he now means to act upon, and carry away the whole fund in medio. This is a piece of grossly deceptive conduct; and the law of this country never recognises the validity of any right which has been obtained by fraud. That principle alone would cut out Hogg from using his poinding cum effectu; but, besides that, the poinding itself is good for nothing. The new bill for £90, with the payment of £210, had completely supplanted the old debt for £300; and Hogg had no right to protest it for non-payment, and then poind in execution. But further, the poinding was not duly reported to the Sheriff, and on this last ground was equally invalid to confer any preference. I am clearly for adhering.

Lord Gillies.—I concur; and not only do so, but I go further than mere concurrence in the views of the Lord Ordinary. There may have been a poinding here, but it was quite abandoned by Hogg; the missive offer on his part gave it up. Suppose that this furniture had been sold privately to a third party, with his full knowledge and consent, and that he concurred in the sale, could he afterwards have seized on the furniture as his own? But the case here, instead of being weaker than that now supposed, is only so much the stronger, because he was himself the purchaser.

Lords President and Craigie assented.

Pursuer's Authorities.—Lea, Jan. 16. 1828, (ante, VI. 350); Finlayson, June 4. 1829, (ante, VII. 698); 56. Geo. III. c. 137, § 4; Tullis, June 18. 1817, (F. C.); Samson, May 15. 1822, (ante, I. 407.)

A. Hutchison,—J. Wight, W. S.—Agents.

No. 99.

Fraser's Trustees, Pursuers.—*Skene—Buchanan.*
Alexander Fraser, Defender.—*Murray—Ivory.*

Foreign.—An action brought, after the lapse of six years, against an English solicitor alleged to have been employed by a person residing in Scotland to recover money in England, and to have then recovered it, barred by the Statute of Limitations.

Dec. 14. 1830.

1st Division. Lord Meadowbank. H.

The pursuers, as trustees and executors of the late Hugh Fraser, after executing arrestments jurisdictionis fundandæ causâ, raised an action, in 1826, against Mr. Alexander Fraser, solicitor in London, a native of Scotland, and a liferent freeholder in the counties of Inverness and Perth, setting forth that the late Alexander Cumming of Pentonville near London was indebted to the late Hugh Fraser, residing in Scotland, in

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a sum of £300, with interest since 1780; and that Hugh Fraser "did employ Alexander Fraser, solicitor, Lincoln's Inn Fields, London, to institute legal proceedings against the said Alexander Cumming for recovery of the said debt;" that the defender Alexander Fraser instituted these proceedings; that the judgment of an English Court, in 1816, was obtained against Cumming for payment of the debt and interest, amounting to £562; and that thereafter the defender received payment of that sum, but had never paid it to Hugh Fraser; and that he was now liable to pay it to the pursuers, as the Captain's trustees and executors.

The defender admitted the employment, and the recovery of the money, but alleged that he was instructed by Hugh Fraser to recover it, and to apply it for behoof of his grand-daughter; in support of which he referred to a letter by Hugh Fraser, and alleged that he had paid it as there directed, so as to be completely exonered. He maintained, however, that as the claim against him was alleged to have arisen in 1813, and the action was not raised till 1826, and as it was an English debt originating out of proceedings in England, where he was domiciled, the action was barred by the English Statute of Limitations.

To this it was answered—

1. That as the employer resided in Scotland, and the party employed in England, and the fund belonged to a Scotsman, and so must be held as placed within Scotland, and the defender, by the nature of his employment, was bound to have remitted the money to Scotland, and he stood in the position of a trustee, the English statute could not apply; and, 2. That supposing it did apply, still, as he had judicially admitted the receipt of the money, and merely alleged the appropriation of it in a particular way, this was a sufficient answer to elide the effect of the statute.

The Lord Ordinary directed the opinion of Sir James Scarlett (the Attorney General for England) and Mr. John Miller on special queries embracing the points—1. Whether the statute applied to a case of this nature; and, 2. Whether the admission on the record, or the allegation that the defender was to be regarded as a trustee, was sufficient to elide the statute. They delivered a joint opinion that the statute applied; but, with reference to the second point, they gave separate opinions. Sir James Scarlett stated—"I am of opinion that the judicial admission of a solicitor or attorney that he has received a sum of money for his client, and has never paid or accounted for it, which is in effect an admission that the money is still in his hands for the use of his client, without any other qualification, would be inconsistent with a plea of the Statute of Limitations. But no such case can occur in the law of England, as a plea of the Statute of Limitations is not accompanied by any other statements or admissions. If, in an action at law against him, in which he pleaded the statute, an answer made by him to a bill in equity, wherein he made the supposed admission, were produced as evidence against him, it would

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become a question for the Jury whether such admission amounted to a promise to pay the money; and if such was their conclusion, though the promise were made above six years after the money had been received, it would nevertheless be an answer to the plea. It was formerly held that any admission that the debt was not paid, was a sufficient answer to a plea of the statute; but in a late case of Farne v. Smart,[1] in which all the cases were reviewed by the Court of King's Bench, the judgment of that Court was, that the admission must be of such a nature as to amount to a promise of payment. Considering the admissions made by the pleadings in this case, I am clearly of opinion that they not only do not amount to a promise to pay, but that they do not amount to any thing like an admission that the defender has not accounted for the money. The whole of his admission is to be taken together, from which it appears that he had directions to pay the money, at the time he received authority to recover it, in a particular way, and that he did so pay it accordingly above six years before the action. I have no doubt that if the whole pleading of the defender were read in evidence against him upon an action had in England, in which he had pleaded the statute, the Judge would direct the Jury to find a verdict for the defender." "I think there is no colour for calling the defender a trustee within the meaning of the statute."

Mr. Miller answered in regard to the admission—"I am of opinion that such admission does not prevent him from pleading the statute, but that the validity of the plea will depend upon the form of the plea, and circumstances referred to in it."—But, "on the whole circumstances of this case, I am of opinion that the admission of the defendant has the effect of charging him with the money recovered; and if a bill were filed against him in a Court of Equity in England for an account, I think such bill would lie, and that a plea of the statute, in the manner and form it is here pleaded, would not be a valid defence. Had the defender rested his defence upon an allegation of a verbal mandate given by the testator, without alleging any other circumstance, I think the case would have been essentially different. But the defender goes on to say, that, 'after some preliminary steps had been taken, it was thought necessary that evidence should be granted, under Mr. H. Fraser's own hand, of this determination.' The defender then quotes and relies upon Mr. Fraser's letter, and I perceive upon the record no other proof of the mandate. This form of pleading, in my opinion, enables the Court to determine whether the defender has put a proper construction upon the letter relied upon; and if it is entitled to construe the letter, I think it would not support the construction he has put upon it. I am aware that the point is not without difficulty; but the impression on my mind is as above stated." In regard to the defender being a trustee, he concurred with Sir James Scarlett.

[1] 6. Barnwell and Cresswell, p. 603.

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The Lord Ordinary, in respect of the difference in opinion, directed that of Sir N. Tindal and Sir E. B. Sugden to be taken; and they having concurred in an opinion that "the pursuers' right of action in this case is, by the law of England, barred by the Statute of Limitations," and that none of the specialties took it out of the statute, the Lord Ordinary "sustained the defence founded on the English Statute of Limitations, and assoilzied" with expenses.

The pursuers reclaimed; but the Court, after advising Cases, adhered.

LORD BALGRAY.—It is a mere adventitious circumstance that the action to enforce this claim is brought in our Courts. It is true that arrestments have been laid of funds within Scotland, but the jurisdiction thereby created is different from that which would have attached to the defender, had he been a domiciled Scotsman. I conceive the defender entitled to take the benefit of the law of England, though he is sued here; and therefore, agreeably to the opinions of the English counsel, the claim against him is cut off by the Statute of Limitations.

LORD GILLIES.—I am of the same opinion. I think Fraser is entitled to plead that he is discharged of this claim in virtue of that law. I must presume that he acted bonâ fide; and, in consistency with the laws of the country where he lived, he undertook and has satisfied the obligations under which he was laid by acting under the letters of the deceased.

LORD PRESIDENT.—There are many cases which support the plea of the defender.

Pursuers' Authorities.— (1.)— Sande, l. 1. t. 12. de Fin; Huber Prælect. l. 1. t. 3. § 7; 3. Ersk. 7. 48; Kames' Princ. of Equity, b. 3. c. 8. p. 568; Thomson and Hay, July 16. 1708, (4504); Rutherfurd, Feb. 9. 1738, (4508); Renton's Trustees, July 7. 1755, (4516); Randall, July 13. 1768, (4520); Ker, Feb. 20. 1771, (4522); Barret, Feb. 4. 1772, (4524); Countess of Haddington, March 6. 1821, (F. C.); Broughton, Feb. 24. 1826, (F. C.)—(2.)— Dig. l. 44. t. 7. § 21; and l. 42. t. 5. § 3.

Defender's Authorities.—Rickman and Parry, May 24. 1827, (ante, V. 700); Grove, Nov. 1740, (4501); Lovat, Dec. 2. 1742, (4512); Renton's Trustees, July 7. 1755, (4516); Macneill, March 2. 1761, (4517); Randal, July 13. 1768, (4520); Ker, Feb. 20. 1771, (4522); Barret, Feb. 4. 1772, (4524); Broughton, Feb. 24. 1826, (ante, IV. 496); York Buildings Co., Feb. 14. 1792, (4528); Dilvalle, March 9. 1786, (4525); Campbell, June 5. 1818, (Dow's Rep. VI. 116); 3. Ersk. 2. 40, as compared with 3. Ersk. 4. 7; Glyn and Co., June 8. 1830, (ante, VIII. 889); Gordon, Nov. 12. 1818, (F. C.); Fortune, Jan. 19. 1610, (4429); Galbraith, Nov. 15. 1626, (4430, and 4446); Stranger of Middleburgh, Dec. 6. 1626, (12420); Falconer, Dec. 11. 1627, (4501); Harper, Feb. 15. 1630, (4431); Elphinstone, Feb. 1. 1665, (17018); La Pine, Feb. 14. 1721, (4451); York Buildings Co., Jan. 31. 1783, (4472); Hyde, Feb. 7. 1634, (4447); Chatto, Jan. 10. 1702, (4447); Gordon, Nov. 12. 1818, (F. C.)

J. SHAND, W. S.—T. M'KENZIE, W. S.—Agents.

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Dec. 14. 1830. Fraser's Trustees &c. v. Falconer.

WILLIAM STEWART and Others, (FRASER'S TRUSTEES,) Pursuers.—*Skene—Buchanan—Anderson.*

COSMO FALCONER, Defender.—*Ld. Adv. Jeffrey—Sandford.*

Principal and Agent—Reparation.—Circumstances in which a party acting under a factory which exempted him from liability, except "for his actual intromissions," was found not responsible for a debt alleged to have become irrecoverable through his negligence.

Dec. 14. 1830.

1st DIVISION. Lord Meadowbank. H.

THIS case was connected with the one immediately preceding. In 1814, Hugh Fraser's trustees executed a factory in favour of Cosmo Falconer, writer in Edinburgh, empowering him to complete their titles,—to recover the whole estate of the deceased,—to pursue or defend where necessary,—to settle with the legatees, and generally to do every thing competent to the trustees: "Declaring that he shall be no further liable than for his actual intromissions, and that he, by his acceptance hereof, shall be bound to hold just count and reckoning to us for such sums of money as he shall receive, after deduction of a reasonable sum of money for his trouble." Shortly after the truster's death, a memorial was communicated to the trustees by a party interested under the trust, in which memorial it was stated, inter alia, that a debt due by Mr. Cumming of Pentonville to the truster might probably be rendered available to the trust-estate, notwithstanding claims which were made to it by his grand-daughters. This memorial was sent by the trustees to Falconer, who, in 1815, wrote on the subject to Mr. Fraser of Lincoln's Inn, solicitor, who had been formerly employed by the truster to recover Cumming's debt. Falconer was then informed by Fraser that the money had been obtained by him, and paid to the grand-daughters of the truster, agreeably to letters from the truster to that effect. A charge for this correspondence was made by Falconer in the accounts which he rendered to the trustees. He got no instructions to prosecute Fraser for the contents of Cumming's debt. When the trustees themselves afterwards prosecuted Fraser, (as mentioned in the last reported case,) the defence of Fraser, founded on the Statute of Limitations, was sustained; but the English counsel consulted in that case, differed whether Fraser could have been compelled by the trustees to account for the debt to them, if he had been prosecuted immediately after the truster's death.

As soon as the Lord Ordinary sustained the defence founded on the Statute of Limitations, the trustees brought an action against Falconer as liable to pay them Cumming's debt, which they alleged to have become irrecoverable only through his remissness in calling Fraser to account. Falconer averred that he had never acted on the factory, except on one or two trifling occasions,—the trustees having personally transacted the business of the trust, and only employed him as law-agent; that he had never received any remuneration as factor, but had only charged as a common law-agent; and that he had laid before the trustees his correspondence with Fraser.

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He therefore pleaded—

1. That he was not liable as a factor managing the general business of the trust, having never acted or been remunerated as such. But,

2. That his factory specially exempted him from all responsibility, except for his actual intromissions; that it was not alleged that he had intromitted with the sum in question; that he was not entitled to prosecute Fraser in London without special instructions; that he had never received such instructions, and that the trustees knew precisely how the claim stood; and,

3. That the pursuers could have no claim against him, unless they had originally a good claim against Fraser in London; that this was a point to be determined by the law of England; that English counsel had declared that, independently of the plea on the Statute of Limitations, there was no such claim; and although other counsel doubted this, yet the trustees had no claim against the defender, because they had not proved that they ever possessed a good claim against Fraser.

To this it was answered—

1. That the averments on which the first plea was rested were not true.

2. That the defender being a factor, with a salary for trouble, was liable in exact diligence, notwithstanding the clause in his factory, the meaning of which merely was to protect him against responsibility for bad debts; that he should therefore have prosecuted Fraser before the years of prescription had run; and if he doubted his powers under the factory, he should have called the attention of the trustees to this claim, and specially asked their directions; and,

3. That they knew nothing of the existence of the claim until after the prescription was complete; and as Fraser's defence was sustained on that ground, and English counsel had stated it to be his only defence, the defender could not escape the consequences of his remissness by saying that other counsel were of a different opinion. It was a question not of English but Scottish law, whether Fraser was liable to them when the trust began.

The Court, on the report of the Lord Ordinary, and on advising Cases, without making any observations, assoilzied with expenses.

Pursuers' Authorities.—(1. and 2.)—3. Erak. 3. 37; Macbride, Jan. 7. 1680, (2561); Gibson, July 18. 1710, (3518); Goldie, Jan. 4. 7157, (3527); Scott, Jan. 3. 1696, (13958); Wood, Nov. 28. 1710, (13960); Rae, July 29. 1741, (13963); Colquhoun, June 17. 1823, (ante, II. 407); Carruthers, June 6. 1829, (ante, VII. 712); Lillie, Dec. 13. 1816, (F. C. affd. Bligh, 315); Struthers, Feb. 2. 1826, (ante, IV. 418, affd.); Rowand, July 6. 1827, (ante, V. 903, affd.); Brown, May 21. 1829, (ante, VII. 626); Mason, Feb. 4. 1787, (3535); Lord Lynedoch, Feb. 15. 1827, (ante, V. 358.)

J. Shand, W. S.—A. Johnston, W. S.—Agents.

No. 101.

Dec. 14. 1830. Henderson v. Stewart.

ALEXANDER HENDERSON, Complainer.—*Jameson.*
CHARLES STEWART, Charger.—*Marshall.*

Sexennial Prescription—Bill of Exchange.—Charge on a Sheriff's precept, proceeding on a registered protest, interrupts the sexennial prescription of a bill of exchange, so as to allow a charge of horning to be insisted in after the lapse of the six years.

Dec. 14. 1830. 2D DIVISION. Bill-Chamber. Ld. Moncreiff.

THE complainer Henderson, being charged by Stewart under letters of horning signeted the 3d of September last, to make payment of a bill which had fallen due on the 8th of April 1824, presented a bill of suspension, founded on the sexennial limitation of bills of exchange. To this it was answered, that the bill had been protested, the protest registered in the Sheriff Court books of Clackmannanshire, a precept obtained thereon on the 13th of April 1824, and a charge given next day, which, it was pleaded, was sufficient to elide the plea of limitation. The Lord Ordinary refused the bill, and the Court adhered.

J. M'LAURIN, W. S.—J. GIBSON Jun., W. S.—Agents.

No. 102.

Dec. 14. 1830. Smith &c. v. Stewarts.

MRS. ELIZABETH GOVAN or SMITH and Others.—*Keay—Graham Bell.*
JOHN GOVAN STEWART.—*Ld. Adv. Jeffrey—Baird.*
ADAM STEWART—*Sol.-Gen. Cockburn—More.*

Competing.

Succession—Clause—Substitute, or Conditional Institute.—A party having, mortis causa, disponed her estate to William (the second of a family of nephews), and the heirs of his body, "whom failing before me, then" to Adam (the third), and the heirs of his body, "whom also failing before me, then" to the fourth, and the heirs of his body, "whom all failing, then to my own nearest heirs and assignees whomsoever;"—the disposition in all parts, when mentioning the persons called to the succession, setting forth William, "whom failing as aforesaid, the said Adam, and the other substitutes above mentioned;"—and William having survived her, but died without issue—Held, in a competition between the eldest nephew as heir of conquest to William, the heirs whatsoever of the granter,—and Adam,—that Adam was entitled to succeed.

Single Bills.

LOCH'S TRUSTEES v. LOCH.

Process—Reclaiming Note.—A reclaiming note is not incompetent, although a Revised Case is not appended; but it ought to be so.

Dec. 14. 1830. 2D DIVISION.

A reclaiming note having been presented against an interlocutor pronounced by the Lord Ordinary on advising Cases—

W. Bell, for the Respondent, objected to its competency, that one of the Cases appended to the note had been printed, not from the revised paper, but the interchanged draft. The Court, however, held that the defect might be remedied, and allowed the reclaimer to print the Revised Case.

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2d Division.
Bill-Chamber.
Ld. Moncreiff.
R.

Smith &c. v. Stewarts.

The late Miss Agnes Govan was the eldest of several sisters, one of whom Margaret (Mrs. Stewart) had four sons—the claimant John Govan Stewart being the eldest—William, now deceased, the second—the claimant Adam the third, and the fourth Andrew. In 1820, Miss Govan disponed, mortis causâ, certain lands "to and in favour of William Stewart, my nephew, second son procreated of the marriage betwixt my sister Margaret Govan, otherwise Stewart, and the deceased William Stewart, brushmaker in Edinburgh, and the heirs of his body; whom failing before me, then to Adam Stewart, his immediate younger brother, and the heirs of his body; whom also failing before me, then to Andrew Stewart his youngest brother, and the heirs of his body; whom all failing, then to my own nearest heirs and assignees whomsoever, heritably and irredeemably, but with and under the burdens, provisions, and reservations after mentioned," The precept of sasine directed delivery to be given to the "said William Stewart or his foresaids, whom failing as aforesaid, the said Adam Stewart, and the other substitutes above mentioned;" and in all other parts of the deed where the persons called to the succession were mentioned, they were uniformly set forth in the same terms: "The said William Stewart and the heirs of his body, whom failing as aforesaid, the said Adam Stewart, and the other substitutes above mentioned."

Miss Govan died in 1824, being survived by William Stewart, who, after possessing the lands for a few years, died in 1829 without issue. A competition then arose as to the right of succession between these parties:—

1. Two sisters of Miss Govan, and the representative of another sister deceased, who claimed to succeed as heirs of provision to William under the last clause of the destination to Miss Govan's heirs whatsoever, on the assumption that Adam and Andrew Stewart were merely conditional institutes, who were only to take in the single event of William and the heirs of his body failing *before* the granter; and consequently, that as William survived her, the conditional institution in their favour flew off, the condition not having been purified.

2. John Govan Stewart, the immediate elder brother of William, who claimed on the assumption that the condition of William's failing before the granter applied equally to all the other parties called; and that the whole destination, being cut off by the failure of the condition, left the succession open to him as William's heir of conquest; and,

3. Adam Stewart, who claimed as substitute, entitled to succeed under the destination in his favour.

All parties purchased brieves for service as heirs of provision respectively,—it being agreed not to object to the brieve of the heir of conquest, as not in point of form entitled to serve at once as heir of provision, in order that the right to succeed might be determined at as little expense as possible. The several brieves were thereupon brought by advocation

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into this Court, and reported to the Inner House on Cases by the Lord Ordinary, who, at the same time, issued the subjoined note.*

Pleaded for the Heirs whatsoever—

1. As against the Heir of Conquest—The principle in regard to gratuitous tailzied destinations is, that when the limited series of heirs contained in the destination is exhausted or fails, the subject returns to the heirs of the granter, and does not fall to the heirs of the last substitute.[1] Accordingly, even though there were no substitution in the present case in favour of the granter's heirs whatsoever, they would, on the common principles of feudal law, succeed, to the exclusion of those heirs of William not included in the tailzied destination. But a fortiori must they be entitled so to succeed, when the deed contains a substitution

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* "This is a very singular case. The Lord Ordinary, notwithstanding the ability of the argument for the heir of conquest, would have no difficulty in coming to an opinion that his claim cannot be maintained. In point of mere form, a service as heir of provision might perhaps be competent, if the right were made out; but he thinks it clear that unless Adam Stewart is entitled to succeed as a prior substitute, the express destination to the heirs whatsoever of the testatrix must take effect.

"The question between Adam Stewart and the granter's heirs whatsoever is much nicer. The Lord Ordinary is not able to adopt the construction of the clause maintained for Adam Stewart, that the words "whom failing before me," apply only to the heirs of the body of William Stewart, because in this view there would be no words of substitution or institution to connect Adam with the failure of William; and the idea is too whimsical at any rate. But still he has the greatest possible difficulty in thinking that it was the meaning of the testatrix in this deed to prefer her own heirs whatsoever to Adam and Andrew Stewart, in the event of William surviving her when she distinctly gave the estate to them in the case of William and the heirs of his body failing before her own death. The idea may be consistent in a legal argument; but it is in the highest degree improbable in regard to the actual intention of the party. And looking to the whole deed, the Lord Ordinary cannot in a legal view, reconcile the constant description of Adam &c., as substitute heirs, with the plea of heirs whatsoever; for he holds it to be clear that, in their construction of the clause, Adam is not in any sense a substitute, but purely a conditional institute, who, if William had predeceased the testatrix, would have taken an institute without any service to William. The cases of Peacock and Colquhoun do not touch this, because in them there was a substitution, whether the party predeceased or survived. Whether, even in such a case, service to a first institute predeceasing the maker is necessary, the Lord Ordinary must think doubtful, when he reflects on the discussions in the case of Seaforth. But the clause in the present case cannot be construed in the way maintained by the heirs whatsoever, without putting it out of all doubt that Adam is called purely as a conditional institute, and consequently that the description of him as a substitute, is incongruous with this construction of the clause.

"On the whole, notwithstanding the difficulty in the words, the Lord Ordinary, looking to the whole scope of the deed, and nothing else, is strongly inclined to think that the true meaning of it is in favour of the claim of Adam Stewart. But the case is so doubtful and peculiar, that he thinks it proper to report it without a judgment."

[1] Dirleton, voce Limitation; M'Kenzie, 3. 10; Tennant, July 1688, (14897, &c.)

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in their favour. This, as an express declaration of the granter's will, must prevail against the implied will, on which alone the heir of conquest can found, the more especially as substitutions in favour of the natural heirs are always held entitled to peculiar favour.

2. As against Adam Stewart—The will of the granter must, in this as in all cases, be sought in the words employed in the deed; and where the words used are clear and unambiguous, it is incompetent to control them by any speculations as to what might have been expected to have been the intention of the granter. Here the words leave no room for doubt. The estate is first destined to William and the heirs of his body; and it then proceeds, "whom failing *before me*, *then* to Adam Stewart." These words can bear only one meaning, viz. that Adam was a conditional institute, called to the succession only in the event of William and the heirs of his body failing *before* the granter; and as the same condition is not attached to the destination in favour of the heirs whatsoever, who are called 'whom failing' simply, they, as unconditional substitutes, are entitled to succeed to William. The general use of the term *substitutes*, in posterior parts of the deed, as applied to all the parties called, cannot alter the clear unambiguous meaning of the destination; nor can it be permitted to read the clause of destination as proposed by Adam, viz. "to William, *whom failing*, the heirs of his body, whom failing before me, to Adam." This would make the "whom failing before me" apply to the heirs of William's body merely, and not to himself, which is a totally different mode of expression from that used by the granter, and one that is absurd in itself. Besides, it would not answer Adam's purpose, because the heirs of William's body did not fail before the testator, and could not be said to have failed till William's death without issue.

Pleaded for the Heir of Conquest—

Not only is the destination to Adam and Andrew Stewart dependent on the condition of William's failure before the granter, but the destination to the heirs whatsoever is necessarily so likewise. For it would be absurd to suppose, that while the granter preferred Adam and Andrew Stewart to her heirs whatsoever, in the event of William dying without issue *before her*, she should, in the event of his dying without issue *after her*, be held to prefer her heirs whatsoever to these favoured parties. Besides, the heirs whatsoever could only take *failing* Adam and Andrew, and consequently only subsequently to them; so that if these individuals cannot take, there is no room for the heirs whatsoever to succeed as on their failure. The true intention of the granter therefore was, that whichever of her nephews should survive and succeed, he should take free from any tailzied destination,—all the subsequent destinations being vacated by the non-occurrence of the condition that the institute previously called should fail before her; so that the result is the same as if the lands had been disponed to William without any mention of heirs, in which case his heir of conquest

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would have taken, to the exclusion of the granter's heirs. It matters not that there might be a difficulty in form in regard to his serving heir of provision under the deed, since, if the right to succeed be in him, it can be completed by declaratory adjudication, or even a service to take up a special subject in a character different from that in which the party really has right, as was held competent in the case of Bell v. Carruthers.[1]

Pleaded for Adam Stewart—

The meaning of a deed is not to be inferred from an isolated consideration of particular words, but from a general view of the whole deed. Giving a general consideration to the whole deed, and attending to the circumstance that, in all parts of it, Adam and those called after him are denominated 'substitutes it is impossible to hold that they were intended by the granter to be merely conditional institutes. This is a construction which is never received in regard to the succession of heritage, if the deed will bear the construction that an ordinary substitution is intended. In the present case, this is the fair construction of the whole tenor of the deed. Besides, the condition said to be implied in the words "whom failing before me," does not, according to the arrangement of these words, apply to William, but only to the heirs of his body; so that the succession of the after substitutes was not conditional on William's predecease.

Lord Cringletie.—I endeavoured to arrive at the same conclusion with the Lord Ordinary, but have come to entertain that view against which his opinion is strongest. I cannot bring my mind to a perfect conviction of what truly was the intention of the testatrix; but we must be guided by the words which she has used. She dispones to William and the heirs of his body, "whom failing before me, then" to Adam Stewart. I am not satisfied that if William had predeceased, Adam must have served to William, because the words created a conditional institution of Adam. It appears to me impossible to dispute that the "whom failing before me" applied to William and the heirs of his body, and that the survivance of either put an end to the destination. So, in that event, the destination being at end, William was absolute proprietor. I cannot admit a meaning different from the words, and I think that was the meaning of the testatrix. I cannot separate the destination to William, and that to the heirs of his body; and I think the deed intended to leave William at perfect liberty, so that he could have disposed of the property at pleasure. In this situation, and holding the whole destination conditional on William's predeceasing, it is clear that Adam cannot serve under a destination which does not exist. A fortiori, the heirs whatsoever cannot claim, because they are postponed to Adam. It is said that the word substitutes often occurs in the deed; but that does not make any difference to me, because they were substituted conditionally, and all were equally conditional; and I can see no opening either for Adam, or the heirs whatsoever of the granter. Then the succession of William just goes to his ordinary heir, who in this case is the heir of conquest.

[1] June 21. 1749, (14016-9.)

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Lord Glenlee.—I incline to the opinion of the Lord Ordinary. The matter is, as I understand, to be considered here in the same way as if each party had brought a declarator for ascertaining his rights; so that if we are satisfied which of the claimants it was the intention of the testatrix should succeed, we can here find accordingly. This is a question of voluntas. In the ultimate result, I am not aware of much difference between a conditional institution and a conditional substitution. For a long period, every substitution was considered a conditional institution; and that led, in regard to moveables, to stretch the idea as far as could be done. But, in regard to land, the presumption is different; and unless there are some precise words totally excluding the construction, we must hold it as an ordinary substitution. There are, no doubt, words so strong as would, when used, exclude any supposition, except that of a conditional institution; as if the party resume the words of willing, and in such and such events dispones, &c. But we are not necessarily to infer a conditional institution, when the words can bear a different meaning. This principle was strongly illustrated in the case of Webster in 1823;[1] and I do not think there is less reason for considering the destination here to be a substitution, rather than a conditional institution, than there was in that case. It is scarcely possible to attend to the whole deed and provisions, and to doubt that the real purpose was, that the nephews and their heirs should take seriatim; and I cannot possibly go into Lord Cringletie's view that the heir of conquest should be preferred. Suppose Adam out of the way: Though William were fully vested, yet he must, before he could serve heir of provision by conquest, show that heirs of conquest are substituted; while, on the contrary, the property stands destined to heirs whatsoever of the granter, and the only destination to the heirs of William is to the heirs of his body. The heir of conquest could never compete with the heirs whatsoever, and far less with Adam, who is, I conceive, entitled to succeed.

Lord Meadowbank.—I concur; but, as this is a case of considerable nicety, I shall state the grounds of my opinion: It has arisen on the construction of the deed of settlement of Miss Govan, and is purely a question of who is called to the succession of the estate. The question of who is heir is always conducted on the principle of ascertaining, in the best manner that can be obtained, what was voluntas testatoris; and in this we are not tied down to any particular words or clause—we must look at the deed generally. Now, if clear technical words be employed, we must undoubtedly give effect to them. It is equally clear, however, that, in the interpretation of the language used in a deed, we must give one uniform and consistent sense to the same terms in all parts of the deed; and this is of considerable importance in the present question. It by no means follows that the obligation of construction is excluded, although one clause taken by itself may appear perfectly clear; and therefore we must take the whole members of the substitution to see in what sense particular phrases are used. These principles guided the Court in the decision of the great Roxburghe question. It was only by an investigation of the whole entail that they arrived at the conclusion which has carried the estate and title to the

[1] Ante, II. 188.

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present Duke; and there, indeed, they even looked at previous deeds to see what was the meaning of the words used. Proceeding on these principles, I have examined the deed with all the attention in my power, seeking for a declaration of intention merely; and looking at the whole construction of the deed, and seeing that the granter called one nephew, whom failing in certain events, another nephew, &c., whom all failing, her heirs whatsoever, it would require very express words indeed to convince me that the intention of the lady was, in the event of the nephew first called surviving her, neither to call in the second nor the third, nor the heirs whatsoever, but the heir of conquest of the nephew first called, although that heir is not even referred to, and indeed was passed over by her in the destination. I therefore put him aside. Then the question lies entirely between the second substitute Adam and the heirs whatsoever. As to this, I have arrived at the same conclusion with the Lord Ordinary. I agree with him on the general import of the settlement. It is not a feasible supposition that the granter should enumerate certain favourites and the heirs of their bodies, and yet should mean, in an event not unlikely to happen, to exclude them, and call heirs whatsoever. But if she have done so, we must give effect to the will. On dissecting the deed, however, I think the fair interpretation is that which the Lord Ordinary puts on it,—although as to one part of his Lordship's note I have considerable difficulty, viz. his opinion as to the view that the "whom failing before me" applies not to William, but only to the heirs of his body;—and though he calls the view whimsical, yet I confess I entertain it. "William *and* the heirs of his body" is just equivalent to "William, *whom failing*, the heirs of his body." Give it that interpretation, and the words "whom failing before me, then" only applies to the heirs of his body, and not to William himself; and their failure before the death of Miss Govan carries the estate to Adam. But, independently of this, it is clear that we must give the same meaning to the same words in different parts of the deed. Then see to what the heirs whatsoever are obliged to resort, to make out that the previous substitutions have failed. They say that "whom failing before me" excludes the second substitution, except in case of William and his heirs failing *by death* before the death of the testatrix. But the "whom all failing," they say, means not whom all *dying*, but whom all *being incapable of taking*. I cannot allow them to put this different construction on the same expressions; and as they are only called, whom all failing, they cannot come in while Adam and Andrew are alive. In this situation I arrive at the same conclusion with the Lord Ordinary, that taking the whole deed, and the mention of these heirs as substitutes &c., we are bound to prefer Adam.

Lord Justice-Clerk.—This is a case of nicety; and though my opinion is decided, yet I do not consider it remarkable that there should be a difference on the Bench. Taking the whole deed, and considering this as questio voluntatis, I have arrived at a conclusion similar to that of Lords Glenlee and Meadowbank. In the case of Urrard,[1] I proceeded on the grounds that the words there used were of a clear technical import, which excluded any other

[1] Richardson v. Stewart, July 5. 1821, (ante, I. 105); affirmed April 8. 1824, (2. Shaw, 149.)

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construction; and if that were the case here, I would not hesitate to apply the same rule. But where there are no clear technical terms used, we must look to the whole deed, and are bound to ascertain from it the intention of the party; and, in that view, I do not entertain the slightest doubt that the claim of the heir of conquest is altogether unfounded. The person first called is the second nephew, passing over the eldest; and the deed calls the heirs of the body of the deceased, whom failing, others. I cannot admit the heir of conquest under such a tailzied succession. We are precluded from the possibility of supposing that the testatrix intended him to take the estate, and he has nothing to do with the succession. Then we come to the competition between Adam and the heirs whatsoever. Although I cannot certainly shut my eyes to any of the terms of the deed—(and, with deference to the view of the Lord Ordinary, I take the same view with Lord Meadowbank as to the construction which he calls whimsical)—yet it is only after considering the whole clauses that I have come to my conclusion. The whole heirs are described repeatedly as substitutes. I cannot lose sight of this; and giving it a fair and rational construction, I think there is nothing to indicate that if William survived the testatrix, she intended to pass over the other two nephews, and the heirs of their bodies, and to jump at once to the heirs whatsoever of the granter. But how are they called?—only "whom all failing;" and can it be said that all have failed, when Adam and Andrew are alive? Such a construction would be a stretch never before attempted in any case, and I can arrive at no such conclusion. But taking the deed altogether, and deciding here as if there were a declarator, I think that Adam Stewart is entitled to be preferred.

Lord Cringletie.—I never meant to say that the heir of conquest was called by the deed, but only that, the whole destination failing, he took as heir of William, the tailzie being at an end.

The Court found that Adam Stewart was entitled to succeed, and remitted to the Lord Ordinary to proceed accordingly.

W. Horsburgh, W. S.—R. Rutherford, W. S.—W. Young, W. S.—Agents.

No. 103.

Mason, Pursuer.—*Moir.*
Merry, Defender.—*Aytoun.*

Process — Jury Court — 1. *Wm. IV. c.* 69. § 7. — The Court remitted to the Lord Ordinary to proceed in a case which came back from the Jury Court under a verdict disposing of part of the cause.

Dec. 15. 1830. 1st Division.

Mason raised a reduction of three relative deeds. The whole cause was remitted to the Jury Court, where an issue was tried in regard to the validity of one deed, and a verdict was found for the defender. On the subsequent return of the cause to the Court of Session under the late act, both parties moved the Court to remit to the Lord Ordinary to proceed with the cause, the defender at the same time intimating that he was to maintain that the effect of the verdict, which was returned as to one of the three deeds, cut off the pursuer from all interest to insist in reducing the other two.

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Dec. 15. 1830.
Mason v. Merry.
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The Court, after delaying to consider the effect of 1. Wm. IV. c. 69. § 7, which enacts that "all questions relating to the application of the verdict, or the rights and interests arising therefrom, shall proceed before the Division of the Court to which the cause belongs," remitted as craved.

T. Darling, S. S. C.—Aytoun and Greig, W. S.—Agents.

No. 104.

William Howatson, Petitioner.—*Jameson—M'Neill.*
John Murdoch, Respondent.—*Keay—Shaw Stewart.*

Sequestration of Land Estate.—Circumstances in which the Court refused to sequestrate lands.

Dec. 15. 1830.
1st Division.
H.

Howatson raised a reduction of a disposition of the lands of Cronberry and others in favour of John Murdoch, setting forth that he was heir at law of Murdoch's author; that the deed had been obtained by fraud, in violation of the act 1621, c. 18, and that Murdoch's title, though ex facie absolute, was truly a trust for behoof of the pursuer. On this he executed inhibition. Murdoch, who had made advances to Howatson's predecessor, raised an action of constitution against Howatson; and, pending these actions, Howatson applied for sequestration of the rents, and the appointment of a judicial factor; or at least for an order on Murdoch to find caution for his intromissions. Murdoch answered, that he was feudally vested under an ex facie onerous and irredeemable right; that the petition could not be granted without prejudging the merits of the actions; and that he had all along admitted that he had purchased the lands for behoof of Howatson's predecessor, and was perfectly willing to reconvey them, on being relieved of the heritable debts, and repaid the advances which he had made on the security of the lands.

The Court refused the petition, but allowed no expenses.

Lord President.—The first of the rents must go to satisfy the heritable creditors. If the remainder should afford any extra intromissions to Murdoch, these will in so far extinguish his advances. That amply secures the petitioner's interest.

Respondent's Authority.—Boaz, Jan. 26. 1828, (ante, VI. 462.)

No. 105.

Mrs. Hepburn or Cowan, Pursuer.—*Cuninghame.*
W. H. Kerr and Robert Wight, Defenders.—*Forsyth—Hope.*

Bona Fides—Terce—Trust.—Where a party died infeft in heritable property, which he conveyed by a trust-deed to his widow and others; and she having disclaimed it, but, at the request of his creditors, concurred in conveying the property to a trustee for their behoof, under declaration that she should be entitled to claim every right competent to her; and the trustee intromitted with the rents for several years; and she was thereafter served to her terce—Found, that the trustee was bound to account to her for her share of the bygone rents, although he alleged that he had bona fide paid them away to the creditors.

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Dec. 15. 1830. 1st Division. Ld. Corehouse. D.

Cowan v. Kerr &c.

The late John Cowan, flesher in Musselburgh, died in 1815, feudally vested in certain heritable subjects. After his death, he was found to have executed a trust-settlement in favour of his widow and certain other persons; but as it appeared that his debts exceeded his estate, they declined to act. His widow in particular declared, at a meeting of the trustees, "that she would not accept the office, and was determined to set aside the settlement."

A general meeting of the creditors of the deceased having named Mr. Robert Wight, accountant in Edinburgh, to act for their behoof, Cowan's trustees, in 1816, at their request conveyed the subjects in his favour; and the following clause of reservation was inserted in the conveyance:—"Providing always, as it is hereby expressly provided and declared, that our having granted these presents shall not be construed into or infer any act of homologation or acceptance of the foresaid deed of settlement executed by the said John Cowan, on the part either of me, the said Elizabeth Hepburn, his widow, or his heirs at law; but that it shall be competent for her or them, notwithstanding hereof, to challenge the said disposition and settlement, in so far as regards the free reversion of the funds of the said deceased John Cowan, after paying all his just and lawful debts."

Mr. Wight then intromitted with the rents, and acted for the general behoof from 1818 till 1825, when having resigned, Mr. William Hackney Kerr, accountant, was elected to act in his stead. On Wight's resignation, he claimed a balance of £147. 8s. 4d. as due to him, the amount of which the creditors disputed.

In November 1825, the widow obtained a brief of service to be kenned to her terce; and, after considerable opposition by Kerr, she was served. She then raised an action against Wight and Kerr, in respect of their several intromissions with the rents of her husband's heritage from 1818 downwards, as liable to pay her a terce of the free rents from that date. Wight defended, alleging that, during the course of his intromissions between 1818 and 1825, no claim had been made by the widow; that he had been allowed to expend the whole of the rents then drawn by him, and was largely in advance at the period when he resigned his office, and duly accounted to his successor, and therefore he was protected by the plea of bonâ fide consumption; and at all events that the claim should be made against the creditors, and not against him.

Kerr adopted the defence of Wight as to those years to which it was applicable, but admitted his liability to account from 1825, when the pursuer made a claim to be kenned to her terce.

The Lord Ordinary, "in respect the pursuer concurred with the other trustees appointed by her husband in executing a conveyance of the trust-estate to the defender Wight, not for her own behoof, but solely for behoof of the creditors, and under an express reservation of her right to challenge her husband's settlement, repelled the defences; found the defenders, Robert Wight and William Hackney Kerr, liable to account to the pursuer for her terce of the rents of the subjects uplifted by them

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respectively from the term of Martinmas 1818 till Martinmas last, with interest from the terms of payment respectively; but, before further answer, appointed parties to be heard as to a plea of retention by Kerr."

The defenders reclaimed; but the Court unanimously adhered, and allowed expenses against the trust-estate.

Countess of Dunmore &c. v. Alexander.

Lord Balgray.—There is a reservation in gremio of the conveyance to Wight, so as to keep the widow's claim perfectly open, so far as the reservation extends. The only question therefore is, what is the amount of this reservation? She was quite right to concur with the other trustees at the desire of the creditors, and execute the deed in question; and I rather conceive that the reservation which she inserted was sufficient to save all her claims as the widow of the deceased. This put the defenders in mala fide from the first to intromit on any other footing than as accountable to her for her terce.

Lord Craigie.—It is said by Mr. Wight that he has no trust-funds in his hands to meet this demand; and that, on the contrary, he has paid them away to creditors of the deceased, whose estate remains considerably indebted to him. But when a trustee would availably plead payments to creditors, as exonerating him from demands at the instance of others, he must show that these payments were justly due. If he pays to the prejudice of parties having a preferable claim upon him, his remedy is not to resist that demand when made, but to satisfy it, and recur for relief to the others, whom he has paid prematurely and erroneously.

Lord Gillies.—The reservation by the widow provides, that the conveyance to Wight "shall not be construed into or infer any act of homologation or acceptance of the foresaid deed of settlement &c. on the part of me, the widow," &c. It is impossible to hold her barred from claiming terce after this. I am therefore for adhering. It is a much simpler matter effectually to reserve, than effectually to discharge a terce.

Defender's Authority.—M'Aulay, Jan. 19. 1636, (1740.)

W. Wallace, W. S.—D. Fisher, S. S. C.—Agents.

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Countess of Dunmore and Husband, Advocators.—*Ld. Adv. Jeffrey—Tait.*

Elizabeth Alexander, Respondent.—*Hope—W. Robertson—Carlyle.*

Master and Servant—Locus Pœnitentiæ.—A lady having written to another to engage a servant, and thereafter not to do so; and the two letters having been delivered, through the post-office, simultaneously to the servant—Held that there was no completed contract, and that the servant was not entitled to wages.

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1st Division. Lord Newton. H.

The Countess of Dunmore, being about to change a servant, and having heard that Elizabeth Alexander was to leave the service of Lady Agnew of Lochnaw, wrote to her ladyship, mentioning the circumstance; stating that the wages she gave were £12. 12s. per annum, and requesting to be informed as to Alexander's character. Lady Agnew, in answer, stated that she could recommend Alexander, who would gratefully accept

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the proposed wages; and her ladyship added as follows:—"If Lady Dunmore decides upon taking Betty Alexander, perhaps she will have the goodness to mention whether she expects her at the new or the old term." On the 5th of November, the Countess wrote to Lady Agnew, requesting that she would "have the goodness to engage Betty Alexander for her at the £12. 12s. a year; but she wishes to have her at the new term, or as soon after as possible, because her present one must go at that time." The letter went through the post-office to Lochnaw; but as Lady Agnew had gone to Glasserton-house, it was sent to her there. Upon receiving it, Lady Agnew desired her housekeeper Mrs. Moore (who had accompanied her) to notify the Countess's answer to Alexander, which was done by Moore making an addition on the letter itself and putting it into the post-office, addressed to Betty Alexander at Lochnaw. In the mean while, on the 6th of November, (the day after writing the above letter,) the Countess addressed another letter to Lady Agnew, intimating that she no longer needed Alexander. This second letter, which was also addressed to Lochnaw, was sent to Lady Agnew at Glasserton-house, and was received immediately after the other had been dispatched to the post-office; but Lady Agnew sent the second one by express to the post-office; and both the letters arrived at Lochnaw together, and were delivered at the same moment to Alexander. Lady Dunmore having declined to receive her, or pay her wages, Alexander raised an action against her in June 1827, before the Sheriff of Stirlingshire for wages and board-wages for six months from Martinmas 1826 to Whitsunday 1827, at which time she had got a new situation.

In support of this demand, she maintained that there had been a completed contract, and that Lady Dunmore was not entitled to resile. On the other hand, her Ladyship contended, that as the two letters had been received by Alexander at one and the same time, she was made aware that her services would not be required, and therefore she could not allege a concluded contract.

The Sheriff Substitute, after finding the above facts, pronounced an interlocutor in these terms:—"Finds that Lady Agnew's card, formerly referred to, cannot, from its terms, be interpreted or considered otherwise than as an offer, on the part of the pursuer, to engage as a servant with the noble defender on the terms proposed in a communication, to which this card is obviously an answer;—finds it doubtful whether the noble defender's reply to Lady Agnew, contained in the card libelled on, uncommunicated in any way to the pursuer, can be held to be a legal acceptance of the offer;—but finds it very clear, abstractedly from the specialities of the present case, that the said card, communicated in the manner it has been done to the pursuer by Lady Agnew through Mrs. Moore, must be held to be a legal acceptance of the offer, an actual engagement of the pursuer, and a completion of the contract, from which neither party was entitled to resile;—therefore finds, that the issue of this case depends on the solution of the question, whether a party who accepts of an offer is entitled,

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at the same moment, unico contextu, or with the same breath, to retract his acceptance? And the Sheriff Substitute being of opinion, that the instant an offer is accepted of the contract is completed, it is not in the power of either party to retract or resile;—that from the moment of acceptance, as expressed by Mr. Bell, in treating of the contract of sale, there is between the parties, in idem placitum concursus et conventio, which constitutes the contract;—finds, that as, in the present instance, the contract was completed by the transmission of the card libelled on to the pursuer, the engagement between the parties was rendered indissoluble, without the consent of both, and that it was consequently beyond the power of the noble defender at any time, however short the interval, to retract the acceptance, or resile from the engagement;—on these grounds, repels the defences, and decerns against the noble defenders, in terms of the conclusion of the libel."

The Sheriff Depute having adhered, the Countess advocated; and the Lord Ordinary, having ordered Cases, "advocated the cause, approved of the findings in point of fact in the Sheriff's interlocutor; but altered the judgment of the Sheriff, sustained the defences, assoilzied the advocators," and found no expenses due.*

Alexander reclaimed.

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* "NOTE.—The Sheriff, in his interlocutor of 15th February 1828, has stated the facts correctly, but his judgment seems inconsistent with the facts he has found. He puts his opinion on the ground, that the contract was only completed by the communication to the pursuer of Mrs. Moore's letters; yet he conceives there was some interval betwixt her knowledge of the consent and of the recal which rendered the latter ineffectual. But as the letters were delivered to the pursuer by the same person, and at the same moment, while it is impossible to know which was first read, they must be held as one communication, and the notification of recal being simultaneous with that of the consent must do it away altogether.

"The pursuer in this Court has not attempted to support the Sheriff's view. But assuming that the Lady Agnew's letter of the 2d of November contained an offer on the part of the pursuer, and that Lady Dunmore's letter of the 5th was an acceptance of that offer, she contends that the contract was completed, so as to bar resiling, either by the writing or putting that letter into the post-office, or at least by its being received by Lady Agnew.

"The Lord Ordinary thinks it doubtful if the letter of the 2d can be held as an offer made on the pursuer's part, or any thing but an answer to Lady Dunmore's enquires. But at any rate it seems clear, from the terms of her letter of the 5th, that Lady Dunmore did not understand it as such, and that she did not mean her letter as an acceptance communicated to Lady Agnew, as acting for the pursuer. The letter plainly gives a commission to Lady Agnew to act as the writer's mandatory in engaging the pursuer, conceiving that the contract was still to be made. Now, having given such a commission, it was in the power of Lady Dunmore to give contrary instructions to her mandatory; and if these were received in such time that the mandatory was able to recal any step that she had taken before the contract was completed, no obligation could be incurred.

"Even if the letter of the 5th could be viewed as an acceptance, it seems impossible to hold that it was sent to Lady Agnew as mandatory of the pursuer, so that the receipt

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LORD BALGRAY.—The admission that the two letters were simultaneously received, puts an end to the case. Had the one arrived in the morning, and the other in the evening of the same day, it would have been different. Lady Dunmore conveys a request to Lady Agnew to engage Alexander, which request she recals by a subsequent letter that arrives in time to be forwarded to Alexander as soon as the first. This, therefore, is just the same as if a man had put an order into the post-office, desiring his agent to buy stock for him. He afterwards changes his mind, but cannot recover his letter from the post-office. He therefore writes a second letter countermanding the first. They both arrive together, and the result is, that no purchase can be made to bind the principal.

LORD CRAIGIE.—I take a different view. Lady Agnew, acting for the servant, writes to Lady Dunmore, stating Alexander's readiness to accept the proposed wages, recommending her on account of her character, and concluding thus:—"If

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receipt of it by her completed the bargain. The writer plainly constitutes Lady Agnew as her mandatory in what was to be done, although it may be possible to hold that, by "engaging the pursuer," she meant that she should communicate to her the acceptance contained in her letter; and this communication was therefore necessary to perfect the location.

"But the pursuer, on the authority of a passage in Mr. Bell's work, maintains that it is not necessary, in order to complete a consensual contract, that the acceptance should be communicated to the offerer, because the offerer having previously consented, the mere consent of the person to whom the offer is made constitutes the consensus in idem placitum, which is all that is requisite to perfect his engagement. But if the learned author's meaning is to be taken in the extensive sense here contended for, so as to bar the acceptor from resiling, it does not seem to be supported by sufficient authority. From the reason assigned, the mere existence of a consent in the acceptor's mind would have the effect to bind him—a thing which might admit of being proved by a reference to oath. The pursuer indeed disclaims going this length, and contents herself with maintaining that any clear expression of the consent will be sufficient.

"But surely the expression of consent made to a third person altogether unconnected with the offerer will not do, nor will the writing of a letter of acceptance be sufficient, if this letter is never sent. The Lord Ordinary conceives, that if, after writing such a letter, the author should add a postscript, stating, that on further consideration, or in consequence of new intelligence, he did not choose to accept the offer, and if, from the letter's referring to other matters, he still thought it necessary to send it, the acceptance would be effectually recalled. But if this be the case, the same effect must follow when a second letter retracting the offer is transmitted by the same post, so as to be received at the same time, or where a communication to this effect is made by express or otherwise to the offerer before the acceptance reaches him. In short, each party may resile, so long as his offer or acceptance has not been communicated to the other party.

"The pursuer may have suffered from the disappointment of her expectations; but the same hardship would have been felt, had Lady Dunmore written no letter but the last, in which case, however, the pursuer could have had no claim. The different ranks of the parties, and the great importance of the sum claimed to the one in comparison with the other, leads naturally to the giving all possible weight to the pursuer's argument. But any plea of favour of this kind is in a great measure done away by the very discreditable account which she has given as to her receipt of the letters, particularly in her deposition when examined as a haver in the Inferior Court."

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Lady Dunmore decides on taking Betty Alexander, perhaps she will have the goodness to mention whether she expects her at the new or the old term." Now, what is the answer of the Countess?—a request to Lady Agnew to engage the servant at the wages mentioned, accompanied with a notice that "she wishes to have her at the new term," &c. Lady Agnew was thus the mandatory for both parties, the mistress and the servant; she was on the same footing as a person in the well-known situation of broker for both buyer and seller. Every letter between the principals, relative to an offer or an acceptance respectively was, as soon as it reached Lady Agnew, the same as delivered for behoof of the party on whose account it was written. I hold, therefore, that when Lady Dunmore's letter reached Lady Agnew, the contract of hiring Alexander was complete,—the offer on the part of Alexander being met by an intimated acceptance on the part of the Countess. No subsequent letter from the Countess to Lady Agnew could annul what had passed by the mere circumstance of its being delivered, at the same time with the first, into the hands of Alexander. I do not think the servant could have retracted after the first letter reached Lady Agnew; and if she was bound, it seems clear that the Countess could not be free.

Lord Gillies.—I am decidedly of the opinion first expressed. Lady Agnew received a letter desiring her to engage a servant for Lady Dunmore. She proceeds to take steps towards this by putting a letter into the post-office for the purpose of making the engagement. But, before this letter reaches its destination, her authority to hire the servant is recalled, and, by the help of an express, she forwards the recal, so that it is eventually delivered through the same post with the former letter, and both reach the servant at once. They thus neutralize each other, precisely as in the case put by Lord Balgray of an order and a countermand being sent through one post to an agent. I am therefore for adhering.

Lord President.—I concur with the majority. There was no completed contract here, and Lady Dunmore was at liberty to resile as she did.

Respondent's Authorities.—(1.)—3. Ersk. 31. 3.; 1. St. 12. 16.—(2.) and (3.)—1. St. 3. 9. and 1. St. 10. 2. and 3; Thomson, 344. 372; 1. Bell, 326; 3. Ersk. 3. 88; 1. Bankt. 4. 24; Payne, 3. Term. Rep. 148; Brown on Sale, 152, and Pothier Cont. de Vente, there referred to; Adams &c., June 5. 1818, (1. Barn. and Ald. 681.)

Tait and Young, W. S.—A. and J. Paterson, S. S. C.—Agents.

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R. Aytoun and J. Patten, Raisers.—*Ld. Adv. Jeffrey—H. J. Robertson—Aytoun—A. Dunlop.*

Robert Dougall and Others, Objectors.—*Jameson—A. Wood.*

Stamp Act 55. *Geo. III. c.* 184—*Bank Check—Process—Bill of Exceptions.*—1.—An unstamped draft having been drawn by a party on his bankers at a place beyond ten miles from the office of the bank, but so obscure that they could not be presumed to know that the draft had been drawn beyond the ten miles—Held that, to preclude the bank from availing themselves of it as a voucher to discharge them, it was necessary to instruct their knowledge, when they paid it, of its being beyond the limit.—2.—The only objection taken on the record to the validity of a draft on a banker being that it was drawn ten miles from the office; and parties having gone to issue on this objection before a Jury; and the only plea raised on the trial, after failure to prove know-

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ledge of the defect on the part of the bank, being that a draft drawn beyond ten miles was not a good voucher, whether paid knowingly or not; and the Judge having specially directed the Jury that it was necessary to instruct knowledge, in order to preclude its being used as a voucher; and a Bill of Exceptions having been tendered, which, in the narrative of the counsel's argument, set forth another objection which had not been pleaded, either on the record or at the trial, and which further bore the charge to have commenced with a general statement 'that the said several matters' were not sufficient to exclude the defence—Held incompetent to introduce the new objection at discussing the Bill of Exceptions.

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2d Division.
Jury Court.
T.

THE late Captain James Dougall kept an account-current with the Renfrewshire Banking Company, who carry on business in Greenock. Captain Dougall generally resided at Gourock, within three miles of Greenock; but having been taken ill while on a visit to his mother, who resided at a villa called Sunnyside, in the immediate vicinity of Falkirk, (about forty miles from Greenock,) he, on the 28th of July 1827, granted to his sister Miss Margaret Dougall, then also at Sunnyside, a draft on the Bank, written upon unstamped paper, in these terms:—"Sunnyside, July 28. 1827.—Pay to Miss Margaret Dougall the sum of Nine Hundred Pounds, with which debit my account." (Signed) "JAMES DOUGALL." At this time there stood at Captain Dougall's credit, in his account with the Bank, the sum of £950; and Miss Dougall, having gone to Greenock, presented to the Bank, on the 30th of July, the draft above quoted, which was paid by them accordingly. Captain Dougall having died on the same day on which the draft was dated, a summons of multiplepoinding was thereafter raised in name of Mr. Aytoun and Mr. Patten, the manager and cashier of the Bank, in which these parties gave in a condescendence of funds, admitting that, on the 11th of April preceding Captain Dougall's death, the balance in his favour had been £979. 15s. 6d.; but that, of that date, they had paid an order of his for £29. 15s. 6d., and, on the 30th of July, the above-mentioned order for £900, which left a balance in their hands of only £50, with the interest due thereon. To this condescendence objections were given in by Robert Dougall, residing at Pennyfields Poplar in the county of Middlesex, brother and heir of conquest of the deceased, and as such stating himself to be liable for his brother's debts, and entitled to relief out of the moveable funds; to which objections Mrs. Dougall, relict and executrix of the deceased, afterwards became a party. These objections bore as follows:—"It is believed that the sum of £900 was paid, on the 30th of July, to Miss Dougall. The order which was drawn on the Renfrewshire Banking Company at Greenock, and upon which the said sum was paid, is not stamped; and Sunnyside, at which place it bears to be dated the 28th July 1827, and where it was in fact drawn and issued, is in the neighbourhood of Falkirk, and greatly more than ten miles from the Bank's office at Greenock, where the order was presented and paid. It was known to the said Bank or Banking Company, at the time they made the foresaid payment, that the Sunnyside where the late Mr. Dougall resided, and where the bill is dated, was

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in the neighbourhood of Falkirk, and was more than ten miles from Greenock; at least it was known to them that the Sunnyside where the bill is dated was more than ten miles from Greenock. The order, therefore, was not within any of the exemptions of the act of 55th Geo. III. c. 184, requiring such writings or instruments to be stamped as therein set forth; and consequently, under the provisions of the 13th section of the said act, the condescenders cannot claim to be allowed the money paid upon the said order, or any part thereof, in account against the person or persons by or for whom the order was drawn, or his, her, or their executors or administrators, or his, her, or their assignees or creditors, in case of bankruptcy or insolvency, or any person or persons claiming under him, her, or them."

On the other hand, it was alleged by the Bank that they were ignorant that the Sunnyside at which the order was dated and issued, was beyond ten miles from their office, and that they believed it to have been a villa at one time possessed by Captain Dougall, on the Dumbartonshire side of the Clyde, and within the ten miles, but the name of which they had not known; and they pleaded that the provisions of the 55th Geo. III. only applied to the case of a bank 'knowingly' paying an unstamped draft drawn at a place more than ten miles from their office. The objectors, on the other hand, set forth a general plea, that "under the provisions of 55. Geo. III. c. 184, the respondents (the Bank) are not entitled, in accounting, to credit for the order for £900, dated the 28th of July 1827, stated to have been paid to them." In this state of the averments and pleas, the cause was remitted to the Jury Court, where the objectors were held as pursuers, and the Bank as defenders. The following issue, confined to the £900 in dispute, was sent to a Jury:—"Whether, on or about the 28th day of July 1827, there was in the bank of the defenders at Greenock, on deposit-account, the sum of £900, the property of the late Captain James Dougall; and whether the defenders are indebted and resting-owing to the pursuers in the said sum of £900?"

At the trial, the objectors tendered in evidence the record and extracts from the Bank books, showing the state of accounts as above mentioned; and they then called the nominal raiser Mr. Patten, cashier of the Bank, with a view to prove that the Bank had paid the draft, *knowing* it to have been drawn beyond ten miles; but he having deponed, that when he paid it, he believed that the Sunnyside at which it was dated was a villa on the Dumbartonshire side of the river, and within ten miles, they adduced no further evidence, but pleaded in law that they were not bound to prove knowledge on the part of the Bank; and that if the draft did not fall within the exemption, ex facie at least, by bearing to be drawn at a place within ten miles, it could not be received as a voucher. The Bank led no evidence; and the Lord Chief Commissioner and Lord Mackenzie having directed the Jury that, to exclude the draft as a voucher, it was incumbent on the objectors to instruct that the Bank did not act ignorantly, a verdict was returned for the Bank.

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The objectors thereupon tendered a Bill of Exceptions, in which, in the statement of their argument, they introduced a plea as to the draft, not set forth on the record, or alluded to at the trial, in regard to its being payable to a particular individual named, and not to the "bearer on demand" —the terms in the clause of exemption. The bill stated that they had insisted that, under the provisions of the 55th Geo. III., "a draft or order of the foresaid description—that is, an unstamped order or draft, bearing to be payable only to a particular individual therein named, and not simply to the bearer on demand, and further bearing to be dated and issued at a place which is not within ten miles of the place where the banker or bankers upon whom it is drawn transact business, could not be produced to instruct any payment alleged to have been made by said defenders or said Banking Company, or received as legal evidence of such payment, and as a voucher to discharge them of any part of the foresaid sum proved and admitted by them to have been in the said Captain James Dougall's deposit-account with the said Banking Company; and that the statement of the said defenders, that when the said draft or order was, as they allege, presented and paid by them, they were ignorant that the said place called Sunnyside, at which it bears to be dated and issued, was not within ten miles of the office of the said Banking Company, is not relevant, even if true; and that therefore, as the said defenders did not aver that they possessed, and had not offered to produce any other evidence to discharge them, or the said Banking Company, of any part of the said sum of £950, they were liable in payment to the pursuers, as at the said 28th day of July 1827, not only of £50 thereof which they had admitted to be due, but also of the remaining £900 which they had disputed, and which formed the subject of the foresaid issue; and the said pursuers were entitled to a verdict for the said last-mentioned sum, as due by the said defenders and said Banking Company on the said 28th July 1827, the date mentioned in said issue; and the said counsel for the said pursuers did then and there pray the said Lords Commissioners to admit and allow the said matters so produced and given in evidence for the said pursuers, to be, in the circumstances, conclusive evidence in favour of the said pursuers to entitle them to a verdict under the said issue, and to bar the said defenders of their defence." The bill further recited the charge of the Judges, as follows: "And the said Lords Commissioners did then and there declare and deliver their opinion to the Jury aforesaid, that the said several matters so produced and given in evidence on the part of the said pursuers were not sufficient to bar the said defenders of their defence aforesaid; and that to exclude the said draft or order from being received in evidence on the part of the defenders, as a sufficient voucher to discharge them of the said sum of £900 contained therein, it would have required to be instructed on the part of the said pursuers that the defenders did not act ignorantly, and were in the knowledge that the said place at which it bears to be dated and was issued was not within ten miles of the office

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in the neighbourhood of Falkirk, and was more than ten miles from Greenock; at least it was known to them that the Sunnyside where the bill is dated was more than ten miles from Greenock. The order, therefore, was not within any of the exemptions of the act of 55th Geo. III. c. 184, requiring such writings or instruments to be stamped as therein set forth; and consequently, under the provisions of the 13th section of the said act, the condescenders cannot claim to be allowed the money paid upon the said order, or any part thereof, in account against the person or persons by or for whom the order was drawn, or his, her, or their executors or administrators, or his, her, or their assignees or creditors, in case of bankruptcy or insolvency, or any person or persons claiming under him, her, or them."

On the other hand, it was alleged by the Bank that they were ignorant that the Sunnyside at which the order was dated and issued, was beyond ten miles from their office, and that they believed it to have been a villa at one time possessed by Captain Dougall, on the Dumbartonshire side of the Clyde, and within the ten miles, but the name of which they had not known; and they pleaded that the provisions of the 55th Geo. III. only applied to the case of a bank 'knowingly' paying an unstamped draft drawn at a place more than ten miles from their office. The objectors, on the other hand, set forth a general plea, that "under the provisions of 55. Geo. III. c. 184, the respondents (the Bank) are not entitled, in accounting, to credit for the order for £900, dated the 28th of July 1827, stated to have been paid to them." In this state of the averments and pleas, the cause was remitted to the Jury Court, where the objectors were held as pursuers, and the Bank as defenders. The following issue, confined to the £900 in dispute, was sent to a Jury:—"Whether, on or about the 28th day of July 1827, there was in the bank of the defenders at Greenock, on deposit-account, the sum of £900, the property of the late Captain James Dougall; and whether the defenders are indebted and resting-owing to the pursuers in the said sum of £900?"

At the trial, the objectors tendered in evidence the record and extracts from the Bank books, showing the state of accounts as above mentioned; and they then called the nominal raiser Mr. Patten, cashier of the Bank, with a view to prove that the Bank had paid the draft, *knowing* it to have been drawn beyond ten miles; but he having deponed, that when he paid it, he believed that the Sunnyside at which it was dated was a villa on the Dumbartonshire side of the river, and within ten miles, they adduced no further evidence, but pleaded in law that they were not bound to prove knowledge on the part of the Bank; and that if the draft did not fall within the exemption, ex facie at least, by bearing to be drawn at a place within ten miles, it could not be received as a voucher. The Bank led no evidence; and the Lord Chief Commissioner and Lord Mackenzie having directed the Jury that, to exclude the draft as a voucher, it was incumbent on the objectors to instruct that the Bank did not act ignorantly, a verdict was returned for the Bank.

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The objectors thereupon tendered a Bill of Exceptions, in which, in the statement of their argument, they introduced a plea as to the draft, not set forth on the record, or alluded to at the trial, in regard to its being payable to a particular individual named, and not to the "bearer on demand" —the terms in the clause of exemption. The bill stated that they had insisted that, under the provisions of the 55th Geo. III., "a draft or order of the foresaid description—that is, an unstamped order or draft, bearing to be payable only to a particular individual therein named, and not simply to the bearer on demand, and further bearing to be dated and issued at a place which is not within ten miles of the place where the banker or bankers upon whom it is drawn transact business, could not be produced to instruct any payment alleged to have been made by said defenders or said Banking Company, or received as legal evidence of such payment, and as a voucher to discharge them of any part of the foresaid sum proved and admitted by them to have been in the said Captain James Dougall's deposit-account with the said Banking Company; and that the statement of the said defenders, that when the said draft or order was, as they allege, presented and paid by them, they were ignorant that the said place called Sunnyside, at which it bears to be dated and issued, was not within ten miles of the office of the said Banking Company, is not relevant, even if true; and that therefore, as the said defenders did not aver that they possessed, and had not offered to produce any other evidence to discharge them, or the said Banking Company, of any part of the said sum of £950, they were liable in payment to the pursuers, as at the said 28th day of July 1827, not only of £50 thereof which they had admitted to be due, but also of the remaining £900 which they had disputed, and which formed the subject of the foresaid issue; and the said pursuers were entitled to a verdict for the said last-mentioned sum, as due by the said defenders and said Banking Company on the said 28th July 1827, the date mentioned in said issue; and the said counsel for the said pursuers did then and there pray the said Lords Commissioners to admit and allow the said matters so produced and given in evidence for the said pursuers, to be, in the circumstances, conclusive evidence in favour of the said pursuers to entitle them to a verdict under the said issue, and to bar the said defenders of their defence." The bill further recited the charge of the Judges, as follows: "And the said Lords Commissioners did then and there declare and deliver their opinion to the Jury aforesaid, that the said several matters so produced and given in evidence on the part of the said pursuers were not sufficient to bar the said defenders of their defence aforesaid; and that to exclude the said draft or order from being received in evidence on the part of the defenders, as a sufficient voucher to discharge them of the said sum of £900 contained therein, it would have required to be instructed on the part of the said pursuers that the defenders did not act ignorantly, and were in the knowledge that the said place at which it bears to be dated and was issued was not within ten miles of the office

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of the Bank at Greenock; and with that direction left the same to the Jury."

When the bill came to be argued, the counsel for the objectors were proceeding to maintain the plea, that in respect the draft was payable to a particular individual therein named, and not to the bearer on demand, it obviously was not within the exemption of the statute, when they were stopped by the Court.

LORD JUSTICE-CLERK.—I can see nothing in the charge excepted to, of a direction as to this plea; it is entirely confined to the objection regarding the distance.

Jameson.—The general words in the commencement of the charge refer to all the previous matters set forth as pleaded; and so, on the face of the bill, there is a charge on the plea which is set forth as insisted in on the trial.

LORD CHIEF COMMISSIONER.—The counsel must recollect that there was not a word stated, at the trial, of the objection now raised; and that the only question put in issue, or in the record, was as to the necessity of proving knowledge as to the distance. All the rest of the narrative is surplusage. It is necessary, for the regularity of the course of procedure, that I should take this opportunity of explaining fully the real meaning of a Bill of Exceptions, its form, and how questions are to be decided on it, and to be taken. An exception means that you except to the direction of the Judge in matter of law, and nothing else. Now the exception is not a general allegation that the Jury were directed to find for the defenders, when they should have been directed to find for the pursuer. But the party sets forth specific direction, and it is then submitted to the Judges who gave the direction; and if they consider it not correct, they alter it so as to correct it. Every thing set forth in the bill, as given in evidence, is thus confined to what is really excepted to; and its only object is to show on what facts the direction arises, but not to raise exceptions, except to the direction itself, as this would amount to a motion for a new trial, as contrary to evidence or law, or as overlooking matters which should have been considered. Now the charge here is confined to the objection as to distance, and it necessarily excludes consideration of every thing else. If this were not the case, it would allow the question to be converted from the precise point objected to in the charge, into a general motion for a new trial on the whole evidence narrated. In an early stage of our practice in the Jury Court, we allowed a bill without any narrative. That was objected to in the House of Lords by Lord Eldon, who directed that bills should contain the evidence. Now here there is a narrative; but the exception is limited to the words of the charge; and if we extended it further, a bill of exceptions, instead of being as most useful, would be a most mischievous instrument; therefore I am satisfied that we can take nothing into view but the special direction given.

LORD JUSTICE-CLERK.—My opinion entirely coincides with that given; for if counsel are entitled to lay aside the point of direction, and raise up other exceptions out of the narrative, it would be the means of moving new trials, when that was not the shape of the case before the Court. Now here the only point I understood to be raised was the exception to the charge, that it was necessary to bring home to the Bank knowledge that Sunnyside was beyond ten miles; and I cannot admit any other to be raised. If the exceptors could have raised this question,

they would have got it specifically stated in the bill and charge; but they knew the answer would have been, you never raised it at the trial. Besides, looking to the record in this Court, it is not once noticed in any part of the proceedings; and it would be very odd if a point not raised in this Court, or in the Jury Court, should now be raised for the first time in discussing the Bill of Exceptions here.

LORD GLENLEE.—I never imagined the direction had reference to any point but knowledge of distance; and if there was any other point, why did they not insist on having a direction on it?

LORD CRINGLETIE.—I certainly had the same view, for there is no such plea stated in the record. The only plea was knowledge; and if the present objection had been taken, there was no need of going to a Jury; and it could not be pleaded to the Jury, as it was never urged in this Court. There is no objection that the verdict is contrary to evidence.

The objectors' counsel then went on to contend that the provision in § 13 as to knowledge only applied to those latent requisites to bring a bill absolutely within the terms of the exemption, which did not appear ex facie, there being an apparent compliance with the requisites; but that it did not apply to the requisite of the draft being within ten miles,—nothing being said as to knowledge of *that*, which was absolutely essential, but only as to the knowledge of failure in regard to the other provisions in the clause of exemption.

The Court, without requiring the objectors to answer, disallowed the bill, with expenses.

LORD JUSTICE-CLERK.—I cannot doubt that the Judge left the case to the Jury with a proper direction in law, the Bank having no sort of knowledge that Sunnyside was beyond ten miles. The onus probandi clearly, by this section of the act, lies on the party objecting; and as there is no proof, it is clear that no other direction could have been given.

LORD GLENLEE.—I am of the same opinion. The question is, whether the payment to Miss Dougall on this draft can be sustained as a good payment, so that the Bank shall be allowed credit for it; and as to that, the only thing is the 13th section; and consequently it must be libelled that they knowingly paid, and there is no such allegation.

LORD CHIEF COMMISSIONER.—Onus probandi of primâ facie knowledge of the distance by the bankers rests on the pursuer. If the draft was dated at Edinburgh, or any other well known place, there would be primâ facie evidence that they must have known the distance; but where the place is obscure, the onus probandi lies on the objector to give primâ facie evidence that the bankers knew, which the banker must rebut. But here there is no evidence of knowledge at all. I am still of opinion that the direction was right.

LORD CRINGLETIE.—The objection taken was, that the distance was known to the Bank. That matter of fact the objector undertook to prove, and we are entitled to take it for granted that there was no proof. Suppose this a prosecution for penalties, which is the same case as for forfeiture—what figure would the prosecutor have made here? I have no doubt whatever that the charge is right.

PEARSON, WILKIE, and ROBERTSON, W. S.—R. WELSH, S. S. C.—Agents.

No. 108.

W. ELMSLIE, Pursuer.—*Buchanan.*

Dec. 15. 1830. Elmslie v. Grant &c. Binny v. Maclean.

MRS. GRANT and CAPT. MACLEAN, Defenders.—*A. Wood—Macdougal.*

Heritable Creditor—Mails and Duties—Retention.—A tenant being creditor of his landlord, and holding his possession under a stipulation that he was to be allowed to apply the rents in liquidation of the debt, held entitled, in a question with an heritable creditor pursuing an action of mails and duties, so to apply the rents actually fallen due prior to citation to the action.

Dec. 15. 1830. 2D DIVISION. Lord Medwyn. T.

MR. GRANT of Lakefield, who was indebted to the defenders, Mrs. Grant and Captain Maclean, gave them possession, at Martinmas 1828, without any written lease, of certain parts of his estate, on an arrangement that the rents were to be applied in extinction of their respective debts. In September 1829 they were served with a summons of mails and duties, limited to those due at or preceding the previous Whitsunday, at the instance of the pursuer Elmslie, as in right, to a certain extent, of an heritable bond over the lands. They pleaded in defence, that they were entitled to apply the rents fallen due prior to citation in liquidation of their debts.

The Lord Ordinary pronounced this interlocutor:—"In respect that the defenders, Mrs. Grant and Captain Maclean, were not summoned to this action till September 1829, and that they were legally entitled to have settled their half year's rents due at Whitsunday preceding with the common debtor, and therefore are entitled to compensate the said half year's rent with the claims they have, to a greater amount, against him, and for the discharge of which, pro tanto, it appears that they had respectively entered into possession of parts of the estate of Lakefield; sustains the defences; and assoilzies the defenders."

Elmslie reclaimed; but the Court adhered.

W. ELMSLIE,—G. MONRO, S. S. C.—Agents.

No. 109.

THOMAS BINNY, Pursuer.—*Buchanan.*

CAPTAIN J. MACLEAN, Defender.—*A. Wood—Macdougal.*

Expenses.—A defender in an action of maills and duties found liable in expenses.

Dec. 15. 1830. 2D DIVISION. Lord Medwyn. T.

THIS was an action similar to the preceding, but concluding against Maclean for rents of other parts of Grant's property to fall due at the Martinmas subsequent to the serving of the summons, and in time to come. Maclean pleaded in defence, that his agreement with the proprietor was for a forehand rent; and that the whole year's rent, down to Martinmas 1829, had already been extinguished in terms thereof. The Lord Ordinary decerned against him for the half year's rent "legally due at Martinmas 1829, and for the subsequent rents;" and found him liable in his proportion of expenses. He reclaimed as to expenses; but the Court adhered, varying so as to include only the expenses occasioned by him as to the half year's rent, for which decerniture was given against him.

PEARSON, WILKIE, and ROBERTSON, W. S.—G. MONRO, S. S. C.—Agents.

MRS. M'INTYRE and HUSBAND, Claimants.—*Rutherfurd—Russell.* No. 110.
MAJOR STEVENSON, Claimant.—*Jameson.*

Dec. 16. 1830.
M'Intyre &c. v. Stevenson.

Clause—Fee and Liferent.—Construction of a clause as to a right of fee and liferent under a trust-deed of settlement and relative codicil.

Dec. 16. 1830.

1ST DIVISION.
Lord Meadowbank.

CAPTAIN STEVENSON left a trust-settlement by which he appointed his trustees to lay out the residue of his estate "on proper security, payable to themselves, and to hold it in that state during the time after limited, and in the mean time to make due inquiry" after the existence of certain sisters and their issue. If these were discovered within the space of five years from his death, he directed his trustees to secure the whole free residue for the use of his sisters in liferent, and for their children equally in fee; but, in the event (which happened) of the non-appearance of these relations, he appointed, "that immediately after the expiry of the said space of five years from the time of my death, the residue of my effects shall be divided amongst and paid to my other relations after named, viz. the Rev. George Stevenson, Dean of Kilfinora in Ireland,"—nine other persons nominatim,—and "the said Elizabeth Stevenson in Bocaird, my niece,—and Frances Thomson, spouse to Dr. James Stevenson,—equally and proportionally amongst them, and their heirs respectively. But in regard that I intend that the shares of the said Elizabeth Stevenson and Frances Thomson shall be held by them in liferent, and that the fee thereof shall go to their children respectively, I appoint my said trustees to lay out and secure their shares accordingly, and in such a manner as that the fee or capital falling to the said Mrs. Frances Thomson shall, after her death, go to her children by the said Dr. James Stevenson."

He afterwards added this codicil: "I have resolved to revoke the foregoing deed, in so far as regards the fee of the sums disposed to my residuary legatees, in the event that any of my sisters therein named, or their heirs, shall not appear as therein specified; and it is now my will that the residue of my subjects, which I appointed by the said deed to be paid over to the said residuary legatees, shall remain under the power and management of my trustees named in the said deed, and the interest thereof paid by the said trustees by way of annuity to the said residuary legatees during their natural life; and at their death I appoint the principal sum to be paid over by my said trustees to the said Elizabeth Stevenson, if in life, and failing thereof, to her heirs, as their absolute property; and, with this alteration, I declare that the said deed shall have full effect," &c.

Captain Stevenson died on the 10th of May 1818, and his trustees made the requisite advertisements; but neither the sisters, nor any one in their right, appeared. In the mean time, one of the liferent annuitants died; and disputes having arisen between Elizabeth Stevenson and Mrs.

No. 110.

Dec. 16. 1830. M'Intyre &c. v. Stevenson.

M'Intyre, (in whose favour the codicil was conceived) and the surviving annuitants, respecting their mutual claims upon the interest accruing on the residuary capital during the five years, and also regarding other relative questions, the trustees brought a multiplepoinding, pending which a second annuitant died. On the 30th of June 1826, the Court pronounced a judgment, disposing of the chief part of these questions, and by which their Lordships, inter alia, found that the free residue, with five years interest, was to be accumulated into a capital sum, and made the subject of the liferent of the annuitants,—the fee being in Mrs. M'Intyre;—that, by the death of two of the annuitants, their annuities were lapsed, and Mrs. M'Intyre was entitled to uplift the capital sum corresponding thereto;—"that the said Mrs. M'Intyre is entitled, as fiar of the residue, to uplift at present the portion of the fund in medio corresponding to the annuity provided to herself by the deed of settlement, as being both liferenter and fiar, her liferent being in consequence extinguished;—that, upon the death of each of the remaining annuitants, the said Mrs. Elizabeth M'Intyre and her representatives will have right to the capital sum set free and disburdened by the death of each annuitant, until the whole of the residue of the fund in medio, set apart in the mean time for answering the annuities, shall be paid over to the said Mrs. M'Intyre and her representatives; and, with these findings, remit to the Lord Ordinary to proceed," &c.[1]

Subsequently to this interlocutor, Mrs. Frances Thomson drew a share of the interest arising from the residuary fund along with the other liferenters. She died in August 1828, on which occasion Mrs. M'Intyre claimed right to uplift a share of the residuary capital corresponding to Mrs. Frances Thomson's liferent. This was disputed by Major Stevenson, her only son, who claimed the liferent of that share of the capital.

The Lord Ordinary ordered Cases.

Pleaded for Mrs. M'Intyre—

1. Under the original settlement, she and Mrs. Frances Thomson were fiars of their respective shares, their children being mere substitutes, though possessing an indefeasible right of succession. But if the fee, however qualified, was in Mrs. Thomson, and if her children were mere substitutes, then the clause in the codicil revoked the fee, and conferred on her a mere annuity. Upon her death the annuity fell, and a corresponding share of the capital then fell to be uplifted by Mrs. M'Intyre.

2. The true meaning of the codicil was exclusive of a double series of liferents being laid on any one share of a residuary legatee; and it was equally exclusive of the children of Mrs. Thomson taking a liferent in prejudice of her during her lifetime. This last was indeed evinced by the conduct of the parties, since Major Stevenson had never claimed the liferent during his mother's life; but no preference was given to Mrs.

[1] Ante, IV. 776.

Thomson and her family over the other eleven residuary legatees under the will, and no preference was apparently meant for them under the codicil. It was clear, therefore, that the testator's meaning was, to burden Mrs. Thomson's original residuary share with her own liferent, and with no other.

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3. The only liferent to be paid was to 'the residuary legatees.' By this expression it could not fairly be held that an unmarried child of Mrs. Thomson was, in the view of the testator, as a person classed along with all the others who were specially named, and afterwards spoken of as 'residuary legatees.' But if that child was not fairly in the view under this clause, there was no room to confer a liferent on him.

4. The matter was res judicata by the former judgment.

Pleaded by Major Stevenson—

1. The effect of the codicil was to convert the persons who were to have the fee of the residue divided amongst them in terms of the trust-deed, into liferenters of the shares which they would otherwise have had in fee. The claimant, as the only child of his mother, and as one of the legatees, was entitled to a share of the residue, agreeably to the trust-settlement, burdened with a liferent in favour of his mother; and the effect of the codicil was to convert him into a liferenter, in so far as regarded that share.

2. It was quite immaterial that his mother, either by right or by sufferance, had drawn the interest during her lifetime; that did not decide whether the settlement gave a liferent to him. Besides, she stood in this peculiar situation, that while she enjoyed a liferent, and no fee under the first settlement, the codicil made no revocation of any liferent, but merely converted certain fiars into liferenters, thereby superadding the liferent of the claimant to that of his parent.

3. There was no res judicata. Mrs. M'Intyre's provision was differently expressed from that of Mrs. Thomson; so that even if Mrs. M'Intyre had been regularly held to be a fiar, it did not follow that Mrs. Thomson was so. But the finding that Mrs. M'Intyre was a fiar proceeded on the joint application of herself and her children, the only parties who could have any interest to oppose it. It was therefore, in fact, a finding of consent of parties, and was not even a precedent, much less a res judicata, against the claimant.

The Cases having been reported by the Lord Ordinary, the Court preferred Major Stevenson, and found him entitled to expenses.

Lord Balgray.—The question here turns on the import of two clauses,—the first being in the original trust-deed, the second in the codicil. In order to make the first step towards a decision, we must inquire what is the import of the rights created by the original settlement. Now I conceive from its terms that the residuary share was vested in the trustees, in order that they should pay the interest arising upon it to Mrs. Stevenson during her lifetime, and should vest the fee in her son Major Stevenson at her death. They held the fee for his behoof

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under a certain burden. The next point is, What change on these rights was induced by the codicil? The words are quite clear, and the meaning just is, that the parties for whom the right of fee was previously destined, should, in lieu thereof, receive only a right of liferent. But as I hold Major Stevenson to have been a residuary legatee, to whom the fee of a share was destined under the original trust-settlement, I must also hold him under the codicil, though deprived of that fee, to be entitled to a liferent.

Lord Gillies.—I am of the same opinion. Under the first deed Major Stevenson was clearly, as a residuary legatee, the fiar of one of the shares of the residue. After the conversion of the fiars into liferenters, he retained a right of liferent of that share; and I do not see any repugnantia between the claim of Major Stevenson for the liferent of one of the shares of the residue, and the fact that his mother previously drew the interest on the same residuary share during her lifetime. It is competent under any trust-deed to provide an annuity to A. and B., with this qualification, that, on the death of the first, it shall go to the survivor.

Lords President and Craigie concurred.

E. Macmillan, S. S. C.—J. Mackenzie,—Agents.

No. 111.

David Kerr, Pursuer.—*Shaw.*
Edward Kerr and Others, Defenders.—*Cuninghame.*

Process—Proving of the Tenor.—It being averred, in a summons of proving the tenor, that the settlement of a deceased lady had never been cancelled or altered by her in any shape, and had been placed in her repositories, "but has been since abstracted from the said repositories, or at least has disappeared;" and it being objected that the casus amissionis was irrelevantly libelled, no casus amissionis being stated—The Court refused to sustain the libel, but allowed an amendment.

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David Kerr raised an action of proving of the tenor, setting forth that his aunt Mrs. Love had executed a settlement in his favour, dated the 17th of August 1825; "that the said deed was never revoked or cancelled, or the conveyance therein contained" abrogated by his aunt; but in April 1830, having been lent by her to his father Edward Kerr, "was by him retained, and has since, as he alleges, been lost or mislaid." He further subsumed that, in May 1830, a new settlement of the same estate was executed by his aunt in his favour, and was delivered to him; "that the said disposition and assignation was irrevocable, and no attempt was made by Mrs. Love, or with her knowledge or authority, to revoke or cancel the same, or to alter or impugn it to any extent, or in any way; that, after receiving the said disposition and assignation, the pursuer, who resided in family with his aunt Mrs. Love, requested her to deposit the same in her repositories as a place of safety, and this was accordingly done; but the said disposition and assignation has been since abstracted from the said repositories, or at least has disappeared; that the said Mrs. Love died on the 30th of June last, and the pursuer has made careful search for the recovery of the two several deeds in his favour above recited, but has been unable to recover the same; therefore it is necessary that the tenor of the foresaid deeds should be proved in manner underwritten," &c.

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The pursuer's father having, as heir of line, been called along with other defenders, pleaded as a preliminary defence, that there was no relevant casus amissionis libelled. He stated as to the first deed, that the deceased had requested him to cancel it, and he had therefore burnt it.

Shaw for the Pursuer.—The summons contains the essential statement that the deeds had been executed by the deceased, and had never been revoked by her, but were mislaid or destroyed. As to the disappearance of the first, it was stated to have been "lent to the defender, and by him retained, and has since, as he alleges, been lost or mislaid." It was impossible, at the time the summons was drawn, to be more specific as to the casus; but the defender had now filled up the details of this casus by stating that he himself had burnt the deed. As to the second deed, it was stated that it "has been abstracted from the repositories of Mrs. Love, or at least has disappeared." The pursuer having stated this much as to the casus amissionis, and having averred its disappearance to be without the privity of the deceased, was entitled to put in a condescendence stating the details of that disappearance.

Cuninghame.—An irrelevant summons cannot be amended by a condescendence. It is now of the more importance that a summons should be complete in itself, as it is all that is given out as an extract. But the summons here is irrelevant. The first deed had been cancelled by the directions of the deceased, and, on the pursuer's showing, was superseded by the second. As to the second, all that was stated in the summons was, that it had been placed by Mrs. Love in her repositories, "but has since been abstracted from the said repositories, or at least has disappeared." This is so vague, that, until the libel is amended, the pursuer can proceed no further.

Lord Balgray.—The only point here is, whether there is enough in the libel to admit of its being followed out by a condescendence? I would rather incline to allow a condescendence; and on viewing it together with the summons, we could decide on the relevancy of the whole taken jointly.

Lord Gillies.—I have considerable doubts as to that procedure. The first deed is done away by the second; and what is the casus amissionis of the second? It is subsumed to have been put into the repositories of the deceased by the pursuer's own desire, and there it is not now to be found. It has been abstracted, or has disappeared. Is that a relevant casus?

Lords President and Craigie observed, that an amendment of the libel was proper before proceeding further.

The Court therefore allowed an amendment of the libel.

Maclean and Giffen, W. S.—J. Patten, W. S.—Agents.

No. 112.

Dec. 16. 1830. Macmaster v. His Creditors.

JOHN MACMASTER, Pursuer.—*Hope—Pyper.*
HIS CREDITORS, Defenders.—*Marshall.*

Cessio Bonorum.—The pursuer of a process of cessio having raised an action of damages against his incarcerator for wrongous imprisonment, ordained, on getting the benefit of the cessio, to grant a conveyance to the trustee for his creditors of "his eventual interest or benefit in that action, without prejudice, however, to the pursuer to prosecute and follow out the said action in his own name, if the trustee to be named in the disposition omnium bonorum shall decline, or unduly delay to do so."

Dec. 16. 1830. 1ST DIVISION.

JOHN MACMASTER, having been imprisoned for debt in Stranraer jail, raised an action of damages against Kerr, his incarcerating creditor, for wrongous imprisonment, and applied for aliment. Kerr's agent then addressed a letter to him, along with the draft of a disposition omnium bonorum in favour of Kerr as trustee for the creditors, and offered him liberation as soon as he agreed to sign it; but intimated that his aliment would be stopped, if he refused. Macmaster objected that he was not obliged to assign to Kerr, as trustee, the action of damages directed against him as an individual; and the Magistrates found that he was not bound to do so. He then brought a process of cessio, to the benefit of which he was ultimately found entitled, and he was then required to execute a disposition, including the action of damages. Kerr lodged a minute, intimating his willingness that some other person than himself should be named trustee. Macmaster still objected that he was not bound to assign the action of damages at all, though he was ready to account to his creditors for any sum he might recover. Kerr insisted that it should be assigned to the trustee, as a condition of the pursuer obtaining the cessio.

LORD BALGRAY.—I think it would be proper to leave the pursuer to carry on the action of damages himself. What he recovers under it falls, no doubt, to his creditors; but he is the party to pursue.

LORD GILLIES.—The pursuer is bound in the first instance to assign his whole estate of every sort, and, inter alia, this action, to a trustee for behoof of his creditors. If the trustee fail in prosecuting the action, the bankrupt is then entitled to carry it on.

Hope for the Pursuer.—The right so to insist might be reserved in the interlocutor ordaining the pursuer to convey. Unless this reservation be made, the bankrupt's title may be objected to.

LORD GILLIES.—The reservation is superfluous.

Marshall for the Defenders.—We do not object to the qualified reservation being inserted.

THE COURT then "found the pursuer entitled to the benefit of the process of cessio bonorum, and ordained him to give in a disposition and inventory of his whole estate and effects, conveying, inter alia, his eventual interest or benefit in an action of damages now in dependence in

this Court, at the pursuer's instance against certain of the creditors; without prejudice, however, to the pursuer to prosecute and follow out the said action in his own name, if the trustee to be named in the disposition omnium bonorum shall decline or unduly delay to do so," &c. No. 112.

Dec. 16. 1830. Macmaster v. His Creditors.

Fraser v. Globe Insurance Company.

R. Welsh, S. S. C.—J. Wemyss, W. S.—Agents.

THOMAS ALEXANDER FRASER, Pursuer.—*Gordon—Hope—Dunbar.* No. 113.
GLOBE INSURANCE COMPANY, Defenders.—*Sol.-Gen. Cockburn—Rutherfurd.*

Loan—Faculty.—A debtor having borrowed £60,000 and granted an heritable bond, payable at Candlemas 1829, with interest at five per cent. during the not-payment; and the creditor being bound not to exact repayment of the principal sum before Candlemas 1835, if the interest were regularly paid, and at which term the lands were to be redeemable by the debtor—Held that the debtor was entitled to repay the loan, and redeem the lands at an earlier term than Candlemas 1835, if he thought fit.

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1st Division. Ld. Corehouse.

ON the 24th of May 1828, Mr. Fraser of Lovat borrowed £60,000 from the Globe Assurance Company of London, and granted a bond and disposition in security, containing the following provisions:—To repay the said sum at and against the term of Candlemas 1829, with the sum of £12,000 sterling of liquidate penalty in case of failure in punctual payment, together with the interest of the said principal sum at five per cent., without any deduction whatever in respect of any present or future taxes &c., from the date thereof to the foresaid term of payment, and half-yearly, termly, and proportionally thereafter," &c. "But declaring that this bond is granted under this express condition and provision, that so long as the said interest or annual rent shall be punctually paid in the manner above stipulated, it shall not be competent to the Globe Insurance Company to demand payment of the said principal sum till the term of Candlemas 1835; but if the said interest shall not be paid punctually at the terms," &c., the principal sum was to be demandable: "And further declaring, that it shall be optional to me (Lovat) to repay the said principal sum of £60,000 either wholly and at one time, or in such instalments as I shall think proper—such instalments never being less than £10,000." And for further security to the Insurance Company, and "more certain payment of the aforesaid principal sum of £60,000, liquidate penalty thereto annexed, and interest or annual rent, and termly failures, as before mentioned," &c., he disponed his lands of Strichen to the Company. The disposition, as usual, bore to be "heritably, but redeemably always, and under reversion, in the manner &c. after mentioned." In the precept of sasine various provisions were inserted, and, among others, the following:—"But declaring always that the said lands &c. are and shall be redeemable by me" from the Company "at the aforesaid term of Candlemas or the 2d day of February

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1835, or at any term of Lammas or the 1st day of August, or Candlemas or the 2d day of February thereafter, upon premonition of the intention to redeem of six months, to be made by me" &c. to the Company at their head office in London, " and that by payment to the said Company of the foresaid principal sum of £60,000, whole interest due thereon at the time," &c. In case of refusal by the Company to accept payment, Lovat was to consign in the Bank of England. This was followed by the declaration of a power of sale, if Lovat did not pay up the whole principal and interest on six months notice.

In 1829, Lovat, finding that he could borrow at a lower rate of interest, and that the Globe Insurance Company refused to accept repayment of the £60,000 before the term of Candlemas 1835, raised a declarator against them, concluding to have it found that he had right to make payment of the whole sum at any term of Candlemas or Lammas subsequent to Candlemas 1829, and that either in one sum, or by instalments not less than £10,000; that, on doing so, his lands of Strichen should be declared disburdened, and the defenders decerned to grant discharges; and that the rate of interest due since Lammas preceding (or any other term fixed by the Court) should be reduced to such rate as the Court should determine.

Pleaded by the Company.—By the agreement the Company were bound not to exact repayment before 1835, so that the money was locked up from them till that time, and they could not in the mean time avail themselves of any emerging investment, however beneficial. The only counterpart of this sacrifice was, that the debtor should be bound to pay five per cent. interest during as long a period, and that he should be debarred from availing himself of any fluctuations in the money market, by which he might borrow cheaper, and throw back so large a sum upon the Company. These were the intentions of the parties, as appearing from the correspondence; and the bond and disposition gave effect to them. By that deed, the loan, and the burdening of the land, formed one part of the transaction, and repayment and redemption of the land the other. The redemption, or, in other words, the repayment of the loan was to take place at Candlemas 1835, or any subsequent term, on six months previous notice being given. The provision was worse than useless, if the pursuer could pay up his debt, and so redeem his lands before 1835. This was the first term at which the defenders were at liberty to call up their money, and it was only at that term that the pursuer was entitled to redeem.

Pleaded by the Pursuer.—The only consideration which he was bound to give for the loan, was interest at five per cent., so long as he kept the use of the money. The presumption was, that he was to be entitled to repay the whole sum borrowed, and disburden his lands, as soon as he was able and willing to do so. It would require the most express provisions to defeat this presumption. He had indeed bound the creditors

not to exact repayment for a certain term; but they had not restricted him as to his power of offering repayment, any further than that he should never pay less than £10,000 at a time, and that if the investment assumed so permanent a character as to lie on his hands till 1835, he should then be bound to give a premonition of six months before repaying. The words in the clause of redemption, stating the lands to be redeemable at 1835, were, at the worst, mere surplusage; they occurred in the disposition in security, which was only an accessory of the personal obligation in the bond, and they could not change the nature of that obligation; and as they were solely intended in favour of the pursuer, they could not be made to have the effect of depriving him of the power of making earlier repayment of the bond, if it were otherwise clearly competent to him to do so.

The Lord Ordinary "sustained the defences, and assoilzied," with expenses.

The pursuer reclaimed;* and the Court, without hearing his counsel, altered, and remitted to the Lord Ordinary, but found no expenses due.

Lord President.—Under the bond, the principal sum was made payable by the debtor at Candlemas 1829. The defenders say that this was done in order to give them a right to call up the principal, if Lovat failed in regular payment of the interest. He did not so fail in point of fact, and the effect of his punctuality clearly was to debar the creditors from calling up their principal before 1835; but it did not prevent Lovat from paying up the principal sooner, if he was able and willing.

Lord Balgray.—As I found my opinion to be at variance with the interlocutor, I considered the case with great care. Perhaps it may have been the intention of the parties, as appears from the correspondence, to keep this money invested for a certain term of years; but all these private intentions must go for nothing, when we are called upon to put the legal construction on the terms of this bond as written out. In regard to the clause as to redemption of the lands inserted in the precept of sasine, on which the defenders found, there are several things to be kept in view. In the first place, the sum in the bond is made repayable by the borrower at Candlemas 1829. In the second place, that sum is not made exigible by the lender before Candlemas

* "The defenders, in the appendix to their relaiming note, printed the bond and disposition, and at that part of the bond which obliged Lovat to repay the principal sum at Candlemas 1829 a note, in the following terms, was subjoined:—"It was necessary to make the personal obligation to repay as at Candlemas 1829, because it is subsequently declared, that if irregularity occurred in the payment of interest, the principal sum might, in that event, be called up within the seven years. If obligation to repay had been made only at Candlemas 1835, (a distance of seven years,) the borrower might have delayed payment of interest &c. during all that period, and there would have existed no direct obligation to compel him to pay sooner. Hence the reason of making the personal obligation as it stands, qualified by the subsequent declarations. Mr. Fraser's agent (Mr. M'Kenzie) was fully aware of this; and he knows that the bond, with his approbation, was carefully revised by counsel, who had this fully in view."

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1835, if the interest be regularly paid in the mean time,—a stipulation which is inserted expressly in favour of the borrower, and of him only; and, in the third place, it is further made optional to the borrower to make repayment of the whole, either as a slump sum, or by instalments not less than £10,000 each. These are the respective rights and obligations of the parties as stipulated in the bond. Then the deed proceeds, "in further security" of the Globe Insurance Company, to dispone the lands of Strichen. But this was merely in security to them of their rights, as already expressed in the bond; and this security was to preserve these rights entire to them, but not to alter their nature. This accessory and correlative of the bond and obligation cannot be allowed to alter the obligation itself, the import of which I have already considered, as depriving the creditor of the power of exaction during a certain term, while it nevertheless leaves the debtor at liberty to tender payment. As to the clause of redemption occurring in the precept of sasine, which is a clause in the accessory to the bond and obligation, it appears to me not to deprive the pursuer of the right to pay back the whole loan at any of the terms after Candlemas 1829, at which it was expressly stipulated in the bond that it should be payable by him, though not exigible by the creditor till a certain postponed period. I therefore hold him entitled now to make the payment, and am for altering the interlocutor.

Lord Craigie.—I perceive a note appended to the second page of the copy of the bond as printed by the defenders. Do the statements in that note make part of the record, or was the note originally appended to the bond itself?

Hope, for the Pursuer, answered in the negative.

Lord Craigie was understood to say that he was for adhering.

Lord Gillies.—I have not experienced much hesitation in arriving at the same conclusion with Lord Balgray, although I proceeded, in forming my judgment, with the circumspection naturally suggested by finding it so different from that of the Lord Ordinary. I see no difficulty in supposing the existence of a right on the part of the debtor to tender payment at a period earlier than the lender was entitled to exact it. It does not follow, that because a creditor is restrained for a certain time from demanding payment, the debtor may not be allowed to pay earlier, if he find it convenient. There are many analogous stipulations in other contracts. Take that of a lease. It is quite common to allow a break in favour of the tenant, at a certain term in the middle of the lease, although no corresponding break be allowed to the landlord. In regard to the correspondence referred to, the agents are all men of integrity, but they had misunderstood each other. And why was that note of explanation appended to the second page of the bond? Just because it was felt by the defenders, in printing the bond for us, that its terms were insufficient of themselves to satisfy the Court that the pursuer was restricted in his power of repayment. Had the note been part of the bond, I cannot. I should have agreed with Lord Craigie; but, as it is not there, I do not see the meaning of that clause in the bond which allowed Lovat to pay up by instalments of £10,000 at a time, if he was not allowed to pay at all before 1835; for after that date there was no provision for his making any payment, except the whole sum at once. I would also observe, that there is another part of the bond corrobo-

rative of this interpretation. If Lovat failed to pay interest for a single term, the creditors might sell the estate. Had they sold, perhaps long before 1835, on what principles were they to account with Lovat for the price? Could they have put the proceeds of the sale into a bank, and said to Lovat, You draw two per cent. on £60,000 worth of these proceeds, and pay us five per cent. on that sum till Candlemas 1835? Or could they have brought an action of damages for the loss of interest between the sale and that term? On the whole, I am clear for altering.

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Dec. 16. 1830. Fraser v. Globe Insurance Company. — Finlayson's Trustee v. Pedie.

J. Morison, W. S.—Gibson-Craigs, Wardlaw, and Dalziel, W. S.—Agents.

D. Stewart (Finlayson's Trustee), Pursuer.—*A. Wood.*
James Pedie, W. S., Defender.—*Skene—Buchanan.*

No. 114.

Process—Personal Exception.—A party having raised a declarator containing general conclusions of accounting, but without any narrative to sustain an accounting, except with reference to the subject-matter of the declarator; and having raised another properly drawn summons for a general accounting, which was thrown out of Court on a defence that the previous action constituted lis pendens; and the declaratory conclusions of the first action having been passed from; and the defender having now pleaded that the conclusions for a general accounting were not supported by the narrative—The Court refused to listen to this as a defence to exclude the action, but allowed the pursuer to amend his libel.

Dec. 16. 1830. 2d Division. Ld. Fullerton. T.

This was an action raised by Finlayson against Pedie, W. S., concluding to have it declared that a certain lease assigned to Pedie by Finlayson was held by the former for behoof of the latter, and that Pedie was bound to execute a reconveyance thereof; and the summons further concluded in general terms for a count and reckoning, but without any narrative to support such conclusion, except with reference to the lease and transaction which formed the subject of the declaratory conclusions. Stewart, having subsequently been appointed trustee for Finlayson's creditors, sisted himself as a party to this action, and also raised another summons of declarator and count and reckoning, which set forth grounds for a general accounting; but in defence Pedie pleaded that the present action constituted lis pendens as to the count and reckoning, as well as the declarator. The Lord Ordinary sustained this defence, and dismissed the action; and Stewart having consented to an absolvitor from the declaratory conclusions in the present action, Pedie thereupon pleaded that the conclusion for count and reckoning was rendered incompetent, there being no narrative to support a conclusion for a general accounting apart from the transaction relative to the lease. The Lord Ordinary having overruled this plea, and conjoined the action with one at Pedie's instance against Finlayson, Pedie reclaimed, contending that it ought now to be dismissed. The Court, however, holding that he was not entitled, after getting the second process dismissed on the ground that the present formed lis pendens quoad the general conclusions of count and reckoning therein competently set forth, now to turn round and get this also sent out of

No. 114. Court on the ground that it did not contain any competent conclusions of count and reckoning, so as truly to have given rise to the defence of lis pendens, remitted to the Lord Ordinary, as the record was not closed, to allow an amendment of the libel.

Dec. 16. 1830. Finlayson's Trustee v. Pedie.

H. Inglis and Donald, W. S.—J. Pedie, W. S.—Agents.

Stewart v. Fraser.

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John Stewart, Pursuer.—*Hope.*
James Fraser, Defender.—*Skene.*

Process—Jury Trial—1. *Wm. IV. c.* 69.—The Court, in the exercise of the discretion committed to them by 1. Wm. IV. c. 69, § 5, refused to grant a trial by jury before a full Bench, and intimated this as a general rule in all cases.

Dec. 17. 1830. 1st Division. Jury Court.

After an order had been issued that the trial by jury in this (commonly called the Belladrum) case, should proceed in presence of the four Judges of the First Division of the Court, their Lordships this day intimated that they had reconsidered the order in the robing-room, and that, as it was entirely discretionary on the part of the Court to grant or withhold it, their Lordships had come to the resolution that it ought to be recalled. The Lord President, with concurrence of the other Judges, observed, that when a trial takes place before the President of a Division and the Lord Chief Commissioner, a Bill of Exceptions was clearly competent to the Division to which the presiding Judge belonged. But if the trial was before the whole of that Division, any judgment pronounced by them in the course of the trial could not afterwards be reviewed by themselves; and therefore it was extremely doubtful whether a Bill of Exceptions could be tendered. All power of review in such a case was taken from the Court of Session, and a remedy could only be sought in the House of Lords. But as there were doubts entertained whether such an appeal could be made without a Bill of Exceptions, and as in the case of a single Judge trying the case a bill was competent, and it was very doubtful if it were competent when it was tried by a full Bench, the Court had come to the resolution, in the present state of the law, not to try any case before a full Bench. This would prevent any judgment of the Court from being the subject of an appeal, except such as should be pronounced after the mature deliberation attendant on the review of a Bill of Exceptions.

Carnegy and Shepherd, W. S.—H. Macqueen, W. S.—Agents.

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Dec. 17. 1830. Gavin v. Montgomerie &c.

MISS GAVIN, Pursuer.—*Ld. Adv. Jeffrey—Shaw.*
PETER MONTGOMERIE and TRUSTEE, Defenders.—*Sol.-Gen. Cockburn —Wilson.*
JOHN LINDSAY CRAWFURD, Defender.—*Murray.*

Process—Jury Court—New Trial—Proof—Agent and Client.—1.—A new trial granted where the Court considered the verdict contrary to the real evidence, although the verdict was conformable to the opinion of the Judge.—2.—The wife of a defender in an action of reduction of the acceptance of a bill, of which he was drawer and indorser, admissible as a witness for the acceptor as against the holder.—3.—Confidential correspondence between a party and his law-agent, relative to an indictment for forgery of a bill, not admissible as evidence against the party in an action of reduction of the same bill as forged and fraudulent.—4.—Defences prepared by a party with reference to an indictment for forging a bill, but not lodged, inadmissible evidence in an action of reduction of the bill.

Dec. 17. 1830.

1st DIVISION. Jury Court. Ld Cringletie.

IN the spring of 1827, Peter Montgomerie of Ladeside in Ayrshire, and John Lindsay Crawfurd, were indicted at the Ayr circuit for forging, or fraudulently obtaining from Miss Gavin, residing in Beith, a bill for £800, apparently accepted by her, dated the 23d of December 1823, drawn and blank indorsed by Crawfurd, and payable at the post-office of Beith, twelve months after date. The diet was deserted pro loco et tempore; and thereafter (in May) Montgomerie gave Miss Gavin a charge on the bill, of which she brought a suspension, and thereafter a reduction-improbation. In the summons (after the usual first reason) she set forth—"Secundo, The pursuer never adhibited her name to any of the bills generally and particularly above called for, either as acceptor, drawer, indorser, or in any other capacity; and the name 'Elizabeth Gavin,' which is written as acceptor of the said bill of £800, is an entire forgery: Tertio, The pursuer never received value for any of the bills generally and particularly before called for, and never, to her knowledge, put her name to any of the said bills; and the same, in so far as it is attempted to make them the foundation of any claim against the pursuer, are false and fraudulent." Defences were lodged by the trustee on the sequestrated estate of Montgomerie (who had become bankrupt) denying the forgery and fraud; and by Lindsay Crawfurd to the same effect, and further stating that "he was as much deceived in the manner in which the bill was reared up as the pursuer was, and had no personal interest in it, having never in his life had any transaction with the pursuer. The indorsation of his name to the bill was a forgery, and he never had any share in the transaction. The defender, therefore, can have no objection to the first conclusion of the libel to have the bill improved and reduced." A record was then made up as between Miss Gavin and Montgomerie's trustee, Crawfurd having declined to appear further, but still being, ex facie of the action, a defender.*

* Pending the process, Montgomerie was indicted at Glasgow for uttering forged notes &c., convicted, and sentenced to be transported. Crawfurd had formerly been convicted of falsifying writs, and also transported; but had recently returned in consequence of a pardon.

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The case was remitted to the Jury Court, where the following issue was framed and sent for trial: "Whether the bill of exchange, No. 5 of process, bearing to be dated the 23d of December 1823, and to be for the sum of £800 sterling, was not accepted by the pursuer, Miss Elizabeth Gavin, residing at Beith in the county of Ayr?" It was tried at Ayr, before Lord Cringletie, in the course of the autumn; and the opening counsel for the pursuer having, in his address to the Jury, stated that the issue had been expressed in general terms to try both the forgery and fraud, this was objected to by the counsel for Montgomerie's trustee, who alone appeared, and maintained that nothing but the forgery could be tried by the Jury. Lord Cringletie intimated an opinion to that effect, and the trial proceeded on that footing. The pursuer then tendered Mrs. Crawfurd (the defender Crawfurd's wife) as a witness; whereupon the counsel for Montgomerie's trustee objected, that as it appeared from Crawfurd's defences that he had an interest adverse to Montgomerie, and as his wife was identified with him, she was inadmissible; and Lord Cringletie (as appeared from his notes) "rejected her evidence on the ground that her husband is interested, and that she cannot be a witness to support his interest." The pursuer proposed to put in as evidence certain letters which Montgomerie had written to one Webster, a writer in Kilmarnock, who was now dead, "relative to a criminal prosecution raised against Montgomerie by the Crown for forgery of the bill in question, but which prosecution was abandoned by the Lord Advocate. Objected by defender to production of this, as being confidential between Montgomerie and his agents; and as this action relates to same bill, it ought not to be produced." On this ground, his Lordship refused to admit the letters. The pursuer also tendered as evidence against Crawfurd a holograph document, entitled 'Defences,' which he had sent to a friend, who was a tradesman, to lodge with reference to the criminal prosecution against him and Montgomerie for the forgery of the bill in question; to which it was "objected, that they were in the strictest sense confidential, and ought not to be produced; and although Crawfurd does not appear, Montgomerie is entitled to object to the production in so far as it affects him." This document was also rejected. The pursuer further offered in evidence certain letters written by William Montgomerie (a brother of Peter) to Crawfurd, to which it was "objected by the defender, that there is no evidence of these letters having been written by William by authority of Peter. Answered, that the proof of that authority will be found in the letters to Webster relative to the foresaid criminal prosecutions; and although they have not been allowed to be produced, as being confidential, and connected with this cause, they may be founded on to prove William's authority to write the letters proposed to be produced." His Lordship found "that the letters to Webster cannot be produced to prove the authority," and therefore rejected the evidence. After some other evidence, written and parole, had been adduced, the Jury returned a verdict for the defenders.

The pursuer having excepted to all the above judgments, and con-

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ceiving that although no direction had been given to the Jury by the Judge in his charge to confine their attention to the forgery, yet that, from what had occurred in the course of the opening, they had acted under that impression, moved for a new trial on these grounds:—

1. The verdict was contrary to evidence; and the Jury had acted under the belief that they had nothing to try except the forgery, whereas the issue comprehended the question of fraud. It was true that, in the course of the trial, the presiding Judge had, contrary to his original opinion, become satisfied that the issue embraced more than the forgery; but still the Jury had been impressed with the conviction, in the outset, that they had nothing to attend to, except whether the signature was genuine, and so had not given due effect to the evidence relative to the fraud.

2. Mrs. Crawfurd was improperly rejected. The objection was, that her husband had an adverse interest to Montgomerie; but the ground of rejection was, that he had an interest in the cause, and that his wife cannot be admitted to support his interest. In truth, he had no interest. If he had been called to support the validity of the bill, he might have had an interest. But as he had been adduced to set aside the bill, he had no interest but one that was adverse; therefore *he* might have been adduced, and so consequently may his wife. But it is said Crawfurd is a party, and she cannot be adduced against him. The answer is, that although ex facie a defender, he is in substance not so. But it was held in the case of Brodie and Smith[1] that the wife of one pannel might be adduced against another; and here Mrs. Crawfurd was offered as a witness, not against her husband, but against Montgomerie.

3. The correspondence between Montgomerie and Webster ought to have been admitted. In regard to this, there is a clear distinction. If a party have committed a fraud, and then consults an agent or counsel as to his defence, any communication will be protected; but if, in the course of committing the fraud, and before the accomplishment of it, the party communicate with an agent for the more effectually carrying it into execution, then the law gives no protection on the footing of confidentiality.[2] In the present case, Webster was taken into the confidence of Montgomerie at the very outset; and the correspondence, although it occurred prior to the criminal proceedings, and with reference to them, had for its object, not so much the defence of Montgomerie, as the ultimate payment of the bill, and the consequent realizing the fruits of the fraud. There was no doubt confidence, but it was a criminal and illegal confidence, which does not receive the protection of the law. Besides, the correspondence took place with reference to a separate action, and one to which the pursuer was not a party; and whatever may be the rule of

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[1] 2. Hume, 237, (2d edit.); 239, (3d edit.) Several of the Judges intimated great doubts of Brodie's case as an authority. [2] Tait on Evidence, 392; Burnett, 436; 1. Phillips, 143.

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the law of England, it is certain that, by the law of Scotland, the privilege does not extend to a case different from the one as to which the communication occurred.[1] In truth, however, Webster was not the law-agent of Montgomerie in these criminal proceedings, a different person having acted as his agent and adviser.

4. The defences proposed to be lodged by Crawfurd in the criminal action cannot be held as confidential, and protected by privilege. They were prepared with the view of being publicly read, which is entirely inconsistent with the idea that they were to be kept secret. If Crawfurd had written or drawn up a private statement, and this had been found in his repositories, it would have been admissible evidence, and, a fortiori, must a document which was intended to be produced in a Public Court. Besides, those defences were communicated, not to a law-agent, but to an ordinary tradesman, from whom they were recovered; and the rule is settled, that it is only as to a proper law-agent that the privilege of confidentiality can apply.[2] Even if they were to be regarded as confidential, still, as this is the privilege of the party alone, Montgomerie had no right to plead it.[3] Whether they could be founded on against Montgomerie, is a question which could only be settled *after* they had been admitted as evidence against Crawfurd; but the pursuer was ready to have shown such a concert and conspiracy between those parties, as would have entitled her to found on the document against Montgomerie. The same observation applies to other written documents found in the possession of Crawfurd, and which were rejected.

5. The pursuer adduced such evidence of the agency of the brother William for Peter as entitled her to have William's letters to Crawfurd laid before the Jury; and it was clearly competent to refer to those written by Peter to Webster in order to prove the agency.

On the other hand it was maintained—

1. That as the Court must repose confidence in the Judge and the Jury who tried the case, and as they concurred in the verdict, the pursuer was bound to make out a case, not merely of suspicion, but one showing that the verdict was directly contrary to evidence, in which she had entirely failed. It is true that the construction was put on the issue, in the outset of the trial, that it embraced only forgery; but the whole case was left by the Judge to the Jury, and no exception was taken to his charge. In considering the effect of the evidence as to fraud, it must be recollected that the pursuer has never been able to specify in what manner she was defrauded. All that she says is, that she *has* been defrauded; and she founds merely on the circumstance of the defenders being convicted felons, and having written bad letters to others, which plainly is no proof of a specific charge of fraud.

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[1] Burnett, 435-439; Tait, 178; Bower, May 26. 1810, (F. C.) [2] 1. Phillips; Burnett, 437; Tait, 396, 397. [3] 1. Phillips, 139; Burnett, 435.

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2. In regard to Crawfurd's wife, there are two points:—1. Was she admissible,—her husband being a defender? And, 2. Had he such an interest as to exclude him, and consequently her also? As to the first, the case of Brodie is mainly relied on; but no such judgment was there pronounced.[1] There were mere dicta, and these have always been regarded as contrary to law, and to every principle of humanity. On this subject the law of England is clear in favour of her exclusion.[2] But, second, Crawfurd has an interest. The question is not so much whether he has an interest in the bill, as in the *cause*. He puts his defence on the bill being false, and consequently he has an interest to make out that defence; but it was with a view to prove that defence that his wife was called. Besides, his interest was to throw the whole guilt on his associate.

3. The letters to Webster bear intrinsic evidence of being confidential; and it is admitted that he was a law-agent. But it is said they were written with reference to a different suit. This, however, is of no importance. They must be regarded as non-existing, and cannot be produced in any cause where they may affect the client.[3] But both suits relate to one and the same instrument. It is true, that if the agent be particeps fraudis, the rule will not apply; but there is no evidence as to this; and although it is true that Webster was not the agent who attended the trial, yet he was employed with reference to it.

4. As to Crawfurd's proposed defences, it may be true that they do not fall under the protection of the plea of confidentiality; but they were inadmissible against him, and a fortiori against Montgomerie. They were never lodged—they were the mere memoranda of his thoughts, to which utterance was never given; and it would be an act of tyrannical injustice to drag into a Court the secret thoughts of a party, or those he might have put on paper, only to be equalled by the flagrant proceedings in the case of Colledge.[4] Besides, a man in the position in which Crawfurd then stood, would make any statement calculated to save his own neck, although he should sacrifice his associate.

5. There was no sufficient evidence of William being authorized by his brother to write the letters, and therefore they cannot be received.

Lord President.—I have considered this case with the utmost attention; and although it is a most delicate point to give a new trial on the ground that the verdict is contrary to evidence, where it is in accordance with the opinion of the presiding Judge, yet, under all the circumstances, I am of opinion that there should be a new trial. I shall state the grounds of my opinion with reference to the points which have been brought under our consideration.

1. In granting a new trial, I proceed chiefly on this general ground, (which I understand to be a legitimate ground, and recognised in the practice of the law of England,) not that I am convinced that the verdict was wrong, but because I am

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[1] Burnett, 607; Kilk. 602. [2] Hale's Pleas of the Crown, 301. [3] 1. Phillips, 121. [4] 8. State Trials.

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not satisfied that it was in accordance with the evidence. I doubt greatly if the case was well tried. I do not mean to say that it was wrong tried by the Judge; but I am disposed to think that all the circumstances could not have been brought out by the parties, and laid before the Jury, or that the Jury did not give due weight to them in making up their verdict.* Taking the case altogether, it is certainly a most mysterious one; and, for the reason I have already stated, that the verdict is not justified by the real evidence, I am for allowing a new trial.

2. In regard to Mrs. Crawfurd, I think she is not an admissible witness. Observe the position in which she stands with reference to the pursuer and the co-defender Montgomerie. Her husband was made a defender, and gives in a general defence wrapped up in mystery, and says that he was as much deceived as the pursuer was, and that he is willing to allow the bill to be reduced. Now the pursuer does not rest on that defence; on the contrary, she says she will not take it off his hand—that she will prove the forgery and fraud against him; and, in short, she will not let his neck out of the noose. It is true he does not appear as a defender at the trial, but no decree is taken against him in terms of his defences; and consequently, if the verdict had been in favour of the pursuer, it must have been as much against him as against Montgomerie, and made him liable for expenses. In these circumstances, how could the pursuer be permitted to bring forward this woman in an action in which her husband is a defender? It is said that his defence took away all his interest in the matter; but the pursuer thought otherwise. The very first words spoken by this witness might have been fatal to her husband. Holding, therefore, that he was kept as a party by the pursuer, I cannot see how she can be allowed to adduce this witness. But this is not all: Look at what the husband's defence is. He says that he was as much deceived in the manner in which the bill was reared up as the pursuer was, and that the indorsation of his name to the bill is a forgery. I see that, in the proposed defences, he says that his subscriptions as drawer and indorser are both forgeries. Now observe what is his position. Although in form he is a co-defender, yet he is truly suing a reduction of his indorsation, and thereby endeavouring to shake himself loose of the relief which Montgomerie would have against him; for it is plain that if the pursuer cannot pay, Crawfurd must do so. He has therefore a direct interest, and consequently Lord Cringletie's judgment is correct.

3. As to Crawfurd's proposed defences, I cannot see how they can be made evidence. It is said that Crawfurd lodged them, or proposed to lodge them, in a criminal action. So much the worse. It is true that a high-minded man will stand on his own innocence, and disdain to roll guilt over on another. But these defences were given in by a party stamped with the infamy of a previous conviction, and now having the gallows and a halter staring him in the face, and who in that situation will tell any story. Suppose they had been lodged, what faith could be put in the statements there made? Plainly none. But when they have not been given in—when they might have been entirely changed—you may as well attempt to prove what were his secret thoughts, or ask him if he did not intend to make a certain defence, as to put this document in evidence. The statement

* His Lordship then entered into a detail of the circumstances; but as a new trial has been ordered, and the circumstances do not establish any general point, they are not reported.

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in it was not made on oath, and was nothing else but his own secret thoughts. I am therefore clear that it cannot be evidence against him or any one else.

4. The next point relates to Webster's correspondence. The general rule is admitted; but it is said that he was not the law-agent of Montgomerie. There are, however, different kinds of agents. A man may employ one to advise him as to his line of defence, and another to collect evidence. It is not necessary that he be a law-agent. It is sufficient that he acts in that capacity. The correspondence clearly related to the impending criminal proceedings; and a person in this position may employ any one, even a country gentleman, to take evidence, or to do other confidential acts, and that confidence will be protected; therefore I think the letters were properly rejected. It is on the first ground that I am for allowing a new trial.

Lord Chief Commissioner.—I am unwilling to detain the Court with many observations. But this case involves points of the deepest importance to Jury trial, and to the law of evidence. I shall immediately proceed to the consideration of these points. But there is one to which your Lordship did not advert, and on which we heard a good deal from the Bar—I mean the construction of the issue. It was said that, at the outset of the trial, the presiding Judge observed that the only point for the consideration of the Jury was the forgery; but it is admitted that this was corrected before the termination of the trial, and the issue left in its broadest sense in the hands of the Jury. It is therefore needless to say more on this point.

1. The first objection taken to the verdict is, that it is contrary to justice and to the evidence. On this point I confess I have very considerable difficulty; and the Court, in exercising its discretion in granting a new trial, have here a difficult duty to perform. We must attend to a marked line of distinction in regard to cases of this kind—I mean the distinction between the case where there is the hazard of justice not being done, and that of an attempt to make the first trial a mere species of rehearsal, preparatory to the party putting forth his real strength, and seeking justice at a second trial. If the party has by his own conduct, in not bringing forward evidence or otherwise, lost his cause, and wishes to redeem this error on a second trial, the Court ought to refuse the motion; for otherwise you will suffer him to plead his own negligence in his own favour, which would be a dangerous precedent. But if the verdict be plainly contrary to justice, and if a different conclusion should have been arrived at, had the Jury given due effect to the evidence, the motion should be granted. At present I labour under the difficulty of seeing nothing more than strong suspicions of the truth of the charge made by the pursuer; and in so far as your Lordship rests on things omitted at the trial, which, if adduced, would have converted the suspicions into proof, I would conceive it dangerous to allow a new trial on that ground: And here I would notice the case of Scott v. Wilson, alluded to at the Bar.[1] It is true that one cause is not like another in regard to the facts; but these facts elicit principles which may be equally applicable to both. In that case there were grounds of suspicion that a fraud had been committed; and it was proved that there had been a contrivance to bring the party alleged to have been defrauded into a situation where the fraud might be accomplished. Now, if any

[1] 3. Murray, 518.

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thing of that sort had appeared in this case, it might have made it like that of Scott, where we granted a new trial; but it is entirely different.* I would therefore pause before allowing a new trial on the grounds stated by your Lordship; but at the same time I am not prepared to dissent. And here I may observe, that in all questions as to what we have called the machinery of the Court, and not to principles of law, it has been the practice to refer to English cases, and they therefore may be cited in regard to a motion for a new trial. Now I observe one extremely similar to the present in all respects, which was tried in 1756 by Lord Mansfield, assisted by Foster and Dennison, Justices. It began in a question of forgery, and ended in a question of fraud. The plaintiff failed to establish the forgery, and the fraud was left to the Jury, who gave a verdict in favour of the defendant. A motion was then made for a new trial. The Court granted a new trial, on the ground that the facts and circumstances amounted to more than mere suspicion. I therefore doubt whether in this case we can, on the ground of suspicion, grant a new trial; and I think we ought to pause, and consider this case, before we do so.

2. As to Crawfurd's declaration, or proposed defences, I am quite clear that it cannot be evidence against Montgomerie, and therefore this document was properly rejected.

3. As to Webster's letters, I think that the principle of confidence extends to this case. It is the privilege of the party to use this plea. It is one which never expires, but extends to protect the same subject-matter, although to a different suit. It is indeed essential to the safety of suitors that this confidence should never expire.

4. In regard to Mrs. Crawfurd, the question requires much minute consideration. Let us see, in the first place, what is the issue. It is a question in relation to the reduction of the acceptance, and to nothing else. In other respects the bill remains perfectly entire. Now, supposing Crawfurd had not been a defender, could he have been adduced as a witness against Montgomerie? He was the drawer, and liable, in a certain event, in payment of the bill. But the rule which is laid down by Mr. Thomson in his Treatise on Bills, (who quotes the law of England on the subject,) and by Mr. Justice Bayley, is, that a party on a bill or promissory note is competent as a witness, if he have no direct interest, and cannot make use of the verdict in his favour. Now see how Crawfurd stands. The sole question here relates to the acceptance; and he is called on not to support the acceptance, but to set it aside. If he had been called by Montgomerie to support the acceptance, he would have been clearly inadmissible, because he has an interest to support it. But when he is called on not to support it, but to set it aside, he is required to speak against his interest, and therefore liable to no objection on this head. Besides, it is plain he could never make use of the verdict in his own favour. If, therefore, I be correct in this, it is plain that if he would have been admissible in respect of no interest, his wife cannot be rejected on the ground that he has an interest. A case to this effect was tried in the time of Sir James Mansfield, and it was decided that the drawer was admissible.

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* His Lordship then stated the circumstances, which, for the reason already mentioned, are not reported.

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The only difficulty therefore which remains is, whether Crawfurd continued to be a defender in the cause, and the effect of that to exclude him as a witness. As this is a point of Scotch law, and connected with Scotch forms, I would rather decline giving an opinion. But it appears to me that he was dropped out of the case.

Lord Gillies.—There is one difficulty which has not been spoken to; I mean the import of the issue.

Lord President.—It is plain that the parties considered that it embraced the question of fraud, because they went into it.

Lord Gillies.—I think it was calculated to try only the question of forgery.

Lord Chief Commissioner.—We certainly framed it with the view to try both the forgery and fraud. We have been desirous to make issues as general and comprehensive as possible. In regard to this case we had repeated meetings, and were attended by the counsel on both sides on three occasions. At first it was proposed to make the issue whether the pursuer was resting-owing? But a doubt occurred to Lord Mackenzie, whether, having regard to the nature of the action of reduction, such an issue was calculated to try the case; and it was afterwards framed as it now is, whether "it was not accepted by the pursuer." Such an issue we understand to be suited to try both the forgery and the fraud.

Lord Gillies.—This explanation is quite satisfactory, although, on reading the issue, I would have put a different construction upon it. We must, however, go on the assumption that it embraced the question of fraud.

The case embraces only two points to which I mean to speak:—first, whether the verdict be contrary to evidence; and, second, whether Crawfurd's wife be admissible.

1. On the first point I feel even more strongly than your Lordship. It is true, I do not recollect any case in which the facts and circumstances under which a fraud was committed have not been specified; and although this may at first sight be favourable to the defender, yet it is not always so. Take the case of a notorious thief being in possession of my accepted bill for £10,000; I may be staggered, and even compelled to admit that my signature is genuine; but, being granted to such a person, I am quite certain that it must have been elicited by some fraudulent act. The general rule no doubt is, that the party alleged to be defrauded must show *how* he was defrauded; but I apprehend that where there are sufficiently strong real circumstances of suspicion, the party holding the document must show *how* he got possession of it. He stands precisely in the position of a person holding stolen goods, where, although the party injured cannot explain how they were stolen, yet the holder must give an account of how he came to be possessed of these goods.[1] I do not go into more circumstances, because I am quite satisfied that there ought to be a new trial.

2. In regard to Crawfurd's wife, I am inclined to hold that she is admissible as a witness. The question depends on whether her husband has any interest. It is not sufficient to say that he is in form a defender. The question is one of substance, not of form; and it is, whether he has an interest. In my opinion, he

[1] His Lordship then stated the circumstances which led him to concur in granting a new trial.

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has no concurrent interest with the pursuer. For what is the point at issue? It is, whether this be a good or a bad acceptance. If it be a good acceptance, the pursuer must pay the bill, and Crawfurd will thereby be relieved. If it be a bad acceptance, she is not bound, and consequently Crawfurd must pay in virtue of his indorsation. Can he, therefore, have any interest to show that this is not a good acceptance? His interest is quite the reverse. Take an analogous case: Suppose that a disposition of property is executed in favour of A. and B., and that the heir at law brings a reduction on the head of deathbed, and A. acknowledges that the deed is bad; but B. denies this, and alleges that the granter was free from disease at the date of its execution: The question then comes to be, whether he was affected with the disease. Now suppose that A. and his wife had been residing in family with the granter, and knew all the circumstances, and put in defences acknowledging the existence of the granter's sickness as libelled; B., from ignorance, or a worse cause, denies this, and joins issue with the pursuer. In these circumstances, could not the pursuer adduce the wife of A. as a witness? In point of form, A. must be made a party to the action; but I apprehend that as it is manifestly against his interest to reduce the deed, his wife could be adduced as a witness by the pursuer of the reduction.

In regard to the other points of the case, I concur with your Lordship.

Lord Craigie.—I agree in general with Lord Gillies; and I think that the terms of the issue are such, that, notwithstanding thisv erdict, it would have been competent still to have tried the question of fraud, because I could not have supposed it to have embraced that point. But, after the explanation which has been given, we must hold it as including the question of fraud, and I can have no hesitation in granting a new trial. The verdict appears to me to be against the real evidence of the case. [His Lordship then stated the circumstances.]

As to Crawfurd's wife, I agree entirely with Lord Gillies. He had no interest, and the bill was not protested against him, except for recourse.

Lord Balgray.—As I did not hear the counsel fully,* I may not be entitled to deliver my opinion; but although I at first had some difficulty, I now agree with your Lordship that there ought to be a new trial. I doubt extremely, however, as to the admissibility of Crawfurd's wife. The law of Scotland has always been tender in doing any thing likely to disturb the confidence necessarily existing between husband and wife. Crawfurd was made a party to this action by the pursuer, who thus acknowledges that he has an interest in the matter. I cannot distinguish the interest of the wife from that of the husband.

Lord President.—The clerk will make out a special interlocutor granting a new trial, and finding that Mrs. Crawfurd is admissible; but that the correspondence between Peter Montgomerie and Webster, and William Montgomerie and Crawfurd, is not admissible.

Shaw, for the Pursuer, intimated that he excepted to these latter findings.

The Clerk then inquired how their Lordships meant to dispose of the question of expenses.

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* His Lordship was not present at the reply.

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Gavin v. Montgomerie &c.
Ritchie v. Radley.

Lord Chief Commissioner.—In such cases as this, and more especially where there is a difference of opinion with the presiding Judge, the expenses of the first trial must be paid.

The Court pronounced this interlocutor:—"The Lords set aside the verdict in this case, and grant a new trial, upon the pursuer paying to the defender the expenses of the former trial; and the Lords find that the Judge on the former trial did wrong in rejecting the evidence of Mrs. Crawfurd; but that his Lordship did right in refusing to admit as evidence the draft of a scroll of the intended defences for Crawfurd, and also the correspondence betwixt Webster and Peter Montgomerie, and William Montgomerie and Crawfurd."

W. Patrick, W. S.—W. Mercer, W. S.—Agents.

David Ritchie, Advocator.—*Maidment.* No. 117.
William Radley and Others, Respondents.—*Jameson.*

Summary Application—Inferior Courts A. S.—Master and Servant.—Claim by a discharged servant for wages and board-wages not of a summary nature, and held not to fall within the provision for summary procedure in the Inferior Courts A. S.

Dec. 17. 1830.

2d Division.
Ld. Mackenzie.
R.

The advocator Ritchie, a servant in the Dundee Lunatic Asylum, having been dismissed by the respondents Radley &c., the superintendant and managers of the institution, presented a summary petition to the Sheriff of Forfar, praying that these parties should be ordained to pay him £9 sterling, as the wages due him to the ensuing term, and 12s. weekly from the time of his dismissal, as board-wages. To this petition it was objected that the claim was incompetently made in a summary form; and the Sheriff having sustained this defence, and dismissed the petition, Ritchie brought an advocation, on the grounds—

1. That the claim, being of an alimentary nature, could not competently be pursued for summarily; and,

2. That, at all events, the provisions of the first section of the Inferior Courts A. S. (P. II. c. 1.) authorized the Sheriff to allow actions, not summary in their own nature, to proceed summarily in the form of a petition, and that his ordering service of the petition in this case was tantamount to such allowance.

To this it was answered—

1. The claim of a discharged servant for wages and board-wages is not alimentary, but of the nature of a claim of damages; and,

2. The A. S. is intended to allow causes, requiring in particular circumstances summary dispatch, to proceed summarily; but this is not a case of that description; and further, when the action is not in its own nature summary, the special allowance of the Sheriff, on an application for that purpose, is necessary.

The Lord Ordinary remitted to the Sheriff to recal his interlocutor, and repel the preliminary defence; but, on a reclaiming note by Radley &c., the Court altered, and remitted simpliciter.

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Dec. 17. 1830. Ritchie v. Radley.

Brown's Trustees v. Palmer.

LORD GLENLEE.—I can conceive cases where it would be very proper to allow summary procedure, as where they admit of immediate determination, and require no minute investigation of facts. But the case of an action by a servant dismissed is quite different. This depends on an investigation of facts, and must be made in an ordinary action.

LORD CRINGLETIE.—The A. S. refers to cases requiring immediate dispatch, such as that of a man turned out of his house; but here the claim is for payment of money; and I can see no greater urgency than in the case of any other man suing for payment of a debt.

LORD MEADOWBANK.—The words of the A. S. are clear; and this case does not come under the class there mentioned as requiring immediate dispatch, or in which the interests of parties would suffer by following the ordinary course.

LORD JUSTICE-CLERK.—I agree that, on a sound construction of the A. S., this case does not fall under it. The provision of the A. S. is an extraordinary remedy; and it would lead to intolerable abuse, if all actions for servants' wages were held as falling within the rule.

J. BROWN,—D. FISHER, S. S. C.—Agents.

No. 118.

BROWN'S TRUSTEES, Pursuers.—*Hope.*
JOHN PALMER, Defender.—*Rutherfurd.*

Jurisdiction — Arrestment Jurisd. Fund. Causa— Foreign — Executor. — Held that arrestment jurisdictionis fundandæ causa cannot create a jurisdiction in the Courts of this country against an executor resident in a foreign country, and where the office fell to be executed, to the effect of calling him to account here for the execution of his office.

Dec. 17. 1830.

2D DIVISION. Lord Medwyn. R.

THE late David Brown, by his latter will executed in India, conveyed all his property there to the defender John Palmer of Calcutta, as executor, for the purpose of recovering his effects, and paying over the amount, after deduction of expenses &c., to certain persons in this country, as trustees appointed by a relative deed, with power to recover the same from Palmer. Brown died in 1819; and Palmer, who continued to reside in India, not having, as the trustees alleged, accounted for his intromissions as executor, they raised an action of count and reckoning against him in the Court of Session, having previously used arrestments of certain funds owing to him by parties in this country, jurisdictionis fundandæ causâ. A defence was given in for Palmer, to the effect that being an executor in India, where the duties of the office were to be fulfilled, and being still resident there, and subject to the jurisdiction of the Courts in that country, arrestment could not establish a jurisdiction in this Court to call him to account here for the execution of his office.

The Lord Ordinary, "in respect the defender, who is an executor subject to the law of England as administered in India, has all along remained in India, subject to the jurisdiction of the Courts in that country, finds that the arrestment jurisdictionis fundandæ causâ is not a suf-

ficient authority for this Court calling upon the defender to account for his intromissions as executor; therefore dismisses the action, and decerns." The Court adhered. No. 118. Dec. 17. 1830. Brown's Trustees v. Palmer.

D. Fisher, S. S. C.—J. and C. Nairne, W. S.—Agents.

John Munro, Pursuer.—*Neaves.*
Thomas Hogg, Defender.—*Moir.*

No. 119. Dec. 18. 1830. Munro v. Hogg.

Title to Pursue—Stamp—Expenses.—A party pursuing on an unstamped disposition, and who eventually succeeded in his action with expenses, not allowed the expense of stamping the disposition.

In the action at Munro's instance against Hogg, decided on the 14th instant,* it had been objected by the defender that Munro's title was an unstamped disposition omnium bonorum. Munro had therefore got it stamped, and having ultimately obtained decree against Hogg, with expenses, he insisted, inter alia, on being allowed the expense of the stamping. Hogg objected that the pursuer must himself bear the expense of making up his own title to pursue. In a case of mutual missives, where one party unfairly attempts to resile, and obliges the other to be at the expense of a stamp, the case was different from the present; for there the party was in mala fide to attempt to break his own contract by pleading the want of a stamp; which was a defect partly occasioned by himself. Here, however, the disposition to Munro was a unilateral deed, to which Hogg was no party, and he was no more liable to pay the price of affixing a stamp to it, than to pay the price of originally drawing and extending it. Dec. 18. 1830. 1st Division.

The Court struck out of Munro's claim for expenses the sum which it had cost to affix the stamp to the disposition in favour of the pursuer.

A. Hutchison,—J. Wight, W. S. Agents.

Magistrates of Perth, Advocators.—*Ld. Adv. Jeffrey—Jameson—Patton.*
Malcolm Stewart, Respondent.—*Rutherfurd.*

No. 120. Dec. 18. 1830. Magistrates of Perth v. Stewart.

Superior and Vassal—Burgage.—Magistrates having "disponed, and in feu-farm demitted," certain burgage land by a charter containing procuratory of resignation, but no precept of sasine, "to be holden of the King in free burgage, fee, and heritage, for ever," for prestation of burgal services,—"and also to be holden of the Magistrates in feu-farm" for payment of an annual sum in name of feu-duty,—"and doubling the said feu-duty the first year of the entry of each heir and of each singular successor thereto, as use is in feu-farm;" and the disponee being infeft under the procuratory by a Magistrate, the Town Clerk being notary, and the sasine registered in the Burgh books; and the disponee having sold, with procuratory, to a party who was

* Ante, IX. p. 171.

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similarly infeft, and who paid the annual prestations due in name of feu-duty for several years; and the Magistrates having raised an action to have him decerned to pay a sum "as the double feu exigible on his succession to the said lot"—The Court assoilzied, "reserving to the Magistrates to bring such action against the defender as they may be advised to institute for fulfilment of the prestations or other stipulations contained in their contract with him as accords, and to the defender his defences thereto."

Dec. 19. 1830.

1st Division. Ld. Corehouse: H.

In the year 1804, the Magistrates of Perth, having sold a lot of land by public roup for £100 sterling and certain prestations, granted a charter, in the following terms, to Patrick Stewart as the purchaser:—"We, for ourselves" &c., and for the "whole community of the said burgh, heritable proprietors of the said lot of ground, for and in consideration of the foresaid price of the yearly feu-duties underwritten, and with and under the provisions after mentioned, sell, alienate, and dispone, and in feu-farm perpetually demit, to and in favour of the said Patrick Stewart &c., all and whole the foresaid lot of the Burgh Muir, &c.; in which lot we bind ourselves to infeft the said Patrick Stewart, to be holden of our Sovereign Lord the King's Majesty, and his royal successors, immediate lawful superiors thereof, in free burgage, fee, and heritage, for ever, for payment of the burgh maills, service of burgh, and others used and wont, and that by resignation in manner underwritten; and also to be holden of the Magistrates and Town Council of the said burgh in feu-farm, fee, and heritage, for ever, for payment, out of and for the said lot of ground hereby disponed, by our said disponee to the Town Chamberlain of Perth, of the price and value of 13 bolls of wheat, and 13 bolls of barley, in name of feu-duty, yearly &c., and doubling the said feu-duty the first year of the entry of each heir, and of each singular successor thereto, as use is in feu-farm, &c.: And for expeding the said infeftment, by resignation, we constitute our procurators to compear before any of us &c., and resign, likeas we hereby resign &c. in the hands of us, or any of us, as in the hands of our Sovereign the King's Majesty, our immediate lawful superior thereof before mentioned, as to the burgage-holding, and in the hands of the Provost, or any of the Bailies," for himself, and in name of the community, "superiors of the same, as to the feu-holding, in favour and for new infeftment of the same to be given to the said Patrick Stewart; providing, that if our said disponee shall not make punctual payment of the said feu-duty yearly, but shall allow two years thereof to run into a third unpaid, then and in that case he shall incur a forfeiture of the feu-right," &c. They further bound themselves to warrant "the subjects hereby disponed, with this charter, and the resignation and infeftment to follow hereon, to be valid," &c.

The charter contained no precept of sasine. It was followed by infeftment given by one of the Magistrates, in which the Town Clerk acted as notary. The instrument of sasine set forth the obligation to infeft Stewart, to be holden of the King "in free burgage, fee, and heri-

tage, for ever, for payment of the burgh mails," &c.;—" and also to be holden of the Magistrates &c. in feu-farm, fee, and heritage, for ever," for payment of the feu-duty already mentioned;—" and doubling the said feu-duty the first year of the entry of each heir, and of each singular successor, as use is in feu-farm," &c. The instrument then stated resignation to have been made, under the procuratory in the charter, in the hands of the Magistrate, as in the hands of the King, as to the burgage-holding, and in the hands of the same Magistrate, for the Town, as to the feu-holding, for new infeftment; which resignation being so made, the Magistrate gave heritable state and sasine to Stewart of the subjects, " to be holden in manner before mentioned."

Stewart, soon after his entry, executed a disposition, with procuratory of resignation, in favour of his brother Malcolm. In virtue of this procuratory, Malcolm took infeftment in 1810, at the hands of one of the Magistrates, the town-clerk being notary as before. The sasines both of Patrick and Malcolm were registered in the Burgh Court books. Malcolm Stewart paid, from the first, the annual sum stipulated in name of feu-duty.

In 1828, the Magistrates and the Town Chamberlain (to whom the prestation in name of feu-duty was payable) raised an action against Malcolm Stewart before the Sheriff of Perthshire, setting forth that they had granted a feu-charter of a lot of ground to Patrick Stewart in 1804; " that, by the tenendas of the said feu-charter, the said lot of ground is declared to be held burgage, and also to be holden of the Magistrates &c. in feu-farm, fee, and heritage," for payment of the value " of 13 bolls of wheat, and 13 bolls of barley, in name of feu-duty, yearly;"—" and doubling the said feu-duty the first year of the entry of each heir and of each singular successor thereto, as the use is in feu-farm." They then subsumed that Patrick Stewart, the first vassal, after being duly entered, had sold the lot to Malcolm Stewart, who had also taken an entry; and being a singular successor, he was liable in the duplicand of the feu-duty. The summons therefore concluded against him for " £25. 14s., as the double feu exigible on his succession to the said lot."

Stewart pleaded—It was impossible for him to be simultaneously the immediate vassal of the King in a burgage-holding, and also of the Magistrates by a feu-holding. In virtue of the Magistrates' procuratory of resignation, he had obtained infeftment as the immediate vassal of the Crown; and this would have thrown the Magistrates out of the subject altogether as his superiors, if they could ever have pretended to such a character. But it was only as his superiors, claiming the reddendo due for what they warranted to be a good feu-holding, that the duplicand was asked; and as he had got no feu-holding from them, and could get none, he owed them no feu-duty. It was true he had always paid the annual sums contracted for in name of feu-duty; but he was entitled to resist the demand for a duplicand of the feu-duty in respect of his entry, because none was

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stipulated in his titles, or exigible by law, for an entry under a burgage holding; and the Magistrates had given, and could give, no other.

Pleaded by the Magistrates—

The lot of ground disponed in the charter was sold by public roup. The price payable for it consisted partly in the sum of £100 paid down, but chiefly in certain annual prestations undertaken by the pursuer. The onerous consideration for which these prestations were undertaken was, in substance, the granting of a good title to the ground to the purchaser, and that had confessedly been done. It lay with the defender, therefore, acquiring the land on certain terms, to make bonâ fide implement of his part of the contract; and it was only the question of his personal liability which was raised in this action. He did not attempt to deny his liability for the ordinary annual prestations stipulated for in name of feu-duty, and he had always paid them. But if he was bound to pay the annual prestation, he was equally liable under the contract for the duplicand of it, which was stipulated to be paid on the entry of a singular successor. He did not deny that he was a singular successor, or that he was entered; and therefore the precise case had occurred which rendered a duplicand exigible under the contract, as much as the possession of the land rendered the ordinary annual prestations due from year to year.

The Sheriff pronounced this interlocutor:—" Finds that the original charter, of date 7th May 1804, having been granted by the town of Perth, for an onerous consideration, in favour of Patrick Stewart, therein stated to have been the purchaser of the subjects, and Patrick Stewart having been infeft on the said charter, and having afterwards sold and disponed the said subjects for an onerous consideration to the defender, who holds and stands infeft in that disposition, the investigation proposed by the defender, for the purpose of establishing that he had an interest, along with Patrick Stewart in the original purchase, and that there was an agreement that the charter should have been made out in favour of the defender, and that it was by mistake the charter was made out in favour of Patrick Stewart, cannot be permitted in this action;—finds, that by the said original charter the subjects were to be holden " in free burgage, fee, and heritage for ever, for payment of the burgage mails, service of burgh, and others used and wont;" and also to be holden in feu-farm and heritage for ever for payment of a certain feu-duty, doubling the said feu-duty the first year of the entry of each heir and of each singular successor thereto, as use is in feu-farm;—finds it maintained by the pursuers, that in September 1804, when the defender acquired the subjects by purchase from Patrick Stewart, who is still in life, the fee was full by the said Patrick Stewart being then the entered vassal in the subjects;—finds that the defender has completed his title no otherwise than by taking sasine on the disposition by Patrick Stewart to him, the " town-clerk" officiating as notary, and the instrument of sasine being recorded in the burgh register only, which was done on the 10th of April 1810, at which time

no double feu-duty was exacted or demanded from the defender;—finds that, in these circumstances, the defender cannot be held to be the entered vassal of the pursuers under the feu-holding, and is not at this time, and under this action, liable in payment to the pursuers of the double feu-duty libelled; assoilzies the defender from the conclusions of the action, and finds him entitled to expenses."

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The Magistrates and Chamberlain brought an advocation, in which Stewart objected to their title that the whole Council were not parties to the action. This objection was repelled.[1] On the merits the Lord Ordinary "advocated the cause, and assoilzied the defender from the conclusions of the original action," with expenses.*

The Magistrates reclaimed.

LORD PRESIDENT.—If we gave decree under this action as libelled, we should be sanctioning the strange attempt to make a person the vassal, in the same subject, of two separate immediate superiors at the same time.

LORD BALGRAY.—I acquiesce in the principles laid down by the Lord Ordinary, which are indisputable; but, after giving full effect to them, there is a question remaining beyond their reach. I would observe generally, that whether a disposition be granted with a feudal or a burgage holding, the granter may competently make a variety of stipulations with his disponee. He may take the disponee effectually bound to make sundry payments, according to the terms on which the parties choose to agree. In this case the absurd blunder

* "NOTE.—The object of the Town of Perth in granting this charter was to combine a burgage-holding with a ground-annual payable to the town—a practice not uncommon in the Scotch burghs. But they have attempted to do this in a manner totally incompatible with feudal principles. They declare that the subject should hold burgage of the Crown for the usual reddendo of burgal services, and also of the Magistrates and Town Council for payment of a feu-duty in grain, to be doubled as a composition on the entry of singular successors. But it is impossible for a vassal to hold a subject of two immediate superiors at the same time. As the Magistrates had the power of conferring either a burgage or a feu tenure, a doubt might have arisen, in other circumstances, in which character the respondent had actually entered. But no such doubt can exist here. He has resigned on a procuratory executed in the hands of the bailie, and his sasine is registered in the books of the burgh. Even if he had wished to enter in a feu-holding of the town, he could not have done so under this charter, which contains no precept of sasine, but only a procuratory of resignation, the execution of which never could have the effect of placing him in the situation of a vassal holding of the town. Accordingly the respondent's counsel very properly admitted at the bar that the respondent is entered the vassal of the Crown in burgage, and that he is not the entered vassal of the town in feu. It follows by necessary consequence that he cannot be made liable in an ordinary action for the composition of a singular successor, only payable on an entry in feu—an entry which neither is nor can be made by virtue of this charter. It is said that the Town of Perth has long been in use to make such grants; but no local practice, however inveterate, can derogate from the fundamental principles of law."

[1] May 27. 1830, (ante, VIII. 819.)

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has been committed of attempting to cobble up two inconsistent holdings together. This is quite inept. But at the bottom of the transaction, and in gremio of it, whatever may be the holding, there is a real onerous contract entered into between the parties; and either contracting party may come here, and insist on having the contract put into an available practicable form, so as to enable him to enforce implement against the other. Here there was a sale by public roup—the sale of a burgal subject. The price consisted in the payment of a certain sum, and of certain annual prestations according to particular conditions. Is the purchaser to be free from payment of any of these sums? or has the condition of the contract taken place, which entitles the seller to enforce implement of the bargain? I say it has. If the Magistrates attempted an action of maills and duties, or any enforcement of a right on a footing implying that they were feudal superiors, I should oppose them. But here it is only the personal obligation which they seek to enforce by means of a personal action. The defender, as their debtor, is liable in payment, the condition of his obligation having taken place. The Magistrates perhaps should first have brought a declarator of their rights under the transaction; but though this has not been done, the obligations to be declared are there, and there is a contract binding on the defender, which he must implement. On the whole, therefore, whilst I would qualify our judgment so as to recognise the principles of law laid down by the Lord Ordinary, I would alter his interlocutor, and sustain the conclusion against the respondent for payment.

Lord Craigie.—In the case of Dawson v. Mitchell, it was held that whatever might be the form of infeftment under which an heritable subject was conveyed to a disponce, any collateral stipulations were unimpeachable. It would have been better here to have avoided the confusion of mixing the two feudal holdings together; but it is only necessary to sink the feu-holding, as inept and superfluous; and the title being made up under a burgage tenure, the obligations undertaken by the defender are binding upon him. The present is a petitory action, brought by the parties who are in right of the feu-duties. I think there was no need of a declarator; but that the Magistrates, as in right of the sums stipulated in name of feu-duties, have the title to ask for a duplicand, the defender being entered, and a singular successor.

Lord Gillies.—We can have no difference regarding the principles of law which are laid down by the Lord Ordinary. But we cannot make the feudal law bend to the practice of the town of Perth; we cannot dispense with feudal principle, so as to accommodate our judgments to that practice. I can very well understand that, in any contract however absurd, it must be binding in all its stipulations upon the contracting parties, so far as their meaning can be got at. But how far is the claim by the Magistrates exigible against the defender here? I would lay aside the whole phraseology of the charter, so far as applicable to the case of feu-holding, and treat this as a case of burgage-holding, which it is, and nothing else. What, then, are the stipulations of the parties to the original contract?—That a certan sum is to be payable annually in name of feu-duty. If it be payable in that name, the contracting party is bound to pay it, though the prestation may have received an erroneous designation from the town-clerk. Then there is a further bargain, that the sum to be paid periodically shall be increased on certain contingencies. This is a legal stipulation. Let the increase be dependent on any event, and doubled when the event

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occurs which is contemplated by the contract—whether that event be an entry, or any thing else. But here is the difficulty—How far can these stipulations be made good against a third party? The defender here is a purchaser from the first vassal; and the ground on which the duplicand is claimed is, that he is a singular successor in a feu-holding. Is this double payment made a real burden on the land? If not so, can it be enforced against a singular successor, and in the terms of this summons? Look to its conclusions. They are, that the defender should be decerned to pay the sum, "as the double feu exigible on his succession to the said lot." Now, no human being can maintain this to be a case of feu-holding; yet the demand is only placed on the footing of its being so; and the claim is for the duplicand to the Magistrates, as having entered a singular successor in the feu. I would adhere to the interlocutor, reserving to the Magistrates to make their claim in a more competent form.

Lord President.—That is my opinion. In all burgage-holdings, the Magistrates are mere commissioners of the Crown to give infeftment to the vassals. In correct principle, they have no right to lay a single sixpence of burden, in their own favour, on any burgage holding; for by such burdens they might disable the King's vassal from performing burgage services. Had the practice of imposing ground-annuals on burgh vassals, in favour of third parties, been checked at first, the Crown had a right to do so; but now perhaps it is sanctioned by inveterate usage. But here something very different is attempted. The Magistrates endeavour to make themselves the superiors of the burgh lands—a thing which they never can do in the face of their own burgh charter. Let the Magistrates bring a declarator, departing from their feu-holding, and craving leave to expunge it from the defender's charter, and we shall then determine the relative rights of parties. But under their summons, as at present laid, we should sanction a monstrous anomaly, if we gave a decree in their favour.

Lord Gillies.—It is said that the defender has accepted a disposition in terms of the stipulation now insisted on. Suppose an adjudication of the land were brought, how far would the adjudger be bound by them? I question whether he would not be entitled to demand an entry on the usual terms of a burgage tenure. But as it seems we are equally divided, I suppose the case must stand over.

Lord Balgray.—On again considering the peculiar terms of the summons, I am not inclined to sustain the claim, because of the shape in which it is made.

Lord Craigie.—It is quite correctly stated by the Lord President that the Magistrates, in a burgage tenure, act merely as commissioners of the Crown. But then, as representing the community, they also hold property, sometimes land, sometimes fishings &c., which they can dispone in feu; and in this case there has been a jumble of the rights arising to them in these distinct characters. But still, notwithstanding that confusion, there is substantially a binding contract here. A consideration was given for these feu-duties, and the party receiving it is bound to pay the equivalent. In truth, and substance, and honesty, the defender is liable to give that implement of the contract which the Magistrates now demand. A party must not take the full benefit under a contract, and still pretend to withhold counter performance on his part.

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THE COURT then adhered, "reserving to the Magistrates of Perth to bring against the respondent such action as they may be advised to institute, for fulfilment of the prestations or other stipulations contained in their contract with him as accords, and to the respondent his defences thereto;" and found them liable in further expenses.

Advocator's Authorities.—Dawson and Mitchell, Nov. 14. 1827, (ante, VI. 19.); 2. Erak. 5. 5; 1. Bell, 696; Dixon, Feb. 1. 1823, (ante, II. 161); Visc. Arbuthnot, July 21. 1680. (11385.)

W. MURRAY, W. S.—GIBSON-CRAIGS, WARDLAW, and DALZIEL, W. S.—Agents.

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JOSEPH M'CHRISTIE, Suspender.—*Jameson—Whigham.*
MRS. HELEN KEA or FISHER, Charger.—*D. F. Hope*—Gillies.*

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2D DIVISION. Bill-Chamber. Lord Gillies. F.

AFTER the judgment in this case mentioned ante, VIII. 1006, the bill, with answers, was laid before the Lord Ordinary on the Bills, who, in respect of the judgment in the question of liberation between the parties reported ante, VIII. 481, refused the bill. The Court, however, on a reclaiming note, in respect that by the judgment in that case they meant only to decide the question of liberation, remitted to the Lord Ordinary to advise the bill and answers on the merits.

R. W. NIVEN, W. S.—W. SPALDING, S. S. C.—Agents.

Single Bills.

RUTHERFURD v. NISBET'S TRUSTEES.

Process—Expenses.—In adhering to interlocutors of Lords Ordinary repelling *preliminary* defences with expenses, the Inner House, if they intend to award additional expenses, must repeat the finding; allowed, however, in this case, in respect of a contrary practice, without such special finding.

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2d DIVISION.

IN the case mentioned ante, No. 2. p. 3, the Lord Ordinary, in repelling a preliminary defence, found the defenders liable in expenses under the Judicature Act, they having intimated an intention to reclaim; and the Court simply adhered without any special finding as to expenses, it not being the practice of the Second Division to repeat the finding of expenses in cases of this sort, any more than in adhering to interlocutors on the merits. On the Auditor's report coming before the Lord Ordinary, a question arose whether the interlocutor of the Court carried the expenses of the Inner House procedure, the First Division having decided [1] that, in regard to the determining of preliminary defences, a special finding of expenses by the Inner House was necessary; and that a simple adherence was not to be held a repetition of the finding to that effect in the Lord Ordinary's interlocutor. The Lord Ordinary reported the matter; and the Court, in order that the decisions might be uniform on the point, consulted the other Division. The result of the consultation was, that, in cases of preliminary defences, there should be a special finding of expenses when the additional expenses were to be allowed; but, in respect of the contrary practice of this Division, the Court allowed the expenses in the present case, as intended to be carried by the interlocutor.[2]

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* Mr. Hope, on the resignation of Mr. Jeffrey, (who had been appointed Lord Advocate,) having been elected Dean of Faculty, this day took his place.

[1] Learmonth v. Morton, Feb. 28. 1829, (ante, VII. 492.)

[2] Since this judgment, the Court have directed the Clerks to repeat the finding of expenses, even in cases decided by the Lord Ordinary on the merits.

Misses J. and E. Kibble, Pursuers.—*Ld. Adv. Jeffrey—Skene.*
John Stevenson and Others, Defenders.—*Jameson—A. Dunlop.*

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Dec. 18. 1830.
Kibbles v. Stevenson &c.

Sasine—Registration—Writ—Marriage Contract.—1.—A precept of sasine held not to be exhausted by an unrecorded infeftment, but still competent to take a second infeftment thereon.—2.—The parents of an intended husband having, in their son's contract of marriage, conveyed a property to him and the children of the marriage, and marriage having followed thereupon—Held no ground for reducing the disposition, that the subscription of the bride was not properly tested.

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2d Division.
Ld. Mackenzie.

In the year 1793, in contemplation of the marriage of the late James Stevenson with Janet Johnstone, James Stevenson senior, and his wife Janet Spreul, the father and mother of the intended husband, became parties to an antenuptial contract of marriage, whereby they disponed their lands of Braehead of Thornly in the county of Renfrew "to and in favour of the said James Stevenson junior, and the children to be procreated of the said marriage,—whom failing, his nearest heirs and assignees whomsoever." In so far as regarded the subscriptions of the intended husband, and of his father and mother, disponees of Braehead, the contract was in all respects regularly executed; but, with reference to the subscription of the bride, the designation of one of the witnesses thereto was left blank; and while in the testing clause his surname was set forth as 'Stevenson,' he had signed it 'Stven.' Marriage followed on this contract, and James Stevenson junior was infeft base on the 10th of August 1793; but his infeftment was omitted to be recorded. On the 25th of December thereafter, a second infeftment was taken on the same precept, and duly recorded. James Stevenson junior died, leaving several children, of whom the eldest, James Stevenson tertius, attained majority in 1817, when he made up titles to the lands of Braehead by service as heir of his grand-parents, and thereafter obtained a precept of clare constat from the superior, in virtue of which he was infeft in October 1819, having passed over the contract of marriage and infeftment thereon in favour of his father. Thereafter he borrowed various sums of money, to the extent of £3,350, on the security of bonds over the lands, which bonds came by progress into the persons of the pursuers Misses Kibble. In 1828, the defenders, younger children of the marriage between James Stevenson junior and Janet Johnstone, having then, for the first time, as they averred, discovered the existence of the marriage contract, proceeded to obtain themselves served heirs of provision to their father in the lands of Braehead under the contract of marriage; and having been served accordingly, they were infeft therein to the extent of their interests upon a precept of clare constat obtained under letters of horning from their eldest brother, James Stevenson tertius, as lawful superior, in virtue of his having, by his service to his grandparents, taken up the mid superiority created by the base infeftment of James Stevenson junior under the marriage contract.

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Thereupon Misses Kibble raised the present action, concluding for reduction of the marriage-contract, and the second infeftment thereon in favour of James Stevenson junior, on the grounds—

1. As to the marriage contract—That it was null, in respect of the defect in the designation and signature of the witness to Janet Johnstone's subscription; and,

2. As to the infeftment—That the first sasine, though unrecorded, had exhausted the precept in the marriage contract, so that a second infeftment on the same precept was inept.

Certain preliminary defences were stated and reserved; but as the case was ultimately decided on the merits, without any express judgment on these, it is unnecessary to advert to them.

On the merits, the defenders pleaded—

1. That the defect in the testing clause could in no degree invalidate the conveyance of the lands, the subscriptions of the disponers being in all respects regular; and that, at all events, the marriage following on the contract precluded any objection from defect of formality; and,

2. That a precept of sasine was not exhausted by an unrecorded infeftment.

The Lord Ordinary ordered Cases on the whole cause; but it is only necessary to advert to the argument on the second point.

Pleaded by the Pursuers—

A precept of sasine is a mandate; and, like other mandates, when obeyed, it is exhausted, and the powers of the mandatory fall. If any fatal error occur in giving infeftment, the precept is not exhausted, because that which is ordered by it has not truly been performed; and if any fatal error occur in drawing out the instrument, it is held not to be exhausted, because there is no legal evidence of any infeftment having been given; and, in the eye of law, it appears that infeftment has not been given, and consequently that the precept is not exhausted. The case is totally different where sasine has been regularly given, and a correct instrument drawn out, but omitted to be recorded. The recording is not, in its own nature, essential to the infeftment, but is only required by statute for a specific purpose, and under the sanction of a specific penalty. If the act 1617 had, like the prior statutes, or like that of 1669, c. 8, regarding resignations ad remanentiam, declared an unrecorded infeftment to be null, the precept would undoubtedly be held unexhausted when the sasine was not recorded; but the statute merely provides, that it "shall make no faith in judgment, by way of action or exception, in prejudice of a third party, who hath acquired a perfect and lawful right to the said lands and heritages, but prejudice always to use the said writs against the maker thereof, his heirs and successors." The true import of this provision simply is, that in questions with certain third parties—viz. "such as have acquired a perfect and lawful right to the lands"—an unrecorded instrument of sasine (for the act refers not to the infeftment itself, but to the *writ*) shall not

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make faith in judgment—i. e. shall not be capable of being produced in evidence, so as legally to establish the existence of an infeftment in competition with their rights, without prejudice to the 'said writ' (the unrecorded instrument) being used against the granter. This was the only change produced by the Registration Acts on the previously complete effect of an infeftment, though not entered on any record; and it still left the infeftment, though unrecorded, as creating a real right in the lands, but one which was now liable to be postponed in effect, in competition with the rights of third parties acquired by them in the confidence, arising from no entry appearing on the record, that there existed no real right of a prior date,—the avowed object of the statute merely being to exclude the frauds of proprietors concealing former private rights. Accordingly, from the date of the statute 1617, this has been the construction put upon it; and unrecorded sasines have been held good and effectual in questions, not only with the granter, but with all parties, except those specially mentioned in the act as "third parties who have acquired a perfect and lawful right" to the lands. Thus they have been so held in questions between landlord and tenant,[1] superior and vassal,[2] and with parties against whom burdens were attempted to be enforced,—they not having right to the subject itself contained in the infeftment;[3] and in various other cases.[4] Under authority of these decisions, Erskine has explicitly laid it down (2. 3. 40), that "the not-registration does not avoid the seisin; it is only a ground for postponing it in a question with third parties, who may claim the same subject under a title which has no dependence upon that seisin;" and he is followed by other authorities.[5] If, then, a real right be created by an unrecorded sasine, the necessary result is, that the precept is exhausted; for if delivery be given at all, it must be complete delivery; and as some real right is clearly thereby constituted, it necessarily follows that delivery has been made, and that the precept authorizing delivery has been exhausted, although, from omission to take the further step of recording the instrument, the real right thereby constituted is liable to be postponed in a competition with others, the infeftment in which has been duly recorded.

Pleaded for the Defenders—

It is a general rule, that remedial statutes, of which description the Registration Acts are, should be so construed "as to suppress the mischief, and advance the remedy." The object of the Registration Acts is to enable the public to rely with confidence on the records; but if the plea of the pursuers were sustained, so that an unrecorded sasine might be produced to cut down one appearing in the register, that confidence would be in a great measure destroyed, and the object of the statutes

[1] Ld. of Dunipace, March 25. 1623, (13538); Grey v. Tenants, March 24. 1626, (13540.) [2] Faa v. Ld. of Powrie, June 12. 1673, (13551.) [3] Rowan v. Colville, July 21. 1638, (13546.) [4] Ld. of Cranstoun v. Scott, Feb. 18. 1631, (13545); Dalmahoy v. Ainslie, Nov. 14. 1678, (5170.) [5] 2. Ross, 210; Bell on Completing Titles, 228.

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defeated. The expressions of the act 1617 are not so clear as they might have been; but, so far as regards infeftments, they truly import a nullity in the event of an omission to record. The reservation of the effect of the writs referred to in the statute against the makers could scarcely have been intended to apply to instruments of sasine; for the words of the clause do not in reality include infeftments, as the granter of the disposition on which infeftment is taken cannot be called the 'maker' of the instrument; and this reservation, therefore, undoubtedly has reference to the other writs, as reversions &c., mentioned in the statute. The provision as to infeftments, therefore, is limited to the declaration that they shall not make faith against third parties who have acquired a lawful right to the lands. But this, in reality, is depriving infeftment of all its effects as a real right; for, as against the disponer and his heirs, the bare disposition would afford as effectual a right as a duly recorded sasine; and consequently, if it confer none of the privileges of a real right, or which would not have been enjoyed in virtue of a bare disposition, it necessarily falls to be considered as null under the provisions of the statute; but if any doubt could be entertained on the words of the act 1617, it would be removed by the declaration of the subsequent act 1696, c. 18, which enacts "that no sasine, or other writ or diligence appointed to be registrate, shall be of any force or effect against any but the granters and their heirs, unless it be duly booked and insert in the register;" and it is worthy of observation, that all the cases which seem to have given some effect to an unregistered sasine as a real right, are of a date prior to this statute, with the exception of Keith v. Sinclair,[1] the decision in which, however, is confessedly erroneous, and was disregarded in the subsequent case of the Creditors of Earnslaw.[2] The construction of the statute now contended for is confirmed by the consideration, that the act 1669, c. 8, which is part of the same system, and merely extends the provision to instruments of resignation ad remanentiam, and which proceeds on exactly the same policy with the statute 1617, provides that such instruments shall be registered "in the same manner and way" as sasines, "otherways to be null." Accordingly, with the exception of Erskine, who founds his opinion on the cases above referred to, and those who have followed him, all our writers hold that an unrecorded sasine is null.[3] In like manner, various cases are favourable to this view. In the first instance, which seems to have occurred after the act 1617, of a competition with a second sasine on the same precept, the objection that the precept was exhausted was not even taken.[4] In the case of Kibble v. Stewart,[5] the point was almost in terminis decided; as also in the case of Baxter v. Watson;[6] although, after a reclaiming petition presented in this last case, it was submitted by

[1] Dec. 17. 1703, (13562.) [2] Nov. 29. 1705, (13564.) [3] Stair, 2. 11. 11; Stewart's Answers v. Sasine; Kames' Elucid. art. 35. p. 295. [4] 1. Bell's Com. 694, where also see opinion of Lord Pitfour in note. [5] June 16. 1814, (F. C.) [6] Dec. 2. 1818, (not rep.)

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the parties to the late D. F. Ross, who no doubt pronounced a judgment contrary to that of the Court, and found a purchaser not bound to take a title depending on a second infeftment; but this decision rested in a great measure on the mere fact that doubt was attached to the validity of a second infeftment, and the opinion that a purchaser should not be compelled to take a title which was doubtful. Under these authorities, an unrecorded sasine must be held to be null; and if so, the precept cannot be exhausted. But further—There is no regula juris which says, that after a precept or other mandate has once been executed, it cannot be again put in execution. It is a dictum of common sense, that when every thing is done which is to be performed, the office of the mandatory is at an end, simply because nothing remains for him to do. But, to have this effect, every thing intended to be done must have been executed; and therefore, to exhaust a precept of sasine, the will of the granter must be carried into complete effect; he must be fully divested of the lands, and the disponee fully invested. If, however, the instrument of sasine be not recorded, this effect is not brought about, any more than if no instrument, or a defective one, had been extended after the ceremonial ordered in the precept had been all duly performed. The disponer still remains the feudal proprietor. He can convey the lands, and grant a new precept to another party, infeftment on which will carry the lands. The remedy suggested where a sasine has been omitted to be recorded, viz. to apply for a new disposition, or adjudge in implement of the first, implies, that even in a question between the disponer and the disponee, the former is not divested, since, if that were the case, he could not grant a new disposition, and an adjudication in implement would be inept, as there would be nothing in his person to adjudge. It seems clear, therefore, that if the instrument be not recorded, the will of the mandant has not been carried into effect; the disponee is not vested with that right which it was his intention to convey to him; and consequently the precept is not completely exhausted, but is still a good warrant, to the effect of carrying into complete execution the will of the granter.

On advising these Cases, the Lord Ordinary sustained the defences, and assoilzied; stating in a note that he did not rest on the preliminary defences, but had decided the case on the merits.

The pursuers having reclaimed—

Lord Justice-Clerk.—I entertain no doubt that the objection to the signature of the bride to the marriage contract is not good. Marriage followed; and besides, the conveyance was by the old people, as to whose signatures there is no defect. As to the other objection, it is of an important and delicate nature; and if I had not thought of it before, I should have wished for further consideration; but having had occasion to consider the same general question in the case of the brother of these ladies (Kibble and Stewart), it does not occur as a new case to me. I then concurred in the opinion of the majority of the Court, who repelled a similar objection. After that came the case in the First Division, precisely identical with the present; and Lord Gillies decided that the objec-

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and lawful right to the said lands and heritages, but prejudice always to him to use the saids writs against the partie maker thereof, his heirs and successors.'

It has been said that the terms used merely import that an unregistered sasine is null, but that there is a personal exception against the granter, or his heir pleading the nullity. But I do not think that this is the correct interpretation of the statute; for, in construing a statute, I understand these rules of interpretation should be observed: 1. As far as possible, to give effect to every material word of the statute; 2. That where, in the same enactment, or in enactments on the same subject, a variation in the phraseology occurs, attention should be paid to this variation; and, 3. That the contemporaneous interpretation of lawyers and judges should be adopted, rather than any more recent, as most likely to discover its genuine meaning. Now it seems not disputable that the Judges who probably framed the act 1617 did not interpret it so as absolutely to nullify an unregistered sasine, but to a certain extent gave effect to it, even when not used against the granter or his heirs. On the 25th of March 1623, Durie reports this case: 'In an action pursued by the Laird of Dunipace contra his tenants, wherein the pursuer's sasine being quarrelled for not being registered in the Clerk Register's books within the space of 60 days after the date thereof, the Lords repelled that allegeance, because they found no person who had interest to propone that nullity, but a third person who had a lawful right to the lands standing in his person, as the words of that act itself purports, viz. the Act of Parliament 1617,' (Mor. 13,538.) And again, 24th March 1626, 'A purchaser, though his sasine was not registered, was found preferable to the seller's creditor arresting the rents in the tenant's hands, for the same was a real right with regard to the seller and his creditor, and consequently against the tenants who did pretend no right to the property,' (Mor. 13,540.)

It may be remarked in passing, that Lord Haddington, who became President of this Court in 1616, did not resign that situation till February 1626. He was also Secretary of State, and no doubt was the author of the improvement upon the Secretary's Register introduced by the act 1617, as he is known to have been of the acts passed in Parliament 1621. He was also the first keeper of the new Register, and cannot be supposed ignorant of the meaning of the act, or to have put a wrong interpretation upon it; yet, in the first of the above cases decided when he presided in the Court, the person entitled to object want of registration is clearly defined in terms of the act—not that the sasine is null; and, by the second, the same is held good—not because of the personal objection against the seller, or those in his right pleading it, but it is distinctly held to be a real though qualified right. In like manner, in Lord Cranstoun v. Scott, Feb 18. 1631, an allegeance was repelled, because a sasine not registered makes a real right, though it will not give preference in a competition, (Mor. 13545.)

In Rowan v. Colville, July 21. 1631, to an unregistered sasine of a mill, with the multures of the defender's lands, the defender could not object nullity, as he had no right to the mill, (Mor. 13546.)

At a later period the same view was taken; and a superior's sasine, though not registered, was found a good title in a declarator of non-entry against the vassal, "who did pretend no right to the superiority." (June 12. 1673, Fas v. Lord Powrie, 13,551.)

Again, it was found that "a sasine unregistered was not absolutely null, but may be an active title in an improbation of other rights on that land," Nov. 14. 1678, Dalmahoy v. Ainslie, 5170.

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Thus, for more than half a century after the passing of the act 1617, the interpretation put upon it was uniform, and not importing a total nullity, as prescribed by the act 1599; and as the object or motive of these two acts, as indicated in their preamble, was different, this may account for their different effects. The act 1599 was to prevent injury, by the forging of private writs, "the same being kepit obscure, quile the moyane of the tryale of the falset of thame be taken away." Hence they were to be registered within 40 days, otherwise to be null, as if they had been forged. The act 1617, again, was to prevent an evil of a different kind—the mischief arising from double alienations "by the fraudulent dealings of parties who, having annalzied their lands by their unjust concealing of some private right made by them, render the subsequent alienation, done for great sums of money, altogether unprofitable." Hence it was provided that the specified writs should be made public by registration; "and if they remain private, in consequence of not being registered, they are not to bear faith against the party to whom the lands are annalzied, "having acquired a perfect and lawful right to the lands." To remedy the evil to be provided against, it was not necessary to go further; and accordingly the enacting words appear expressly limited to the object in view; and the interpretation put upon the act during a century at least did not extend its meaning.

The authority of Stair is referred to, as importing the absolute nullity of sasines unregistered, where he says "they are null." Considering the numerous cases, in his own time, where effect was given to such a sasine, when not used in competition for the lands, it would have been singular if he had so laid down the law; but he clearly means null, in terms of the statute, against third parties: For in treating, in a previous page, directly of the subject of sasines, he mentions the necessity of registration as required by 1617, c. 16, and recites the precise terms of the act; and it is only when he comes to discuss the question what would be the effect if a sasine were given in to be recorded, and the Keeper were to mark the same registrate, but yet not insert it in the register, that he uses the above terms, importing no more than the nullity, so far as it goes, by the act; and accordingly, when, at a subsequent part of his work, he treats of competition, he says, "Sasines, inhibitions, and interdictions are ordained to be registrate as before expressed, or otherwise they are null as to any who have a complete right, who thereby are preferable." Again, instruments of resignation ad remanentiam were, by 1669, c. 3, to be registered within 60 days, "otherwise the said resignations to be null."

It has been said that there was no reason for making any difference between the consequence of not registering this instrument, and the writs mentioned in 1617; and therefore, as this was declared null, so it must be understood that the others were held to be so too. But as the resignation could not be quarrelled by the granter or his heirs, if creditors and singular successors were guarded against their ignorance of this transfer of the property to the superior, there was no other party against whom the superior, having the radical right in him, required to use such a title; and therefore the qualification of nullity only, against third parties having lawful rights in the lands, was not nesessary to give the full benefit of the act of resignation to the superior, without injury to the singular successor of the resigner. But whether we can now discover a sufficient reason for the difference of expression, the difference is obvious; and it must be recollected that at this

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very time the Court was giving effect to a sasine unregistrate, and not holding it an absolute nullity.

If the object of 1669 had been precisely the same as that of the act 1617, and if the simple declaration that it was null was equivalent to that enactment, it is singular that, in subsequently providing for the registration of burgage writs, the same expression was not adopted. But, on the contrary, there is an anxious repetition in 1681, c. 11, of the nullifying clause in 1617, declaring the same "to make no faith in judgment be way of action or exception, in prejudice of a third partie who hath acquired a perfect and lawful right to the said tenements, but prejudice always to them to use the said writs against the parties-makers thereof, their heirs and successors."

There are statutes, besides those already noticed, in which nullity, without any exception, is prescribed for want of registration: thus, as to letters of horning and relaxation, and inhibition and interdiction, by 1579, c. 75, and 1597, c. 268; and I cannot conceive why this simple expression should have been abandoned, if an absolute nullity was meant to be the effect of non-registration of sasines. Therefore, looking to the very precise and guarded expressions of the acts 1617 and 1681, I have great hesitation in giving them such an interpretation as to infer absolute nullity, instead of holding that one possessing under such a title is a feudal proprietor, all whose acts and deeds will be effectual as such, except against those who have obtained a complete competing title to the lands, on the faith of the records showing no other sasine over them. Why should not an unrecorded sasine be good (as has been found) in favour of a purchaser against tenants, for removing them, or for pursuing them for rents; or a good title for multures; and even for reduction-improbation of other rights over the lands. A superior, on such a title, has pursued a decree of non-entry; and to these, let it be remembered, there are no contrary decisions. Such a title has never been found ineffectual for these purposes. I should also think, that if a party has granted double conveyances, and sasine has been taken by both disponees, but the last disponee is first infeft, neither sasine being recorded, in a competition between the two the infeftments would be good, and the first would be preferred—the act 1693, c. 13, only supplying an omission in the act 1617, and regulating the preference of those which are recorded. If a purchaser neglect to record his sasine, would a creditor of the seller, arresting the tenant's rents, be preferable, having merely a personal right? If a proprietor possessing upon an unrecorded sasine give an heritable bond to a creditor, or a locality to his wife, would these not be effectual against his personal creditors, and preferable to them?—and would not the widow be entitled to a terce in virtue of an unrecorded sasine, against the personal creditors of the deceased husband? And I conceive that although a disposition by the husband, or an heritable bond without infeftment, would not hurt the terce, yet that, if infeftment followed, although not recorded, they would exclude the terce, and be good in favour of the grantee; and when the doctrine of recognition was a part of our law, I cannot conceive that, in the case of alienation by the vassal to a stranger, it would have been a good defence against an action of recognition that the disponee was only possessing on a sasine unrecorded, which certainly was good against the granter, and effectually alienated the fee from him; although the casualty would not be incurred, if the disposition was not completed by sasine, or the sasine was null.

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Further, I would hesitate to hold that an adjudication without infeftment would be a sufficient title to insist in a reduction of a right founded on a disposition or heritable bond upon which sasine has followed, though unrecorded, (Dundas v. Wallace, Nov. 10, 13,283;) or that a general service would be sufficient to carry right to a disposition on which infeftment has been taken, and where the only objection is, that it has not been duly recorded, as if it had been merely a disposition without infeftment, or with infeftment on a precept a me, unconfirmed by the superior, (Douglas v. Somervell, July 10. 1713.)

In short, I must still hesitate about holding that one who is possessing upon a sasine, valid in all respects, except that it has not been recorded, has nothing but a mere personal right in the lands, as if his title were a simple disposition; and although I am aware that the opinions indicated in two recent cases tend that way, yet, till the matter is settled by a decision directly in point, I incline to hold by the doctrine so expressly laid down by Erskine, b. ii. tit. 3. § 40.

Lord Balgray.—I concur in the opinion of Lord Medwyn, as it appears to me to lay down the principles of our law as applicable to the present question, and as derived from our practice, and supported by our best authorities.

It is vain to dispute or deny, even at this moment, but that an unregistered sasine must be sustained, and must be held as creating more than a mere personal right, when directed against certain persons. This being the case, it is quite contrary to every feudal principle to hold that the delivery of an heritable subject—viz. the sasine—can be partly given, and partly not given. The mandate is given, and the public officer who executes it cannot qualify his own act. The difficulty which has occurred, can be very easily remedied by a most obvious and simple legislative interposition.

It is not surprising that a diversity of opinion should arise upon the present question, particularly when it may be affirmed that, ever since the case of Kibble v. Stewart in 1814, the undoubted understanding of practitioners has been, to hold an unrecorded sasine as null, and so to take a new infeftment upon the original precept. Property to a great amount is held, at this moment, on the faith of that judgment and a subsequent one.

This case stands in a most unfortunate predicament. The strict and correct principles of law stand in one way; and the expediency and propriety of a Court of Justice adhering to their judgments, particularly in matters of form, stand directly opposed on the other.

Lord Craigie.—It seems of importance, in this case, to consider the effect of a second instrument of sasine taken upon the same precept with the first, and liable to challenge on other grounds than those introduced by the statute 1617.

It is to be observed that a precept of sasine generally is of the nature of a mandate, and 'cannot reach to what has been already done,'—see Stair. But, along with the instrument of sasine which follows, it is also of the nature of an actus legitimus, which cannot be performed in parts, or at different times, but at once, and without repetition. Where different estates, or parcels of land, are conveyed in one deeed, with a precept of sasine properly adapted to the circumstances of the case, the result is the same as if there were so many different conveyances and precepts; and of course an error or defect as to one of the estates or parcels of land cannot affect the validity of the conveyance as to the rest. But where the conveyance, or precept of sasine, specifies one estate, or one of several parcels of land,

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by a particular name or description, and infeftment follows in the same lands, or in one of the different parcels of land, under a different name and description, it will not be permitted, in a separate and subsequent infeftment taken on the same precept, to correct the blunder. In the same manner, if the instrument of sasine is lost, or cancelled by the party having right to it, it must be incompetent, in virtue of the same precept, to give a new infeftment. And so, if the instrument of sasine omits material words, or if the notary's docquet has been abridged or altered in the record, the result, it is humbly thought, must be the same. In the case which has been referred to, Grey v. Hope in 1790, where certain lands contained in the conveyance and infeftment had been omitted in the record, it was unanimously held, although the question occurred in a Court of Freeholders, that the fendal title was inept; and it surely will not be said that a new infeftment could have been taken, or was attempted, for establishing the right.

From all this it seems to follow, that if an instrument of sasine at one time valid, according to the authorities that have been quoted, shall become in part, or to a certain extent, ineffectual in a question with certain individuals, although not as to others, (which is truly the case with an infeftment not duly recorded,) such infeftment cannot be cured by making out another instrument on the same precept; either a new precept must be obtained, or, if that cannot be done, there must be an adjudication in implement of the conveyance, in the same manner as if there had been no precept in the deed. And holding, as is indicated by the interlocutor of the Second Division of the 21st of May 1830, that the point is yet unsettled, it cannot be thought expedient or just, in virtue of the determinations referred to, to subvert the general law. This would only lead to further and more dangerous relaxations in the established forms, while, by multiplying infeftments on the same warrant at different times, great confusion would arise in the titles of landed property in Scotland.

THE COURT now adhered to the Lord Ordinary's interlocutor in toto.

C. J. F. ORR, W. S.—J. FORRESTER, W. S.—Agents.

No. 123.

GEORGE KINLOCH, Pursuer.—*D. F. Hope—Lothian.*
MRS. MORRISON and Others, Defenders.—*Keay—Skene—M'Leod.*

Thirlage.—The original mill of a thirle having been allowed to fall into disrepair, and a new one having been erected at a different place and on other lands, which served the thirle for a period not exceeding 30 years, during which time a decree of declarator of thirlage as to the original mill was obtained—Held, on the original mill being rebuilt at the expiry of this period, that the proprietors against whom this decree had been obtained were still astricted to that original mill.

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2D DIVISION.
Lord Medwyn.
T.

THE pursuer Kinloch is proprietor of the mill and lands of Blacklaw, with the astricted multures of a certain district, including the lands of Grange and Polcalk, belonging to Mrs. Morrison and others. The original mill of the thirle was situated in the town of Blacklaw; but it appeared that, about the beginning of last century, the proprietor of Blacklaw had built a second mill close by the water of Ericht, on a piece of ground acquired by him for that purpose within the thirle, though not

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part of the lands of Blacklaw. This mill having been swept away by torrents, it was rebuilt about the year 1745, after which the original mill at Blacklaw was allowed to go to ruin, and the thirle came to be served solely by the new mill on the Ericht. In this state of matters, the proprietor of Blacklaw, in 1762, obtained decree in an action to which the proprietors of Grange and Polcalk, predecessors of the defenders, were parties, finding "the heritors and possessors of the lands of Polcalk and Grange, present and to come, astricted and thirled to the pursuer's mill of Blacklaw, and to bring the whole growing corns to be grinded thereat, seed excepted." Thereafter the mill on the Ericht having been again swept away by floods, the pursuer's father restored the old mill of Blacklaw on its original situation in 1774; but parties persisting in abstracting from this mill, the present pursuer and his curators, in 1789, raised this process of declarator of thirlage to the mill of Blacklaw, not only against Mrs. Morrison and the proprietors, who, or whose predecessors, had been parties to the decree of 1762, but also against two individuals, Miller and Anderson, upland heritors, who had not been parties thereto.

In defence it was pleaded by the parties to the former decree—

1. That they were thereby found to be thirled to the mill on the Ericht, which was the only mill then subsisting, and that the pursuer could not transfer the astriction to his newly-erected mill of Blacklaw; and,

2. That the mill was unfit, from deficiency of water, to do the work of the thirle.

Anderson and Miller further pleaded that they were not astricted, or at all events only in grindable corns; but it is unnecessary specially to advert at present to their defence.

Some very protracted procedure took place in the process, in the course of which the pursuer averred that he had, since its institution, improved the mill, and increased the supply of water, so as to render it capable of performing more work than the thirle required; and, as to the first defence, he pleaded, that the original astriction was to the mill of Blacklaw; and that the temporary suspension of the mill at the town of Blacklaw, for a period not exceeding, at the very utmost, 30 years, during which time the thirle was served by his other mill of Ericht, could not possibly liberate the astricted lands,—more especially as the decree of 1762 found the proprietors astricted, not to the mill on the Ericht, but to the mill of Blacklaw, for which it was merely a temporary substitute.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:*—"Finds that the predecessors of the defenders, Mrs. Mor-

* "There is some discrepancy between the parties as to how long the old mill of Blacklaw had been given up, when the decree 1762 was obtained. It appears pretty clear that it was repaired in 1744, and that it continued to be used for some time afterwards along with the new mill on the Ericht; but in the above interlocutor the fact

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rison, Chalmers' trustees, and Mr. Whitson, were parties to a process which terminated by a decree in 1762, which found the "heritors and possessors of the lands of Grange and Polcalk, present and to come, astricted and thirled to the pursuer's mill of Blacklaw, and to bring the whole growing corns to be grinded thereat, seed excepted;"—that it is not a relevant defence against this decree, that at the time of this decree the thirle was served by a mill built on the Ericht about the year 1745, and not by the original mill at Blacklaw, and that this new mill having been swept away by the floods in that river, the pursuer's father, in 1774, again repaired, or rather wholly rebuilt, the mill at Blacklaw at or near the original spot where it stood at the time when the lands were first feued out, with the mill and astricted multures, by the Abbacy of Cupar, and that the pursuer now calls upon the thirle to frequent the original mill of Blacklaw; but finds it a relevant defence that, at the time of instituting this process, the said mill was insufficient for the purposes of the thirle,—and a sufficient reply to said defence by the pursuer, that he has now made it sufficient, so as not to justify future abstractions."

His Lordship at the same time found the lands of Anderson and Miller astricted quoad grana crescentia, (wheat excepted as to the latter,) and appointed the cause to be enrolled, that parties might state how they proposed to have the state and sufficiency of the mill ascertained.

The defenders having reclaimed, the Court adhered, in so far as regarded those defenders who had been parties to the decree in 1762; but, considering further investigation necessary as to Anderson and Miller, they appointed a minute to be put in as to the averments on which it was proposed, as to these individuals, to go to proof.

P. Pearson,—A. Shepherd,—J. Brown,—Agents.

No. 124.

Alexander Scot, Suspender.—*Skene.*

George Cairns, Respondent.—*Sol.-Gen. Cockburn.*

Superior and Vassal—Clause—Proof.—1.—A vassal being restricted in his feu-rights from allowing any ale-houses or public-houses to be erected on his feu—Held that this applied to a hotel or inn.—2.—Proof of the superior's consent to waive this stipulation in a particular case limited to writ or oath.

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has been taken on the most favourable supposition for the defenders, that the mill mentioned in the decree was built in 1745, and was the only mill resorted to by the thirle from that date; and as this was abandoned, and the mill of Blacklaw repaired or rebuilt in 1775, at the most there were only 30 years during which the suckeners could have attended it. Perhaps the case might have been different if the decree had specially mentioned the new mill as that which was now to be frequented, and if, for full 40 years, this had been duly observed; but as it would have been competent, within 40 years, to rebuild a mill which had fallen down, and oblige the tenant of the astricted lands to frequent it, it must be equally so, although, in the mean time, a substitute, with the consent of all, had been resorted to."

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R.

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M'Lellan v. Kirkpatrick &c.

The suspender Scot, proprietor of the lands of Trinity, adjacent to Newhaven, feued out several portions of these lands for villas; and, in particular, he granted certain lots to the respondent Cairns, inserting in his feu-rights the following clause:—"In respect the said lots, or pieces of ground, were feued out for the purpose of building a neat villa or villas, therefore the said George Cairns bound and obliged himself and his foresaids not to lay out the house or houses to be built thereon into common or outside stairs, nor to build houses close together; that each house shall be self-contained, and shall be built in manner mentioned in the said feu-contract; nor shall the said George Cairns allow any ale-houses or public-houses to be built thereon; nor, in general, to do any thing contrary to the foresaid restrictions."

Cairns having commenced to use a house built by him on his feu as a hotel, in which, he sold wines, spirits, &c., Scot presented a bill of suspension and interdict, on the ground that this was in violation of the restriction in his feu-rights.

In answer Cairns averred—

1. That his house was used as a hotel or inn of a superior description, which he contended could not fall under the prohibition against ale-houses or public-houses, this being intended to prevent low or common tippling houses, but not a respectable inn or hotel; and,

2. That Scot had verbally agreed to his so using the house; and this averment, he contended, he was entitled to prove prout de jure.

The Lord Ordinary having suspended the letters, and granted the interdict, Cairns reclaimed. The Court, concurring with the Lord Ordinary, and holding that Scot's acquiescence could only be proved scripto vel juramento, Cairns referred his averment on that point to Scot's oath; and Scot having deponed negative, the Court adhered.

J. Pattison jun., W. S.—W. Pollock,—Agents.

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2d Division.
Ld. Fullerton.
T.

William M'Lellan, Raiser.—*D. F. Hope—Gillies.*
T. Kirkpatrick and Others, Objectors.—*Jameson—Marshall.*

Question as to whether a certain alleged payment by the raiser of a multiplepoinding should be allowed to be deducted from the fund in medio, as having been made by authority, and for behoof of the common debtor. The Lord Ordinary sustained an objection to the deduction being allowed, in respect of no sufficient evidence, and that a settlement of accounts between the raiser and the common debtor, about a year after the date of the payment, did not include it as advanced by the raiser.

The Court adhered.

W. Spalding,—J. M'Craken, S. S. C.—Stuart and Sprot, W. S.—Agents.

No. 126.

Jan. 11. 1831.
Sclater &c. v. Clyne.

ROBERT SCLATER and Others, Pursuers.—*Skene—A. Dunlop.*
D. CLYNE, S. S. C., Defender.—*Sol.-Gen. Cockburn—More—Boswell.*

Partnership—Joint Stock Company—Title to Pursue—Homologation—Writ.—1.—Where two out of a great number of parties to a contract written roll-wise on several sheets joined together sign the joining for themselves and other parties in virtue of a clause empowering them so to sign, it is not necessary that these signatures be mentioned in the testing clause; and besides, the deed being acted upon, cannot be challenged by a party thereto.—2.—The great majority of partners to a joint stock company are entitled to sue for performance of the obligations under the contract, although others may refuse to concur, or may have died, or become bankrupt.—3.—Circumstances in which death or bankruptcy of partners held not to dissolve a company.—4.—Circumstances in which a provision that the capital stock of a company should be a certain sum divided into so many shares, held not to be a condition of the existence of the company, which was found validly contituted, though only about one-third of the stock was finally subscribed.—5.—Circumstances in which a partner not entitled to plead alleged mismanagement, or even deviation from the contract, as liberating him from his obligations.—6.—The calling up of instalments of stock subscribed for held to be an act of ordinary administration, and so competent to the quorum of the committee of management intrusted with the ordinary business of the company.—7.—Partners having expressly bound themselves to pay their instalments; and it being provided that, on failure, the committee of management should have power to forfeit their shares, provided the sum already paid by them did not amount to £20; but that when such sum did amount to £20, they should have no power of forfeiture, but should be obliged to sell the shares—Held that, in this last case, the company were not bound to exercise this privilege of selling the shares, but might enforce, by action at law, the obligation of payment on the partner failing.

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2D DIVISION.
Ld. Fullerton.
F.

IN the year 1824, which gave rise to numerous joint stock speculations, a prospectus was circulated in Edinburgh for the establishment of a company for the smelting of iron ore, and manufacture of iron in all its branches, to be called the Caledonian Iron and Foundry Company. In this prospectus it was proposed that the capital stock of the company "shall be £100,000 sterling, to be divided into 4000 shares of £25; and that as soon as 2000 shares are subscribed for, the company shall be held as constituted; and the partners shall then be called together for the purpose of adjusting the articles of partnership, electing office-bearers, and giving directions for carrying the objects of the company into effect." It was further stipulated that no one individual should hold more than twenty shares. The defender Clyne became an original subscriber to the proposed company to the extent of twenty shares; and, on the 26th of October 1824, at which date 246 persons had obtained shares amounting in all to 3676, a meeting was held at which Clyne was present, and where a committee of management was appointed—the draft of a contract of copartnery ordered to be submitted to counsel for revisal—a deposit of £1 per share called up—and directions given to the committee to look out for works, or ground for the erection of works, and to purchase the same forthwith.

The committee of management accordingly purchased works, and commenced operations, according to the directions of a subsequent meeting at which also Clyne was present, and they reported their proceedings to a

general meeting, held on the 5th of December 1825, which Clyne likewise attended, and which unanimously approved of the conduct of the committee, and voted them thanks for their exertions. This meeting further appointed a committee finally to revise the contract; and of this committee Clyne was a member, and he attended its meetings. The contract so revised was approved of, and ordered to be engrossed and signed, by an adjourned general meeting, held on the 19th of December 1825, at which also Clyne was present. By the contract thus agreed to, it was declared, as in the prospectus, that the capital stock of the company should be £100,000, divided into 4000 shares of £25 each; but, at the same time, the 26th day of October 1824 was declared to have been the commencement of the copartnery, and it was provided that the same should subsist for 50 years, or till dissolved in manner specially provided for. The contract contained no limitation, such as that set forth in the prospectus, that no one partner should have more than 20 shares; but, on the contrary, it provided for an additional number of votes, according as the partners should have 20, 40, &c. or 100 shares and upwards. The management of the company was committed to a board of 17 directors, it being declared "that any five of the number shall be a quorum for ordinary business;" and the property of the company was vested in eight trustees, of whom Clyne was one nominated in the contract. For raising the capital stock of the company, the parties contracting bound "themselves, their heirs and successors, to advance, by instalments, a sum of money corresponding to the number of shares, of the value aforesaid, annexed to their respective subscriptions,"—the instalments not to exceed ten per cent. each on the amount of the capital, and being declared payable at such periods "as the directors, or committee of management, may appoint." The clause which contained this obligation, thereafter proceeded as follows:—"And it is hereby declared, that each and every partner failing to make payment of any instalment within 30 days from the day fixed for making such payment, (notice, in writing, of the call having been given, as herein before required,) it shall be in the power of the committee of management, in all cases where the sum advanced by such defaulter or defaulters, on his, her, or their share or shares, or interest in the company, does not amount to £20 sterling, to declare, as they are hereby authorized and empowered to declare, the same to be forfeited to the company; and to sell or otherwise dispose of the share or shares so declared forfeited, as they may consider most beneficial for the interest of the company, and that without any process of declarator, or other legal proceeding whatever, but simply by recording such declaration of forfeiture in the minute-book to be kept by the committee of management of the proceedings of the company. But in the event of such defaulter or defaulters having advanced a sum amounting to £20 or upwards, on his, her, or their respective share or shares or interest in the concern, then and in that case the committee of management shall have no power of forfeiture, but shall be bound to bring the said share

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or shares to public roup and sale, on due advertisement to be given," &c. The shares of stock were declared to be transferable, according to a particular form pointed out, and provision was made for the admission of heirs and executors in the room of partners deceased; but it was declared that no trustee on the sequestrated estate of a bankrupt partner should be entitled to vote.

Certain provisions were made for conducting suits at law, whereby the manager, or such person as the committee of management should appoint, was declared to have power to sue for behoof of the company, and to receive and discharge all sums of money that might be awarded to them; but it was specially provided that neither the managers, agents, nor other officers of the company, should institute or defend any action, "without the consent and approbation of the committee of management, or a majority of their number, first had and obtained thereto." And, finally, after various provisions, to which it is unnecessary to advert, it was agreed, that as no single sheet of parchment could be obtained to hold the extended contract, and the names of all the subscribers thereto, the joinings of the several sheets which might be required should be signed by any two out of six partners specially mentioned in the contract for that purpose.

This contract was thereafter exposed for signature, and it was signed, among others, by the defender Clyne, of date the 12th of January 1826, for "twenty shares," adjected to his signature, in his own handwriting. His subscription was duly set forth in the testing clause, as well as that of the two partners who adhibited their signatures to the joinings; but the testing clause took no notice of these parties having signed at the joinings. The speculating mania of the period had by this time a good deal abated, and comparatively few of the original subscribers came forward to sign the contract. Accordingly, at the general annual meeting, held on the 4th of December 1826, it was stated in a report given in by the directors, "that out of 246 individuals who originally put down their names for 3671 of the 4000 shares of the company's stock, 70, holding 1527 shares, have only as yet subscribed the contract." At this meeting a motion was made, that as there was no provision in the contract relative to closing it, the company, to remedy the defect, should now pass a law, authorizing the committee of management to close the contract any time after the 1st of May; and declaring that every shareholder who had not previously subscribed the same, should forfeit to the company his shares, and any instalments advanced thereon. This motion was unanimously carried, and intimations thereof were subsequently given; but, by the 1st of May, there had only signed in all 73 shareholders, possessed of 1546 shares. On the 10th of May, the committee of management declared the contract closed; they did not, however, declare the shares of the parties failing to subscribe forfeited, but only the sums paid by such non-subscribers, excepting always those who had paid up the whole instalments called for.

The operations of the company thereafter continued as formerly, but

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with indifferent success; and at last, in October 1828, it was agreed to wind up the concern and dispose of the works,—which has not yet been finally accomplished. In the course of their management, the committee had made repeated calls for instalments of the capital subscribed; but at the several meetings at which these calls were made, there were never more than seven directors present, which, though a quorum, was not an absolute majority of the committee of management.

Clyne paid the original deposit of £1 per share, (£20 in all,) called up by the first general meeting in 1824, but none of the instalments called by the committee of management; he did not, however, express any disapprobation of the proceedings, or give any intimation that he no longer held himself bound by the contract. In October 1827, the present action was raised for payment of these instalments. The summons proceeded at the instance of Robert Sclater, and about 70 other individuals, designing themselves "all partners or proprietors of the company known by and carrying on business at Springfield, on Leith Walk near Edinburgh, under the firm or designation of the Caledonian Iron and Foundry Company," and also of "John Stirling, manager of the said company." It set forth that these parties had, in 1824, "formed and associated themselves into a society or company for the purpose of carrying on the business of smelting and manufacturing iron in all its branches;" and after reciting the contract, and narrating the circumstances above set forth, it concluded that Clyne should be decerned to make payment of the several instalments sued for "to the pursuers, or their said manager, for behoof of the said company." Prior to the date of the summons, several of the partners had become bankrupt, and were sequestrated, or had died, and their trustees and executors respectively had avoided taking up their shares, the concern being now very unprosperous; but, with the exception of two partners, of whom the one, though an original subscriber, had never signed the contract, and the other was resisting payment of his instalments, the whole surviving and solvent members of the company were parties to the action,—one of them, however, having subsequently disclaimed it. The raising of this action had been authorized by two several meetings of directors, at neither of which was there present an actual majority of the whole committee of management; but, as the individual directors who attended the two meetings were different, more than such majority individually had given their concurrence thereto. The action was further sanctioned by a general resolution of a subsequent meeting of the company, held on the 3d of December, authorizing legal proceedings to be taken against all partners in arrear of instalments.

In defence it was pleaded—

1. The pursuers, not being the whole partners of the company, have no title to pursue; and this objection appears ex facie of their summons, in which they do not even set themselves forth as the whole partners.

2. The action is not brought in terms of the contract, not having been sanctioned by the consent of a meeting consisting of an actual majority of directors, first had and obtained thereto.

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3. The pursuers are barred, by the provisions of the third section of the contract, from enforcing payment of the instalments by a suit at law, their only remedy in a case where, as in the present, £20 has been advanced by the partner in default, being to bring his shares to sale.

4. The company has been dissolved by the death and bankruptcy of certain of the partners.

5. It is de facto dissolved; and whatever claim for his proportion of loss may arise against the defender on an accounting, it is incompetent to sue him for an advance of his capital stock.

6. The contract is not probative or binding, in respect the subscription of the joinings is not mentioned in the testing clause; and, in point of fact, the defender's name, which is written on a different sheet from the contract itself, was adhibited to a loose sheet of paper not at the time attached to the contract.

7. The company contemplated by the defender, when he signed the original proposals and the sheet above specified, was never formed. The company proposed in the prospectus and contract was to have a capital stock of £100,000, divided into 4000 shares of £25 each, whereas the whole of the partners of this company hold but 1546 shares of stock, amounting in all only to £38,650. The stipulation as to the amount of capital was essential to the formation of the company; and until that condition of its existence was fulfilled, no company could be formed, and the contract could not be binding.

8. The defender, at all events, has been liberated, by deviation from the contract in several instances, and particularly in closing the contract, and forfeiting the shares of the original subscribers, whereby they were freed from their obligations, and a company formed on a totally different footing from that contemplated, and with a smaller number of partners.

9. The directors having conducted the affairs of the company most ruinously and improperly, the defender cannot be called on for instalments of stock not necessary to carry on the business of the company, but demanded in order to make up alleged losses arising from their mismanagement; and further, the property of the company is sufficient to pay off all engagements; and,

10. The instalments were not called up in terms of the contract, which requires an actual majority of the whole directors.

To this it was answered—

1. In large joint stock companies, where it is impossible that every partner should become a party to suits at law, it is necessary to dispense with the strict rule which requires all parties having interest to be in the field; and accordingly, in such cases, the rule has been dispensed with, both in England and Scotland, even in actions against third parties;[1] but in an action against an individual partner for enforcement of the obligations of

[1] New River Co. v. Adair, (2. Vesey, 429); Cockburn v. Thomson, (16. Vesey, 321); Shotts Iron Co. v. Hopkirk, Jan. 19. 1828, (ante, VI. 399.)

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the contract, any number of partners may competently sue, especially where, as here, they conclude for payment to the manager "for behoof of the company." Further, as the manager is entitled to grant a discharge, the defender has no interest to entitle him to plead the objection; and the action is also competent in name of the manager alone, both in terms of the contract, and at common law.[1]

2. The approbation of the directors is only required to sanction an action raised by and in name of the office-bearers; and the provision founded on cannot exclude the partners themselves from raising an action in their own names; but, besides, the approbation of a majority was obtained, though not at one single meeting, which, however, is not essential.

3. The proviso in the third section is an option in favour of the company; and the declaration, that where more than £20 has been paid, the directors shall be obliged to sell, proceeds on the assumption that they have taken their option not to sue, and it is then used in contradistinction to the case where less than £20 had been paid, and where the forfeiture is absolute. The clause, however, was never intended to preclude enforcement of the direct obligation on the partners to advance their capital stock.

4. It being declared that the copartnership shall subsist for fifty years—the partners having bound their "heirs, executors, and successors,"—and provision being made for the cases of death, assignation, and bankruptcy, —it is clear that the company is not thereby dissolved.

5. The company, though winding up, is not de facto dissolved; and the instalments sued for are not only necessary for the due winding up, but were called, and should have been paid, while the company was in full operation.

6. It is not necessary that the subscription of the joinings, which is not a statutory solemnity, should be set forth in the testing clause, nor that all the parties to a deed written roll-wise should sign the joinings.[2] The averments of the defender as to his having signed a loose sheet are denied; and as his subscription is duly tested, these allegations can only be made available in a reduction; and even if informal, the contract, having been acted on, would have been binding.

7. The subscription of the whole amount of capital stock was not a condition essential to the existence of the company. The original proposals bore, that as soon as 2000 shares should be taken, (one-half of the full number,) the company should be held as constituted; and the contract declares it to have commenced from October 1824, although the full number never was subscribed. But further, the defender having attended meetings which authorized the company to proceed in its operations, while the whole amount was not subscribed, cannot plead that the company was never formed.

8. Unless on the assumption that the subscription of the full amount

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[1] Cheyne and Mackersy, Dec. 2. 1828, (ante, VII. 110); Somervail, Jan. 22. 1830, (ante, VIII. 370.) [2] Ersk. 3. 2. 14.

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of stock was essential to the existence of the company, there was no deviation by closing the contract, which was necessary in order to have it stamped, and made capable of being acted upon. The number of partners was not thereby limited, as the remaining shares might nevertheless have been disposed of to new partners; and it was not by this measure that the original subscribers were liberated, they having been previously freed by deviation in the contract, which the defender assisted to prepare from the terms of the original proposals. Besides, the directors did not forfeit the *shares*, but merely the instalments, and of such only as had failed to pay up the full amount called for; and even had it been otherwise, such forfeiture was competent at any rate under the proviso in the third section,—it not being averred that the payments by any of these parties forfeited amounted to £20. Further, the defender acquiesced in the measure.

9. Whatever claim the alleged mismanagement of the directors (which is denied in point of fact) may afford against the individuals themselves, it can never relieve one partner from his obligations to his copartners, who suffer equally with himself from such mismanagement. The stock of the company is not sufficient to meet their engagements; but besides, the instalments being legally called, the defender is in the mean time bound by the contract to advance them.

10. The calling up instalments fell, and has all along been held to fall, under the ordinary business committed to the quorum of five directors.

The Lord Ordinary having appointed these pleas to be discussed in Cases, pronounced the following interlocutor, adding the subjoined note:*—"In respect that the action is brought against the defender, as the partner of a company, for performance of obligations set forth

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* "NOTE.—The Lord Ordinary has formed the following opinion on the various and complicated pleas maintained by the defender.

"The company here consists of between 70 and 80 individuals; and of these nearly 70 concur in the present action. Even if it had been an action directed against a third party for the performance of obligations contracted towards the company, this concurrence of the great body of the partners would have been sufficient to support it. But for some such equitable modification of the ordinary rule, a company consisting of so many individuals would be practically incapable of either asserting or defending its rights. Accordingly the principle seems to have been expressly recognised in the case of the Shotts Iron Company against Hopkirk, in which the disclamations of the action by 'a comparatively small number of the partners' were disregarded. The English cases referred to by the pursuers afford instances of the adoption of a similar course, and upon the same ground, in the law of England.

"But there is the less room for difficulty here, as the present action is brought, not, properly speaking, by the company against a third party, but by the great body of the partners against one of their own number, for the performance of obligations contracted by him to his copartners, and concludes for payment of the sums to the pursuers, 'or the manager of the company for behoof of the company'—an action which appears to the Lord Ordinary to be maintainable, not only at the instance of the great body of the partners against a few recusants, but at the instance of any number of the

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as arising under the contract of copartnery, and is raised and insisted in by the whole of the numerous individual partners, with comparatively very few exceptions, repels the objections to the title of the pursuers;—finds further, that the defender did become a party to the contract libelled, and is consequently bound by the provisions therein contained;—that the contract expressly provides, "that the 26th day of October 1824 shall be held, notwithstanding the dates hereof, to have been the commencement of this copartnery;" and that the copartnery must consequently be held to have been constituted and in operation from that date;—that, by the said contract, each member became bound to pay his subscribed share of the stock, "in such instalments, not exceeding ten per cent. each on the amount of the said capital, and at such periods, as the directors, or committee of management herein after named, may appoint;"—that the sums now concluded for consist of the instalments of the defender's subscribed share of the company's stock, called for in terms of the clause libelled; and therefore repels the defences, and decerns in terms of the libel; finds the defender liable in expenses; allows an account thereof to be given in, and remits the same to the Auditor to tax, and to report."

The defender reclaimed.

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partners, however small, as every one of them has a legal interest to insist that the articles of the contract shall be fulfilled.

"2dly, The defender's objection to the execution of the contract is inadmissible by way of exception. The contract in process presents the appearance of a complete and formal deed, bearing the subscription of the defender, with a certain number of shares added in his own handwriting; and that subscription is set forth in due form in the testing clause. The defender does not deny his subscription, and does not aver that it had any other object than that of attesting his accession to the contract. In these circumstances, his allegation that the sheet of parchment on which he signed was separate at the time of his signature, and his plea thence arising, form an objection to the execution at variance with the present appearance of the deed, and with the testing clause, which ought to be made good in a reduction.

"3dly, The circumstances of the present case do not admit of the objection that the copartnery contemplated by the defender was substantially different from that to the support of which he is now called upon to contribute. It is true, the contract provides that the capital stock of the company shall be £100,000, divisible into 4000 shares of £25 each; and such a clause might, in some supposable cases, bear the construction, that the completion of the subscription formed the condition of the contract taking effect. But that construction is inadmissible here, because the printed prospectus, referred to in the original subscription paper signed by the defender in October 1824, expressly provides, that 'as soon as 2000 shares are subscribed for, the company shall be held as constituted; and the partners shall be then called together for the purpose of adjusting the articles of partnership, electing office-bearers, and giving directions for carrying the objects of the company into effect;' because, at a general meeting of the subscribers on 26th October 1824, at which the defender was present, and when little more than 2000 shares were subscribed for, directions were given to the committee to inquire after and purchase the ground and buildings necessary for carrying on the works; and at subsequent meetings, at which also the defender was

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Lord Justice-Clerk.—I am decidedly of opinion that, under all the circumstances, the action is well founded, and that Clyne is liable. The objection to the signing of the contract is frivolous and vexatious, and I can see no ground whatever on which he can maintain his defences on any principle of law or justice.

Lord Glenlee.—If the defender had conducted himself otherwise than he did, he might have had a good plea, on the ground that, having signed the contract on the faith that it would be subscribed by all who had signed the proposals, he could not be bound to go on as a partner with only 70; and when this is combined with the extraordinary proceeding of absolving all the parties to the proposals by what is called the closing of the contract, if he had said tempestivè, I wont be a partner, he might have had a good defence. But, with his eyes open, and seeing this new law made, having remained for a considerable time without testifying any dissent, he must continue bound by the contract.

Lord Cringletie.—I agree with the Lord Ordinary.

Lord Meadowbank.—I concur.

The Court therefore adhered.

J. Kennedy, C. S.—D. Clyne, S. S. C.—Agents.

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present, certain purchases of ground and works, actually made, were approved of; and because the contract itself expressly provides, 'that the 26th day of October 1824 is hereby declared, notwithstanding the dates hereof, to have been the commencement of this copartnery,' &c. In these circumstances, it appears to the Lord Ordinary impossible to consider the provisions as to the number of shares as a condition of the contract taking effect, or in any other light than that of a prospective declaration of the amount to which the company's stock, and the number of copartners, might possibly be increased.

"4thly, As, by the terms of the contract, the shares are transferable, and as it contains a provision regarding the descent of the shares of deceasing members to their executors, there is no ground for holding that the copartnery was dissolved by the death or the bankruptcy of some of the individual members.

"5thly, The alleged acts of mismanagement, and violation of the terms of the contract by the directors, or the other individuals who took an active share in the administration of the company's affairs, however relevant they may be as grounds of action against the parties concerned, do not appear to the Lord Ordinary to afford a defence against the present action. The mismanagement of the affairs of the company, and even the violation of the terms of the contract in some particulars, do not necessarily void the contract between the whole copartners, and certainly do not authorize the defender to plead, by way of exception, his non-liability for his subscribed shares of the company's stock, in an action at the instance of the great body of his copartners, who, if any injury has been sustained by the alleged acts of mismanagement and violation of the contract, are as great sufferers as himself.

"6thly, The provision in the third section of the contract, empowering the directors to declare the forfeiture of the shares of the partners who shall fail to pay the instalments within a certain period, is clearly an option in favour of the company, and does not bar an action for the actual performance of the obligation by the defaulter."

P. GILLIES and J. MILLER, Advocators.—*D. F. Hope—A. M'Neill.*
MRS. MARGARET HUNTER, Respondent.—*Keay—Cuninghame.*

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Gillies &c. v. Hunter.

Title to Pursue—Partnership—Joint Stock Company.—Where the office-bearers of a society have, by the articles thereof, power to sue, they must set forth that title in their libel, and that the defender has become a party to these articles.

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2D DIVISION.
Ld. Fullerton. R.

CERTAIN individuals in the village of Partick formed themselves into a joint stock company, called the Partick Building Society, under regulations, one of which was—"The company to sue and to be sued in the names of the preses and treasurer." In September 1827, the advocators Gillies and Miller, as preses and treasurer of this association, raised an action against the respondent Mrs. Hunter, generally set forth as a member thereof, and concluding for payment of certain advances in liquidation of the company debts; but they did not in their summons specially libel on the regulations above referred to, nor that Mrs. Hunter had become a party thereto. After some procedure, the Sheriff assoilzied Mrs. Hunter on grounds relative to the merits, to which it is unnecessary to advert. Gillies and Miller thereupon brought an advocation, in which the Lord Ordinary remitted simpliciter. They reclaimed; but, in addition to the pleas on the merits sustained by the Sheriff and the Lord Ordinary, they were met with the objection, that as office-bearers of a self-constituted association, they had no persona to entitle them to sue.[1]

To this it was answered—

It has been more than once decided, since the case of Wilson and Kippen referred to, that parties contracting with office-bearers of such associations, or binding themselves in obligations to be enforced at their instance, cannot plead such an objection;[2] and consequently, if, on the merits, the advocators can establish that Mrs. Hunter was a party to the regulations, she will not be entitled to object to an action in name of the

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"7thly, There seems no good objection to the form in which the calls were made. They are to be made by the directors or the committee of management, and it is declared, by the 5th clause, 'that any five of the number shall be a quorum for ordinary business.' What shall be considered as 'ordinary business,' seems a point which admits of being determined by the practice of the company; and according to that view, the calls for instalments seems to have been understood as falling under that description. Besides, the 7th clause evidently includes, as falling under the powers of a quorum, various acts which seem, to say the least, as important and extraordinary as that of calling up the instalments of the subscriptions.

"Lastly, The plea urged in the defender's case, that the contract bound the parties to submit all disputes to arbitration, is one which admits of being waived, and the Lord Ordinary holds it to have been waived, as it is not stated on the part of the defender in the record."

[1] Wilson v. Kippen, June 7. 1823, (ante, II. 378.) [2] Leslie v. Sproat, Jan. 24. 1829, (ante, VII. 312); Gemmel v. Barclay, Nov. 19. 1830, (ante, 33.)

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preses and treasurer, the mode of suing provided thereby. But to this it was replied — The summons does not libel on the regulations, or set forth the title thereby constituted in favour of the preses and treasurer as against all parties thereto; and consequently, however good their title may be if properly set forth, it is not sufficient to sustain this action, which does not found on such title, or specially libel on Mrs. Hunter being a party to the regulations. The Court recalled the Lord Ordinary's interlocutor, and remitted to dismiss the action, in respect the libel was not properly laid.

THE COURT concurred entirely with the decision in the case of Gemmel, but thought that the title founded on the regulations should have been set forth, as also that the respondent had become a party thereto.

W., A. G., and R. ELLIS, W. S.—J. MALCOLM,—Agents.

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MRS. M. CAMPBELL and HUSBAND, Pursuers.—*Skene—A. Wood.*
WALTER BROWN and SON, Defenders.—*D. F. Hope—Brown.*

Competent and Omitted—Personal Exception.—In a conjoined process of sequestration by a landlord, and poinding by the tenant's creditors, the landlord having omitted to state a good plea against certain claims of compensation by the tenant, which were disputed by him unsuccessfully on other grounds, and having allowed the fund in medio to be uplifted and distributed among the creditors, not entitled afterwards to reduce on the ground of the plea so omitted to be stated.

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2D DIVISION.
Ld. Moncreiff.
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THE pursuer Mrs. Campbell was proprietor of a house and shop in Perth, in regard to which her husband's jus mariti was excluded by their marriage contract. Having sequestrated certain effects of Robertson, her tenant therein, for payment of rent, and the defenders Walter Brown and Son, creditors of Robertson, having also poinded the effects in the shop, which were thereafter sold by warrant of the Sheriff of Perth, claims on the proceeds were made by Mrs. Campbell on the one hand, and Walter Brown and Son, with other creditors compearing, on the other. In the process of sequestration, (which was conjoined with the proceedings in the poinding,) Robertson, the tenant, made appearance, and contended that any claim by Mrs. Campbell for rent was compensated by sums owing to him by her husband. The contract of marriage, excluding the husband's jus mariti, would have afforded a sufficient answer to this plea; but Mrs. Campbell, while she disputed the claim of compensation on other grounds, omitted to found on this; and the Sheriff accordingly sustained Robertson's plea, and excluded Mrs. Campbell from any share of the fund, to which he preferred the creditors. Mrs. Campbell allowed the Sheriff's decree to be extracted, and the fund to be divided; but, at the distance of a year, she brought an action of reduction, in which she pleaded that in an advocation she would have been entitled to bring forward the plea founded on the exclusion of her husband's jus mariti in the marriage contract, but omitted to be stated in an Inferior Court, ubi non est copia peritorum; and that this was equally

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competent in a reduction. It was answered, that having allowed the fund to be distributed, and some time to elapse, which rendered it impossible to place the creditors in the same situation in which they would have been, had she stated this plea in the competition, she could not now be allowed to bring it forward.

The Lord Ordinary pronounced this interlocutor:—"In respect that the poinding executed by the defenders created a clear preference in favour of them, and any other creditors duly claiming a share of the proceeds of the poinded goods, unless the pursuer established, by due and competent proceedings, her preference, by her hypothec and sequestration, to the exclusion of the said poinding—in respect that the pursuer did, in regular form, make appearance before the Sheriff, maintaining her claim to the proceeds of the sale for rents alleged to be due; and that the claim having been opposed by the tenant, the pursuer joined issue with him on the merits of the question, and had full opportunity of stating every plea competent; and that the Sheriff determined in foro contentioso that no rent was due, to which the pursuer's hypothec could apply; and in respect that thereafter the funds in manibus curiæ were distributed among the creditors claiming, by judgment of the Sheriff, on the 5th of March 1828, and that all these proceedings were acquiesced in by the pursuer till the present action was raised on 14th April 1829; finds that the omission of the pursuer to produce her contract of marriage in the Inferior Court, and to found thereon a special plea in support of her general plea against the compensation proponed by the tenant, does not, in the circumstances of the case, and in a question with the defenders, afford a good ground of reduction of the decree called for in the summons;—that the fourth plea in law annexed to the condescendence, in which it is set forth that the poinding itself was inept and null, is not competent to be stated in this stage of the proceedings, in respect that it amounts to a special ground of reduction not comprehended in the summons, and which was not offered debito tempore in terms of the A. S.; therefore sustains the defences, assoilzies the defenders, and decerns; finds them entitled to expenses."

The pursuers reclaimed.

Lord Glenlee.—The consequence of the pursuer's conduct has been, that she is not in a capacity to do in favour of the defenders that justice which she might have done, had she obtained a contrary decision to have been pronounced by the Sheriff. Instead of reclaiming against the judgment assoilzieing the tenant, she acquiesced, and allowed the sum to be uplifted and divided among the creditors; and although she had nothing to do with the distribution itself, yet she had with the judgment which allowed the sum to be distributed. If she had brought forward her plea in the Inferior Court, and succeeded, she would have been bound to assign her claim of hypothec, which she could then have done; but it is impossible now to place matters in the situation in which they would have been, had she stated her plea in time; and as by her conduct she

No. 128.

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Rollo v. Campbell.

Boyd v. Napier.

has made the state of matters such that she cannot do the defenders the justice which she otherwise would have been bound to do, I think we cannot alter the interlocutor.

The other Judges concurred, and the Court adhered.

H. Inglis and Donald, W. S.—W., A. G., and R. Ellis, W. S.—Agents.

No. 129.

Hon. R. Rollo, Advocator.—*D. F. Hope—Shaw.*
Robert Campbell, Respondent.—*Skene—A. M'Neill—Dunbar.*

Jan. 12. 1831.

2d Division. Ld. Fullerton. F.

The respondent Campbell was tenant of the advocator Rollo in some ground near Ayr, which he had in part planted with fruit-trees and bushes. A sequestration having been used against him, he agreed to give up his lease on a certain arrangement,—it being inter alia stipulated that he should have no claim for any dung then on the premises, or to take away any trees or bushes of any kind. Having been incarcerated by Rollo for payment of a bill granted for previous rent, he presented a summary application to the Sheriff of Ayrshire, praying for a remit to value the dung, trees, &c. on the premises, and an order on Rollo to condescend on the extent of property intromitted with by him, but containing no pecuniary conclusions of any sort. The Sheriff, holding this to raise up a count and reckoning, entered into a long investigation, the result of which was his finding that the bill above mentioned was extinguished, and that a further balance of rent was also exhausted by counter claims. In an advocation, however, the Lord Ordinary and the Court, being satisfied that there were no grounds for the original petition, and that, besides, the whole proceedings under it were unwarranted and ultra petita, advocated the cause, recalled the Sheriff's interlocutor, and dismissed the action, with expenses.

L. Mackintosh, S. S. C.—H. Cowan, W. S.—Agents.

No. 130.

John Boyd, Suspender.—*D. F. Hope.*
Alexander Napier, Charger.—*Skene—Shaw.*

Cautioner—Bankrupt.—Pending a suspension in which caution had been found, the suspender having obtained a discharge under a sequestration awarded prior to the suspension—Held that no claim lay against the suspender or his cautioner for the principal sum; but a remit made to hear as to expenses in the suspension.

Jan. 12. 1831.

2d Division. Ld. Mackenzie. F.

Boyd, whose estates were sequestrated, having been charged by Napier for payment of the contents of a promissory note, brought a suspension (in which caution was found) on grounds to which it is unnecessary to advert. After the record was closed, but before any judgment was pronounced, Boyd obtained his discharge. The Lord Ordinary having thereupon, in respect of the discharge, suspended the letters simpliciter, but found no expenses due, Napier reclaimed, and contended—

1. That he was entitled to a reservation of his claim for the amount of the bill charged on, as against the cautioner in the suspension; and, No. 130.

2. That the grounds of suspension, on which the record had been made up, were so untenable, that Boyd should have been subjected in expenses. Jan. 12. 1831. Boyd v. Napier. Stewart v. M'Ra.

The Court, holding that no claim for the debt which had been discharged could lie against the cautioner, refused the reclaiming note quoad hoc, but remitted to the Lord Ordinary to hear as to expenses.

Bisset and Morison, S. S. C.—A. P. Henderson,—Agents.

JOHN STEWART, Pursuer.—*Buchanan.* No. 131.
ALEXANDER M'RA, Defender.—*D. F. Hope—Anderson.*

Process – Citation.—An objection to the execution of citation originally written on a paper apart, and afterwards stitched to the summons, that it did not contain the designations of the parties, in terms of 1672, c. 6, sustained.

STEWART having raised an action against M'Ra, the latter objected that the execution of citation was not in terms of the statute 1672, c. 6. By this statute it is enacted, "that all executions of summons shall bear expressly the names and designations of the parties, pursuers and defenders; and that it shall not be sufficient that the same do relate generally to the summons, otherwise the execution shall not be sustained." In the present case, the execution was written on paper of a smaller size, of a darker colour, of a coarser texture, made in a different year, and by a different maker from the paper on which the summons was written. It did not set forth the nature of the claim, nor the date of writing or signeting the summons, nor the number of pages; and the parties were described as "the before-designed John Stewart, pursuer, against the before-designed Alexander M'Ra, defender." It had originally formed no part of the summons, and had evidently been ex post facto attached to it, by stitching it between the cover and the last sheet of the summons. Jan. 13. 1831. 1st Division. Ld. Corehouse. D.

In support of his objection, M'Ra pleaded that the enactment of the statute was express, and proceeded on a principle of expediency highly important; because, if such executions were sustained, they might be transferred from one summons to another, and so the rights of parties put in peril. It was true, a distinction had been taken in the case of Dunbar in regard to executions indorsed on the summons, where it was held not necessary that the parties should be designed; but the statute had been invariably enforced in regard to executions which were not indorsed. In the case of Watt, it was admitted that the execution was written on a sheet forming part of the summons when it was signeted, whereas here the sheet now made part of the summons.

No. 131.

Jan. 13. 1831.
Stewart v. M'Ra.

Richard v. Cochrane's Trustees.

Stewart answered, that the case of Watt was precisely in point. The sheet bearing the execution in that case had no part of the summons written upon it, and was not intrinsically more connected with the summons than the execution in this case. But there the execution of citation was sustained.

The Lord Ordinary having reported the point in consequence of the case of Watt, the Court ordered minutes of debate, and thereafter unanimously sustained the defence, and found expenses due.

Buchanan, for Pursuer, moved the Court "to supersede the case until a new and correct execution be produced."

LORD PRESIDENT.—What is it that we can supersede, when there is no citation?

LORD GILLIES.—A case may be superseded when there is a process before us; but we have sustained the objection that there is no process.

Pursuer's Authorities.—Earl of Leven, Feb. 14. 1706, (3743); Donaldson, Nov. 29. 1750, (3746); Dunbar, Feb. 20. 1755, (3747); Baillie, July 8. 1713; Watt, Feb. 10. 1827, (ante, V. 334.)

Defender's Authorities.—Mack. Ob. 1672, c. 6; Kinglassie, Nov. 26. 1680 (3742); Wallace, Feb. 1687, (3743); Kames' Sel. Dec. 2; 4. Stair, 38. 13. 4; Bankton, 6. 7; Tait on Evid. 13; Office of a Messenger, 34

H. MACQUEEN, W. S.—L. MACKINTOSH, S. S. C.—Agents.

No. 132.

JOHN RICHARD, Petitioner.—*Sandford.*
COCHRANE'S TRUSTEES, Respondents.—*Cuninghame.*

Burgh Royal.—Circumstances under which the Court refused to appoint commissioners to give infeftment to a party who alleged that he held burgage, but that there were no magistrates of the burgh.

Jan. 13. 1831.

1st DIVISION. D.

JOHN RICHARD, weaver in Auchterarder, presented a petition setting forth that Auchterarder anciently enjoyed the privileges of a royal burgh, and that several portions of land in it still held burgage; that he had lately succeeded as heir to a small property of this holding in the village; but as there were no bailies nor town-clerk to give him infeftment, he prayed the Court to appoint certain persons &c. "to act as commissioner or bailie in that part for the special purpose of giving infeftment to the petitioner of the property to which he has right, and that by cognition and sasine, as heir of his ancestor; and to authorize any notary public, duly admitted and licensed, to act as notary to the said infeftment, in the same way as the town-clerk might have done; further, to direct that the instrument to be taken and expede thereon shall be registered in the particular register of sasines for the shire of Perth," &c.

The petitioner having been ordained to produce his titles, it appeared that every sasine subsequent to 1607 had been registered in the particular register for the county of Perth, and that no town-clerk had officiated as

No. 132.

Jan. 13. 1831. Richard v. Cochrane's Trustees.

notary. The disposition to his immediate author in 1781 contained a procuratory of resignation to resign in the hands of a bailie of the burgh, as in the hands of the King; and the infeftment bore to have been given by one of the bailies of the burgh.

Appearance was made by the trustees of the late Basil Cochrane, Esq., who had purchased the estate of Auchterarder, including the village and superiority, who maintained that Auchterarder no longer retained any character or privilege of a royal burgh, having had no magistracy, and no corporation of burgesses for centuries; that although the Court had, in cases of recent disfranchisement, appointed commissioners to act in place of the magistrates of a royal burgh, yet they had never done so in a case similar to the present; and that as they had right to the superiority, which would be affected were the prayer granted, it would be improper, and was incompetent, to give effect to it in a summary petition; and, in order to prevent any plea of hardship, they were willing to give the petitioner an entry by a blench holding.

To this it was answered, That the petitioner would not be safe with any title which the respondents could give him. None of his authors had ever taken an entry from, or paid any feu-duty to a subject superior. His property was held by burgage tenure; and, in the absence of the regular magistracy, he was entitled to have commissioners appointed to give infeftment, as had been done in other cases where a burgh was left without its magistrates.

Lord Balgray.—I do not think there is a case made out for the interposition of the Court in naming commissioners. This is quite different from former instances in which such an interference was made while the corporation or burgh still subsisted, though some temporary derangement of its functionaries had occurred, as in consequence of a reduced election, or otherwise. But why does not the petitioner take the entry offered by the respondents?

Lord President.—At all events, there is a competition of rights between the petitioner and the respondents, which we cannot prejudge by granting this petition, and naming commissioners to give infeftment, as in a burgage holding. We must refuse the petition.

The other Judges assented.

Petition refused accordingly.

Petitioner's Authorities.—Denham, July 1. 1746, (7435); Town-Clerks of Edinburgh, July 3. 1746, (7436); Walker, July 25. 1761, (7447); Reekie &c., Feb. 10. 1829, (ante, VII. 379.)

Respondents' Authorities.—1567, c. 27; 1681, c. 11; Magistrates of Hamilton, Feb. 4. 1726, (10777.)

J. Murray, S. S. C.—Thomson Paul, W. S.—Agents.

No. 133.

Jan. 13. 1831. Campbell v. Price &c.

DUGALD CAMPBELL, Advocator.—*Jameson—Russell.*
HUGH PRICE and Others, Respondents.—*D. F. Hope—Gillies.*

Master and Servant—Recompense.—Held,—1.—(By the Lord Ordinary, and acquiesced in,) That a party, who was hired to take charge personally of a vessel, forfeited his wages by failure to do so, although he employed a delegate;—but,—2.—That he was entitled to reimbursement for the expense of employing the delegate, as in rem versum of the owners.

Jan. 13. 1831.

1ST DIVISION. Ld. Corehouse. D.

CAMPBELL raised an action before the Water Bailie of the Clyde against Price and others, owners of the steam-boat Canning, of which he had been master,—and concluding for £14. 2s. 11d. as the balance of salary due to him from the 25th of September 1826 till the 23d of March 1827, at the rate of 20s. per week.

In defence, the owners stated that the vessel was laid up in dock towards the end of September 1826; that Campbell was bound to take charge of it, and (as was verified by a reference to their oaths in the course of the process) to "give close personal attendance on the vessel;" that after doing so for 12 weeks, and on its removal to Port-Glasgow, he abandoned the charge of it, and intrusted the care of it to a boy; that they had paid him his wages for the 12 weeks, and he was not entitled to any further payment. Campbell admitted that he had not given the stipulated attendance, but alleged that the owner had accepted of the services of the boy; that he had paid him wages, and supported him with food and clothes; that he himself visited the vessel twice a week; that, by the regulations of the harbour, the owners were bound to have some person on board to protect the vessel; and as this had been done at the expense of the pursuer, he was entitled to payment of the balance of his wages. The statements in regard to the boy were either admitted or proved.

The Water Bailie having assoilzied the owners, Campbell brought an advocation, in which the Lord Ordinary "advocated the cause;—found it proved by the oath of the defenders, on the pursuer's reference, that it was stipulated that the pursuer should give constant personal attendance on board the steam-packet during the period referred to in the libel;—found it proved by the parole evidence adduced, that he did not attend personally after the vessel was laid up at Port-Glasgow, but was often absent, and intrusted the charge of the vessel to a boy named John Hall;—found it proved that the pursuer paid for the meat, clothes, and washing of the said boy while so employed, to which extent found him entitled to reimbursement from the defenders, and allowed an account of the same to be given in; and, quoad ultra, assoilzied."

The owners reclaimed; but the Court adhered.

LORD BALGRAY.—I think the interlocutor right. The owners push the matter too far. The man's proper wages are cut off by his failure to give personal attendance; but as this boy slept on board and took charge of the vessel, the expense of procuring his service has been in rem versum of them, and they must reimburse the pursuer for it.

LORD PRESIDENT.—The defenders say they wished the vessel to be in charge of nobody while she lay in the harbour at Port-Glasgow; but would the harbour-master have allowed that?

LORD GILLIES.—I think it would be highly inexpedient in point of police, if he did.

J. BENNETT, W. S.—J. NAIRN, S. S. C.—Agents.

No. 133.

Jan. 13. 1831.
Campbell v. Price &c.

Taylor v. Williamson &c.

TAYLOR, Pursuer.—*Currie.*
WILLIAMSON and Others, Defenders.

No. 134.

Process—Admiralty—Stat. 1. *Wm. IV. c.* 69.—An action of constitution of debt, and sale of a ship, having been raised in the High Court of Admiralty, where it was the practice, after obtaining decree of constitution, to present a petition for warrant to inventory the ship; and the cause having, under the 1. Wm. IV. c. 69, been transferred to the Court of Session, where the Lord Ordinary pronounced decree of constitution—Held that, instead of a petition, a minute to the Lord Ordinary, craving warrant to inventory, was the proper form of proceeding.

IN 1830, Taylor raised an action against Williamson and others, before the High Court of Admiralty, for constitution of a debt, and sale of a ship belonging to the debtors, which had been arrested by the pursuer. The action having been transferred to the Court of Session in terms of the statute 1. Wm. IV. c. 69, decree of constitution was pronounced by Lord Corehouse. According to the Admiralty form of process, the next step of proceeding was to present a petition to the Judge for warrant to inventory the ship, preparatory to a sale.

As it seemed to be inconsistent with the forms of this Court that the pursuer should present a petition to the Lord Ordinary, he tendered a minute, in which this was craved. The Lord Ordinary reported this to the Court, as it was the first instance of this step of procedure since the act was passed which abolished the Admiralty Court. Their Lordships instructed him to receive the minute, and grant warrant as craved.

Jan. 13. 1831.
1ST DIVISION.
Ld. Corehouse.

LORD PRESIDENT.—This should not be done by a mere motion before the Lord Ordinary; and a petition to him is quite inconsistent with our own forms. The Admiralty processes have been transferred to this Court, but not the whole Admiralty forms of process. Such causes must be conducted according to the forms of this Court, and a minute is the proper form.

J. T. GORDON, W. S. Agent.

BIRTWHISTLE'S TRUSTEES.—*Cuninghame.*
M'RA.—*A. Wood.*

No. 135.

Process—Record.—1.—Where parties in an advocation agreed to hold the Inferior Court record, with additional note of pleas, as the record in this Court, a reclaiming note, which had not the Inferior Court record appended to it, found incompetent.—2.—The Court refused to write on a note defective in this way—Observing that the clerk was entitled to score his marking, so as to prevent its proving any obstacle to extracting the decree.

Jan. 13. 1831.
Birtwhistle's Trustees v. M'Ra.

No. 135.

Jan. 13. 1831.
2D DIVISION.

Birtwhistle's Trustees v. M'Ra.

Bell &c. v. Willison &c.

IN an advocation of an Inferior Court process, the parties agreed to hold the record made up in the Inferior Court (which embraced the whole process) as the record in the cause, giving in additional pleas, in terms of the 25th section of the A. S. A judgment having been pronounced by the Lord Ordinary against Birtwhistle's trustees, they presented a reclaiming note, in the appendix to which they omitted to print the replies and duplies, which formed part of the Inferior Court record. When the note was moved,

A. Wood, for M'Ra, objected that it could not be received, as not having the record attached thereto.

Cuninghame, for Birtwhistle's Trustees, contended that the Judicature Act applied only to records made up for the first time in this Court.

The Court were agreed that the note was not in terms of the statute and Act of Sederunt, and refused to write on it.

Wood now craved to have an interlocutor written on the note, refusing it as incompetent, since otherwise it would suspend extract.

Observed on the Bench—The clerk will of course score his marking, as being on a note which could not properly have been received, and which cannot be considered by the Court as competently before them.

R. RUTHERFORD, W. S.—J. MACDONELL, W. S.—Agents.

No. 136.

EDWARD BELL and Others, Pursuers.—*D. F. Hope—More.*
ANDREW WILLISON and Others, Defenders.—*Jameson—Christison.*

Special Legacy or Assignation—Confirmation.—An executor, to whom a share in a company was specially bequeathed, having claimed in a multiplepoinding raised by the company—Held that his right was thereby completed without confirmation, so as to exclude other legatees who subsequently confirmed as executors-creditors.

Jan. 13. 1831.
2D DIVISION.
Ld. Mackenzie.

THE late Robert Bell, by his latter will executed in England, bequeathed to his son James Bell "all and every my shares and share, interests and interest, in the capital stock, business, and concern of the Dundee Sugar-House, carried on under the firm of William Bell and Company;" and he also appointed him his executor and residuary legatee. He died in 1807; and in 1808 the remaining partners of William Bell and Company brought a process of multiplepoinding, in which compearance was made for James Bell, who claimed his father's share of stock in the company in virtue of the above bequest. Mr. Bell had left legacies to three daughters, or their husbands, who were represented by the pursuers Edward Bell and others. In 1811 these parties obtained themselves confirmed as executors-creditors of the deceased, qua legatees. Thereafter they brought an action against Willison &c., the remaining solvent partners of William Bell and Company, concluding for payment of the legacies out of the share of stock in the company belonging to the deceased, as being still in bonis of him; and they contended that the bequest could not be considered a special legacy, so as to

vest under the act 1690, c. 26, without confirmation; but that James Bell's right was merely that of an executor, which required confirmation to complete it; and besides, that the act 1690 specially reserved the rights of creditors.

To this Willison &c. (who had certain claims of compensation as against Bell, the son) answered—The bequest of the share in the concern of William Bell and Company is undoubtedly a special legacy or assignation, and consequently it vested instantly without confirmation; and although the pursuers should be held entitled to plead the reservation in the act 1690 as to the rights of creditors doing diligence, still the claim by James Bell, in the multiplepoinding brought by the partners of William Bell and Company, was an intimation of the assignation, and so transferred the share of the deceased, even to the exclusion of such creditors.

The Lord Ordinary found "that it appears from the record and productions that Robert Bell's share in the stock of William Bell and Company was vested in James Bell, and therefore that the pursuers, as executors-creditors of Robert Bell, have no title to pursue the present action;" and he therefore assoilzied the defenders, adding the subjoined note.*

The Court adhered.

Lord Glenlee.—There can be no earthly doubt that this bequest of the share in the company is a special assignation. Although, however, the necessity of confirmation is superseded by the act 1690, so that actual possession or intimation will be sufficient to vest the right, still the act saves the diligence of creditors; and consequently, if, before possession or intimation, diligence be done by creditors, the subject bequeathed would be carried. The Lord Ordinary's interlocutor does not find that, without intimation, the bequest would have excluded creditors; but that, in point of fact, it appears from the record and productions that the shares did really vest here. The expressions in the note merely refer to the extraordinary plea which seems to have been maintained, that because James Bell was also executor, this could not be considered a special assignation. There can be no answer, however, to the fact that the right of James Bell was not only known privately to the remaining partners of William Bell and Company, but was founded on in a judicial process with them. It is very clear that this is just a concerted plan by these people to get their legacies paid by the company, and save their own relation

* "Suppose not James Bell, but another person, had been executor of Robert Bell, the Lord Ordinary thinks that James Bell would have taken the stock directly, as special legatee, without any necessity to make a claim for it through the executor. If so, why should this subject not vest in him, because he was also executor? As legatee, he might have indeed repudiated the stock, in case it had been worth nothing, or worse; but there is not the slightest reason to think he meant, or could possibly mean, to do that."

No. 136.

Jan. 13. 1831.
Bell &c. v. Willison &c.

James Bell, who, as executor, is liable to them, and is not alleged to be insolvent.

The other Judges concurred.

W. Cook, W. S.—W. Renny, W. S.—Agents.

Landale v. Tod &c.

No. 137.

Thomas Landale, Pursuer.—*D. M'Neill.*

Mrs. E. Roughead or Tod and Husband, Defenders.—*Neaves.*

Agent and Client—Process.—1.—Circumstances as to the conduct of a cause by an agent not relevant to relieve the client from payment of his account.—2.—There is not such a contingency between an action at the instance of an agent for payment of his business account, and the suit still depending in the previous stages of which the account was incurred, as to warrant a remit thereto.

Jan. 13. 1831.

2d Division. Ld. Fullerton. R.

In the action at the instance of Lothian, W. S. against Mr. and Mrs. Tod, mentioned ante, VII. 525, in which the Court, proprio motu, remitted to open up the record as incorrectly prepared, the pursuer Landale acted as agent for Mr. and Mrs. Tod. Landale having brought an action against them for payment of his account, Mr. Tod admitted his liability, and decree was pronounced against him; but Mrs. Tod, who had a separate estate, with a view to affect which the action at the instance of Lothian had been brought, defended on the grounds, 1. Of a denial of employment; and, 2. Of misconduct of the cause by Landale in not properly completing the record, which obliged the Court, proprio motu, to order it to be opened up. In regard to the employment, there was no doubt in point of fact; and as to the alleged misconducting of the cause, there was no specific averment, and the record had been prepared by counsel.

The Lord Ordinary having decerned against Mrs. Tod for half the account in question as the share effeiring to her, she reclaimed, and craved that at least the cause should be remitted, ob contingentiam, to the action at Lothian's instance, which was still depending before Lord Newton, on the ground that the proceedings in that cause were necessary in order to decide this.

The Court, however, holding that there was no contingency, and concurring with the Lord Ordinary on the merits, refused the reclaiming note.

T. Landale,—A. Johnston, W. S.—Agents.

ROBERT WILLIAMSON, Suspender.—*Napier.*
GEORGE HILL, Respondent.—*Maidment.*

No. 138.

Jan. 14. 1831.
Williamson v. Hill.

Interdict—Property.—Interim interdict granted as to certain operations on a mutual wall.

WILLIAMSON presented a bill of suspension and interdict of certain operations by Hill on a mutual wall. The Lord Ordinary, after personal inspection, and on considering answers, passed the bill, and granted interim interdict. His Lordship observed in a note, that the statement in the papers gave no adequate idea of the operations in question, without inspection of the premises.

Jan. 14. 1831.
1st DIVISION.
Bill-Chamber.
Ld. Moncreiff.
F.

Hill reclaimed; but the Court adhered.

LORD PRESIDENT.—It is a difficult matter for the Court to alter a judgment of this sort, pronounced by the Lord Ordinary after personal inspection, especially as it is observed by his Lordship that such inspection was necessary to form a just conception of the case.

J. W. M'KENZIE, W. S.—A. C. HOWDEN, W. S.—Agents.

COLL M'DONALD, Pursuer.—*Jameson—J. M'Donald.*
MRS. BELL M'LACHLAN, Defender.—*D. F. Hope—M'Neill.*

No. 139.

Jan. 14. 1831.
M'Donald v. M'Lachlan &c.

Fee or Liferent.—A husband having bound himself in an antenuptial contract to lay out £500 on security, at the sight of another, payable to himself and wife, and the longest liver of the two in liferent, and to the child or children of the marriage in fee; which failing, to him, his heirs and assignees, in fee; declaring, that if there were more children than one, the fee was to be divided among the children in such proportions as he chose; failing which, to be divided among them equally; and having, after children were procreated, taken a bond for the £500, with reference to the contract, payable as above in liferent, "and to the children already procreated, or to be procreated," in fee; whom failing, to himself, his heirs and assignees—Held that the fee was in the husband.

IN 1815, the late Mr. Archibald Bell, writer in Inverary, in contemplation of his marriage with Miss Louisa M'Lachlan, daughter of Colin M'Lachlan, Esq. of Craiginterve, obliged himself to pay her an annuity of £25 after his decease; "and for her further security thereanent, and

Jan. 14. 1831.
1st DIVISION.
Ld. Corehouse.
S.

Single Bills, &c.

MORRISON, Petitioner.—*Milne.*

Aliment—Poor.—A pauper enforcing a claim for aliment against a kirk-session should bring her action before the Sheriff, and not before the Court of Session.

MORRISON prayed for a remit to the counsel for the poor.

Jan. 14. 1831.
1st DIVISION.

LORD PRESIDENT.—The petitioner states that her object is to raise an action of aliment, as a pauper, against a kirk-session. Such an action should proceed before the Sheriff in the first instance. We therefore refuse the petition.

No. 139.

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also for a provision to the children of the marriage, if any be, to provide and lay out the sum of £500 sterling (including the marriage portion after mentioned) upon well-holden land, or other sufficient security, at the sight and by the advice of the said Colin M'Lachlan, and, after his decease, at the sight and by the advice of Archibald M'Lachlan, his eldest son, or his heir-male of line; and to take the rights and securities thereof payable to himself and the said Louisa M'Lachlan, his promised spouse, and the longest liver of them two, in liferent, and to the child or children of the marriage in fee; which failing, to the said Archibald Bell, his heirs and assignees whatsoever; declaring, that in the event of more children than one, the fee is to be divided among them by such divisions and proportions as the father shall think fit to appoint by a writing under his hand." On the other part, Miss M'Lachlan's father bound himself to pay £100 of tocher with his daughter.

Her father was proprietor of the lands of Craiginterve, which he entailed. In 1801, he had not paid his daughter's tocher to Mr. Bell, who, on his part, had not yet invested £500 in terms of the obligation in the marriage contract. On an adjustment of accounts between them, it appeared that Bell was a creditor of M'Lachlan to the extent of £500. M'Lachlan then granted a bond for that sum, in which, after reciting the obligations undertaken by Bell in his marriage contract, and the terms in which the £500 were there directed to be invested, he acknowledged himself to be debtor in that sum, and that he had undertaken to grant a bond for it "in terms of the said marriage contract." "Therefore I the said Colin M'Lachlan bind and oblige myself &c. to make payment of the foresaid principal sum of £500 sterling to the said Archibald Bell, and Louisa M'Lachlan his spouse, and the longest liver of them two, in liferent, and to the children already procreated, or to be procreated of their marriage, in fee; whom failing, to the said Archibald Bell, his heirs and assignees whomsoever," at the next term of Martinmas, with interest till payment: "Declaring always, in terms of the said contract of marriage, that the fee of the said principal sum of £500 sterling is to be divided among the children already procreated or to be procreated of the said marriage, by such divisions or proportions as the said Archibald Bell, their father, shall think fit, &c.; and, failing thereof, shall be equally divided among them. At the date of this bond, there were children existing of the marriage; and its terms were, in so far as above quoted, varied from those of the marriage contract, in which the provision was "to the child or children of the marriage in fee."

Mr. M'Lachlan died in 1804, having left a trust-deed in favour of Mr. Bell and others, under which it was alleged (but denied) that he was indebted to Mr. M'Lachlan. After two sons had succeeded to the estate under the entail, his daughter acquired right to it, in 1811, in virtue of that deed; and she and her husband thereupon took possession, and assumed the additional name of M'Lachlan. Her husband drew the rents till 1815, when he died. At this time he was indebted in about

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£600 to Mr. Coll M'Donald, W. S. That gentleman, having been confirmed his executor-creditor, brought an action against his wife and his eldest son, as the representatives of the granter of the bond, concluding for payment of the amount, with interest from the date of Mr. Bell M'Lachlan's death. The son denied his representation, and was, of consent, assoilzied.

In defence, Mrs. Bell maintained, 1. That the fee of the £500 was not in her husband, but in his children; and therefore, as no creditor of his could attach it, the pursuer had no title to pursue; and, 2. That if the fee was in her husband, then, as she was sued as the representative of the debtor, the debt was extinguished by her husband's intromissions with the entailed estate, derived from the debtor.

To this it was answered, 1. That the fee of the £500 was vested in the husband, both by the terms of the marriage contract and of the bond—the latter being granted in implement of the former; and, 2. That he had right to the rents of the estate jure mariti, and consequently they could not be imputed in extinction of the bond.

The Lord Ordinary "found that the fee of the bond for £500 sued for was vested in the person of the late Mr. Bell M'Lachlan at the period of his death, and was attachable by his creditors;—that the said bond was not extinguished by the intromissions of the said Archibald Bell M'Lachlan with the rents of the estate, either as husband of the defender Mrs. Louisa Bell M'Lachlan, or as trustee under the trust-deed of the entailer Colin M'Lachlan of Craiginterve;—that the pursuer, having confirmed to said bond as executor-creditor, has now right to the fee thereof, and decerned in his favour accordingly;—found the defender Mrs. Louisa Bell M'Lachlan entitled to the liferent of the said sum in said bond;—found the pursuer entitled to expenses," &c.

The defender reclaimed.

When the cause was first put out for advising, it was delayed; but Lord Craigie expressed a doubt whether the fee was in the husband. The Lord President was also understood to question the soundness of the interlocutor. On the case being advised next day—

Lord Balgray said, I felt this to be a highly interesting case, in consequence of the doubts expressed yesterday. I have therefore carefully looked over all the decisions since 1663, and I must either unread all that I have learned by that perusal, or adhere to this interlocutor. I should be sorry to see it altered. There are two deeds in question;—the first is the marriage contract, and the second the bond by M'Lachlan. The bond bears ex facie to be granted in implement of the marriage contract; and if any question arose from the doubtful meaning of the provisions of the bond, we should be called upon to explain these consistently with the plain terms of the marriage contract, which is the ruling deed. But if the bond stood here alone, I see no difficulty in deciding on its legal import, as clearly vesting the fee in the father. All the obligations in the bond, however, require to be construed referably to the marriage contract; and if we turn to it, do we there find a fee in the children? On the contrary, its precise terms have been

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held, over and over again, to vest the fee in the father. He is taken bound to stock out the sum, and take the rights, payable to himself and his wife in liferent, and to the children in fee. That leaves the children merely heirs, with nothing but a spes successionis. It is true, the father cannot gratuitously disappoint them, but any creditor of his may attach the whole fund so provided.

I may observe also another test sometimes applied to discover where a fee is vested. Suppose the question to be, which of two spouses is fiar; and that the sum had not come through the husband, as in this case, but through the wife? The one test might be, in whose favour is the first destination after the children are exhausted? Here it is the father, the party providing the fund. These are clear rules for fixing the fee in him; and how is it that the defender attempts to make an exception from them? It is said, first, that the terms of the bond are changed from those of the marriage contract. The fee is payable under the contract to children who are all nascituri; in the bond it is made payable to children "procreated or to be procreated." But still these children remain mere heirs, They would require a service just as much in this case as in the other. This very point was expressly decided 170 years ago; and I remark it, in order to put an end to all future discussion of a point like this. It is true, the words then used were "gotten or to be gotten;" but I fancy these are much the same with "procreated or to be procreated;" and it was expressly held that the fee was in the parent, and not in the children.[1] In the second place, the defender says there was a power of distribution reserved to the father. It is always so reserved, and no change is thereby made on the nature of the estate in him as a fee. If the interest on the sum had been taken payable to the children in the lifetime of the father, that would have been a different case. It would have been like the case of M'Kenzie of Redcastle. But there is no such provision here. Again, we have not this sum vested in trustees for the preservation of the respective interests of the parent and children; the only thing like it is, that the sum is to be stocked out on good security at the sight of the wife's father. That natural precaution produces no change on the relative rights of the fiar and the heirs.

Lord Craigie.—I entertain great deference for the opinions of my brother Lord Balgray; but, as in this instance I have the misfortune to differ from him, it is my duty to state the grounds of my dissent.

Few words of technical use are so uncertain in their meaning as those of "conjunct fee and liferent," which are employed in marriage contracts, and other deeds for settling the interests of the husband and wife; and those which are in use for providing the children of a marriage by rights or obligations to the parents in liferent, and "to children procreated or to be procreated in fee," seem liable to the same uncertainty.

With regard to the former, we shall find, that whatever general rules may have been laid down for construing these words, they all bend to the probable intention of the parties in each particular case; and as to the latter, the import of which has been thought to be settled on general grounds in the case of Newlands, decided in the House of Lords in 1795, it has not been attended

[1] His Lordship then quoted several cases, and, among others, the following:—Dairsey, Jan. 1663, (4256); Cuthbertson, March 1. 1781, (4279); Mure, June 29. 1786, (4288.)

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to, that the Lord Chancellor Eldon, who decided the case, took the only means of intimating to the parties and the public, (see Abstract of Appeal Cases annexed to the Faculty Decisions,) that, at the time, he did not mean to determine the general question.

In this case, the words in the bond, although in part different from those in the marriage contract, do not seem to have altered the rights of the parties. The case might have been different, if the bond had been "to the children procreate in fee," there having been no children afterwards born. But where the provision is to children procreated or to be procreated, no distinction has been received in our practice, arising from the state of the family when the rights or securities are completed. In this case the following observations occur:—

1. Trustees were appointed for enforcing execution of the marriage contract, and these not merely in favour of the wife, but also in implement of the provisions to the children. In this manner, the effect of the rule that dominium non potest esse in pendente, was taken away,—the person so named standing at all times in the right and place of those favoured by the deed, and authorized to claim and do every thing which may be necessary for their advantage.

2. The liferent (there is no conjunct fee) is not given to the husband alone, but to the two spouses and the survivor of them, and the wife survived the husband. Thus there was not either a liferent or fee in the husband when the arrestment was used by the pursuer. After the husband's death, the children, (or their trustees,) with the consent of their mother as liferenter, might have uplifted the sums in the bond, or even without the mother's consent, upon finding security in the same manner as in any other liferent right.

3. There is a power given to the husband to distribute the sums in the bond; but what could be the use or meaning of this, if he were truly fiar, and so having full power to do so?

4. If, by the terms of the bond, the fee was vested in the father, his heirs and assignees, what was the use of the substitution which immediately follows in favour of the father, if the fee had from the beginning been in him? Or is it not necessarily to be inferred that the father could not take the fee, unless upon the failure of his children?

Upon all these grounds, I still entertain great doubts as to the interlocutor which has been pronounced by the Lord Ordinary, so far as it finds that the sums in question were so vested in the late Mr. Bell M'Lachlan, as to be liable to arrestment by his creditors. Upon the other points under discussion, I agree with Lord Balgray.

Lord Gillies.—I concur so entirely with Lord Balgray, that I shall express my opinion in very few words. It is true that there are many terms used by lawyers, the precise import of which was long doubtful, so as to give rise to much hardship and regret; but this very circumstance renders it doubly imperative on us, after a positive signification has been attached to them, to adhere to it scrupulously and inflexibly. Now, if there be any form of words to which a certain definite legal import has been rivetted by a multitude of decisions, it is that form of words which we are now called on to consider. And thus I hold it to be fixed, that when any estate, whether real or personal, is conveyed to husband and wife in conjunct liferent, and to their children in fee,

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whom failing, to the heirs of the husband, the fee of that estate is in the husband. These last words decide where the fee lies. Had the destination been to the children, whom failing, to the wife's heir, the fee would have been in her; and thus the very words which have been just quoted as importing that the fee was not in the father, are precisely those which fix it to be actually in him. All this I had thought to be settled, and therefore that, by the marriage contract, as found by the Lord Ordinary, the fee was in the husband. But a doubt is thrown on this, owing to the terms of the bond. If I had to look at the bond by itself, I should still, without hesitation, pronounce the fee to be in the husband. But I am not entitled to consider the bond as an isolated instrument. It bears ex facie to be executed in terms of the marriage contract, and for the purpose of giving effect to that deed. How, then, can I give any weight to the suggestion that it was the intention of parties by the bond to alter those rights, which, on the contrary, the bond bears it was their purpose to implement? I think their rights the same under the bond as under the contract, and I think they were meant to be the same.

As to the intromissions of Mr. Bell M'Lachlan, they cannot be held to have extinguished the debt. That gentleman, it is true, was not an heir of entail; but he drew the rents, not as creditor, but in virtue of his jus mariti, as the husband of the heiress. That was just the same as if he drew as heir. What he so received has not extinguished his claim under the bond of Craiginterve, and therefore I am for adhering. I would also allow expenses, but under modification.

Lord President.—If we must construe the bond as merely giving effect to the contract of marriage, I shall concur with the majority of your Lordships. But, by the law of Scotland, notwithstanding the existence of a contract of marriage which confers a fee on the father, he may afterwards, if he please, propel the fee to the children during his own lifetime, and so make them better than they were before. I doubt, therefore, whether this bond was not meant to give effect to an arrangement like this, as there were children already born at the date of its execution. Though these children were not named in the bond, that circumstance is no impediment to their being the true liars, as they were already born at the date of it. My difficulty is, whether we can construe the bond without reference to the marriage contract. I rather conceive we cannot do so; and it is only on that account that I am for adhering.

Lord Gillies.—If it had been the meaning of parties to give a right of fee to the children, they might easily have added the word 'allenarly' to the liferent right of the spouses.

The Court then "found that in this case the bond must be interpreted in conformity with the import of the relative marriage contract, therefore adhered" &c.; and "of new found the pursuer entitled to expenses, but subject to modification, in respect of any litigation maintained by the pursuer relative to the liferent right of the widow; and remitted to the Lord Ordinary to proceed accordingly."

Pursuer's Authorities.—Sloan Lawrie, July 27. 1779, (3918); Atkinson, Jan. 14. 1808, (F.C.); Wilson and M'Lellan, June 26. 1823, (ante, II. 430); Maitland, Nov. 23. 1827, (ante, VI. 109); Dickson, May 27. 1828, (ante. VI. 856); Williamson, June 28. 1828, (ante, VI. 1035); M'Tavish, Nov. 15. 1787, (12922); Pindar, May 27. 1824, (ante, III. 69.)

Coll M'Donald, W. S.—H. Graham, W. S.—Agents.

WILLIAM ROSS, Suspender.—*D. F. Hope—A. M'Neill.—J. Anderson.* No. 140.
D. YOUNG and A. LAUDER, Chargers.—*Jameson.*

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Ross v. Young &c.

Process—Suspension—Society.—1.—An interlocutor pronounced in a suspension, before closing the record, repelling preliminary objections on the part of the suspender, embraces all objections to the instance of the charger, and form of the diligence.—2.—Parties styling themselves "the committee and congregation" of a religious association, having granted a bill, "conjunctly and severally," in payment of the rent of a place of worship, not entitled to plead that, as a committee, they had no personæ to bind themselves, or that they were not personally liable.

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2D DIVISION.
Ld. Fullerton.

THE Albion Joint Stock Company were proprietors of a hall in Dean Street, Stockbridge, which they let as a place of worship to a small congregation of Relief Dissenters, who, it was said, had no settled minister, and were not recognised by the Relief Church. For the rent of this hall the following promissory note was granted, being signed by four individuals, one of whom was the suspender Ross:—"Four months after date, we, the committee and congregation of Dean Street Chapel, Stockbridge, conjunctly and severally promise to pay to you, or order, at the banking-house of Sir William Forbes and Company, the sum of £12. 8s. sterling for rent of Albion Hall, Dean Street, possessed by us." (Addressed) "To David Young, factor. Andrew Lauder, treasurer." When the note fell due, it was protested at the instance of the chargers Young and Lauder, the factor and treasurer of the Albion Company; and the protest was registered,—the register, however, bearing that the protest was given in by the procurator for the company. A charge having been given for payment, Ross, one of the four obligants, brought a suspension, on the grounds,—1. That neither the Albion Company, nor the chargers, their factor and treasurer, had, as such, personæ standi in judicio. 2. That the document charged on was neither a bill nor a note, or at all events could not warrant summary diligence, not having the names of the payees engrossed in the body. 3. That the registration decree was null, because the protest bore to have been given in by a procurator for the Albion Company, and not for the chargers; and, 4. That the note being granted by the parties thereto in the character of committee of a self-constituted religious association, not recognised by law or their own church, could not legally bind them; and at all events that it could not bind them personally, but only to the extent of the funds of the association. All these pleas were set forth in the revised reasons; but being considered, in great part, of a preliminary nature, an order was pronounced for a debate before closing the record. A debate took place accordingly before Lord Cringletie as Ordinary, who pronounced this interlocutor:—"Having heard parties' procurators on the grounds of the preliminary objections, repels these objections, and decerns; and in respect the suspender declares by his counsel that he acquiesces, makes avizandum with the process, with a view of closing the record." The record was afterwards closed, and the usual order for debate pronounced. Before the cause came out, how-

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ever, in the course of the rolls, Lord Cringletie had been removed to the Inner House; and to Lord Fullerton, who took up his Lordship's causes, the suspender maintained that none of his pleas had been decided by Lord Cringletie's interlocutor, but that every point remained open. Lord Fullerton thereupon ordered Cases to the Inner House. In these the suspender maintained, that the only preliminary pleas competent to be disposed of, before closing the record, were such as formed objections to the process; and consequently that in a suspension it was the pleas of the charger alone which could be preliminary, and so Lord Cringletie's interlocutor could touch none of the pleas on the part of the suspender here which he further contended were well founded on the merits.

To this it was answered—

All objections which go to avoid a decision on the merits of a cause, may properly be termed preliminary; and as a suspension is in substance a defence against payment of the debt charged for, objections to the title or instance of the chargers, or to the formality of the diligence, are preliminary in their nature, and may be competently disposed of before closing the record; and at all events, the suspender having acquiesced in the judgment deciding them here cannot now get over it. In this view, all the suspender's pleas, except that which maintains that he did not competently bind himself, or at least not personally, have been decided; and as to that it, is untenable.

Lord Cringletie. — I certainly meant to decide these objections, and I would now find the letters orderly proceeded.

The other Judges concurring, the letters were found orderly proceeded.

L. Mackinto h, S. S. C.- J. Rymer, W. S.—Agents.

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W. Colhoun Stirling and Commissioners, Pursuers.—*A. Dunlop.*
William Dunn, Defender.—*D. F. Hope—More—A. M'Neill.*

Bona Fides—Violent Profits—Expenses prior to Appeal.—1.—Where a lease of part of an entailed estate was purchased by a party while under reduction, and thereafter a judgment was pronounced sustaining the lease; but contrary judgments were subsequently pronounced in other causes, and particularly in regard to certain leases under the same entail; and, after an interval of ten years, an appeal was taken, and considerable litigation occurred under a remit from the House of Lords; and the lease was ultimately reduced by that House—Held that the bona fides of the party subsisted till the appeal was taken, but then to have ceased.—2.—Circumstances in which expenses prior to appeal were awarded, though the judgment of the House of Lords was silent as to the matter.

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F.

Sequel of the case mentioned ante, VI. 104, (which see.) Both parties appealed against the judgment there mentioned,—the pursuers, in so far as it repelled the reasons of reduction, and found no expenses due,—and the defender, in so far as regarded the special findings against him. On hearing these appeals, and that previously taken in 1825 against

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the original judgment pronounced in 1815, the House of Lords reversed that judgment, and also reversed the second judgment above referred to, in so far as complained of by the pursuers; affirmed it in so far as complained of by the defender; and remitted the cause to this Court "to do further therein, as may be consistent with this judgment, and as may be just;" but without any special instruction to decern, or any finding as to expenses. On the judgment coming to be applied, the pursuers moved for decree in terms of the reductive conclusions, and further claimed the expenses in the supplementary action prior to appeal, and violent profits. The Court at once decerned in the reduction, but remitted to the Lord Ordinary to hear parties on the claims for expenses and violent profits. His Lordship ordered Cases, which he afterwards reported to the Court.

In these it was pleaded for the pursuers—

1. As to expenses—The power of the Court to award expenses prior to appeal, although the judgment of the House of Lords be silent as to that matter, has now been fixed beyond dispute,[1] and could not have been intended to be precluded in this case, as the House of Lords not only did not remit with instructions to decern, or to pronounce any specific judgment, but reversed the decision of the Court in so far as it found no expenses due. The only question, therefore, is on the merits of the claim, which is supported on two grounds:—1. The judgment of the House of Lords having reversed the finding of 'no expenses,' and remitted to do as shall be 'consistent' with such reversal, it would be inconsistent to repeat again the reversed finding of 'no expenses;' and it necessarily follows, therefore, that expenses must be awarded to the party who has succeeded; and, 2. The whole discussion subsequent to the first remit was superfluous and absurd, the defender having already a judgment in his favour, and all his new pleas being utterly untenable; so that if the Court had not been obliged, when the case was last before them, to repel the reasons of reduction, in consequence of the original decision of 1815 being still unreversed, they would undoubtedly have found the pursuers entitled to their expenses.

2. As to violent profits—The question as to when the bonâ fides of a party possessing under a reducible right comes to an end, is always one of circumstances; and the House of Lords, in deciding the Queensberry cases, never intended to alter the law of Scotland on this point, or to lay down, as a general rule applicable to all cases, that bona fides subsists till final judgment against the party in the Court of last resort.[2] In the present case the defender obtained right to his lease pending the action

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[1] Dick v. Cuthbertson, Jan 19. 1828, (ante, VI. 396,) and cases there cited. Same parties, Nov. 30. 1830, (ante, 93.) [2] Lord Eldon in Vans Agnew's Executrix v. E. of Stair, July 22. 1828, (3. W. and S. 321); D. of Gordon's Rep. v. Innes, June 19. 1828, (ante, VI. 996.)

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of reduction, and so could not then have bona fide held it to be unchallengeable. No doubt, the judgment of the Court in 1815 might put him in bona fide, but such bona fides must have come to an end as soon as he was certiorated that the judgment was erroneous. Now that judgment proceeded entirely on the assumption that a prohibition to dispone was not equivalent to a prohibition to alienate. This opinion, however, was completely overturned by the decisions in the Queensberry cases; and, in 1821, three leases of portions of the same estate, of which the subjects of the defender's lease formed parts, were unanimously reduced, as contrary to the very entail in question, though of a duration much shorter than his.[1] These decisions must necessarily have put him in mala fide, and his conduct showed that he was so. Although he had judgment in favour of his cedents, he declined appearing in the House of Lords to support it, and craved a remit, on the allegation that he had never been heard in the Court below, while in fact he had obtained his assignation fifteen months before the judgment of this Court; and when he obtained a remit to be heard, the new pleas brought forward by him were so utterly untenable, that it was impossible they could have been used, except for the purpose of postponing a decree of reduction, and so enabling him to retain possession at the exceedingly inadequate rent (£3) stipulated for by the lease under reduction.

Pleaded for the defender—

1. As to expenses—Although the Court may have the power to award expenses prior to appeal, they will never do so where the House of Lords have had the whole cause before them, and decided it out and out without saying any thing as to expenses—their silence in such case being tantamount to a refusal. The judgment here was equivalent to a remit to decern in terms of the libel; and the Court having found, in a cause where the remit was in these terms, but silent as to expenses, that they could not properly award expenses,[2] they ought not to be allowed here. Besides, the pleas urged for the defender, particularly that of acquiescence founded on circumstances of much hardship to him, were not so untenable as to warrant his being subjected in expenses as for improper litigation.

2. As to violent profits—The purport of the decision of the House of Lords in the Queensbery cases is, that bona fides lasts till final judgment in the Court of last resort; and accordingly that rule has been followed in several subsequent cases, and in particular two, much stronger in favour of the party challenging than the present, viz. the cases of Carnegy v. Scott,[3] and Brisbane's Trustees v. Lead.[4] Here the defender, when he acquired the lease in question, was shown the opinion of the late Lord Hermand and Mr. Ross, who had been consulted when it was originally granted, and who held it to be valid; and thereafter it was

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[1] Stirling v. Walker, Feb. 20. 1821, (F. C.) [2] Reid v. Hope, Nov. 18. 1825, (ante, IV. 198.) [3] Dec. 4. 1827, (ante, VI. 206.) [4] Nov. 26. 1828, (ante, VII. 65.)

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sustained by two judgments of the Court, pronounced after the most mature deliberation. On this judgment till reversed, the defender was entitled to rely, and he could not be expected to be aware of the change in the views of the law subsequently entertained by Judges and lawyers; the more especially as no attempt was made to challenge the judgment by appeal from its date in 1815 till 1825. Then, as to the subsequent proceedings, a great change had taken place in the relative situation of parties. The defender had expended large sums in erecting extensive works on the stream which issued from the loch held in lease by him, and this in the knowledge of the pursuer. A remit to this Court was, therefore, a proper measure for both parties, in order to determine the effect of this altered situation of the parties; and there was nothing in the conduct of the defender, in regard to the proceedings in the cause, sufficient to warrant the inference that he was not completely in bona fide to rely on the judgment of this Court till it was finally reversed in 1829.

Lord Justice-Clerk.—This is a case of considerable difficulty with regard to the extent to which the pursuer pushes his claim for violent profits. In 1815, when the case was first litigated, the decision was in favour of the defender by a majority. The question was on the meaning of the word 'dispone.' No appeal was taken; but other cases, as to the effect of the word 'dispone,' occurred —viz. the Queensberry cases; and undoubtedly, in 1819, the opinion of Lord Chancellor Eldon was clearly expressed, that a prohibition to dispone was equivalent to a prohibition to alienate. Then, in a challenge of other leases under this very entail before the other Division of the Court, they were held good for nothing. This was in 1821. All this time, however, there was no appeal, nor till 1825. The case is then taken to the House of Lords; and it turns out, in fact, that there was there a total misconception as to the defender having acquired the lease after, and not before, the judgment in 1815. A remit was obtained, on which considerable litigation took place; and we considered ourselves bound to repeat the old judgment in form, though we were agreed that it was bad; but we repelled all the new pleas, which were utterly baseless. Then, keeping in view all the judgments as to violent profits, particularly the case of Carnegy v. Scott, which is the strongest case, the question is, what time is to be fixed for the ceasing of bona fides, and the commencement of mala fides? Now, considering that there was no appeal till 1825, and nothing done till then to disturb the defender, he was not called upon to consider the other decisions, and he may therefore say he cannot be held till then in mala fide. The difficulty I had was as to the effect of the decision of the other leases challenged under the same entail. We are, however, driven to the fact that there was no appeal entered till 1825, so that till then we cannot assume his knowledge of the sedecisions. From that period it is very different, for his legal advisers must then have considered the matter, and told him his lease was bad; and considering his getting the remit, and fighting all these points here, I cannot conceive he was, under the special circumstances as to this particular entail, in bona fide after 1825. I cannot, however, hold that the mere circumstance of the decisions in 1821 in the other causes, without an appeal in the defender's own cause,

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will do. As to expenses—the pursuers must be found entitled to those incurred subsequent to the first remit from the House of Lords.

Lord Glenlee.—I concur. The defender must have been conscious that his right was void. The claim is not properly for violent profits, but for damages; and the best way would be to fix a reasonable rent.

Lord Cringletie.—I am of the same opinion. There is a great error in saying that it is a fixed point that the final judgment setting aside a right is to be the point at which mala fides commences; for, even in the Queensberry cases, the judgment of the House of Lords did not reduce the leases, but only showed that they must be reduced. Mr. Dunn could not have had the smallest hope, or least idea, that the judgment would not be reduced, as it turned entirely on the word *dispone*, and from 1825 he was undoubtedly in mala fide.

Lord Meadowbank.—Your Lordship has expressed in terms the opinion I had formed. I do not believe that, from 1817 to 1825, there was a lawyer at the bar who did not know that the judgment in this case would be reversed. The whole question turned on the meaning of the word *dispone;* and the late Lord Meadowbank, by whose vote the decision was carried after the Court had been equally divided, stated that if he could see that *dispone* was ever used in the same sense as *dispose of*, he would have entertained an opposite opinion. Now, in the discussion in the Queensberry cases, authorities were referred to, particularly a quotation from Dirleton, showing that *dispone* and *dispose of* were used as convertible terms; so that if that authority had been before him, the majority in 1815 would have been the other way. Still, however, until Dunn was told that the judgment was to be challenged, I cannot hold him liable in damages.

The Court accordingly found that the defender's bona fides came to an end at the date of the appeal taken in 1825, and remitted to the Lord Ordinary to hear parties further; and also found the pursuer entitled to the expenses in this Court, subsequent to the remit in 1826, and prior to the last appeal, and also to the expenses of this discussion.

J. and W. Ferrier, W. S.—W., A. G., and R. Ellis, W. S.—Agents.

No. 142.

Lord Macdonald &c., Petitioners.—*M'Neill.*
William Thomas Grant, Respondent.—*D. F. Hope—Buchanan.*

Process—Record.—Circumstances in which, after a record was closed, and the time for reporting a diligence expired, a complainer was allowed to make a new production with his Revised Case, which had not been recovered under a diligence, and which the respondent had not seen; but the respondent allowed to re-revise his Case, and a remit made to the Lord Ordinary to determine "whether any and what expenses ought to be found due to him in respect of the re-revisal."

Jan. 15. 1831.

1st Division.
Ld. Moncreiff. D.

In the petition and complaint Lord Macdonald v. Grant, a record was closed, and Cases were ordered by the second box-day, in the autumn vacation, to be relodged by the 5th sederunt day in winter. Diligence against havers was granted at the same time to both parties, to be reported on 1st July. This diligence was repeatedly renewed, and the time for lodging cases was as often prorogated, until the lodging of the Revised Cases was fixed for the 23d of January 1830 the diligence being previously to expire.

No. 142.

Jan. 15. 1831.
Macdonald &c. v. Grant.
Ramage & Co. v. Briggs.

On that day the complainers lodged their Revised Case, and made several new productions with it, which the respondent had not seen. He complained of this as an irregularity, and insisted that these productions should be withdrawn. The complainers resisted this on account of the management which, they said, had been resorted to by the other party in embarrassing the effectual use of their diligence, by which they alleged they would be placed at an unfair disadvantage, unless they were allowed to produce these documents; and they stated that they had no objection to the respondent re-revising his Case after seeing the new productions.

The Lord Ordinary, "in respect that, at the time when Cases were ordered, a diligence was granted for the recovery of writings, and that the diligence was renewed when the Cases were ordered to be revised; and further, in respect that it is stated, and not denied as matter of fact, that the documents in question were recovered from the agents of the Duke of Argyll after the Cases were ordered, though not under the use of diligence; allowed the said documents to remain in process, but allowed the respondent to see the Revised Case for the complainer till the first box-day in the ensuing vacation, and parties to re-revise their Cases to be re-lodged by the third sederunt day in November."

The respondent reclaimed; and the complainers having offered to withdraw all their new productions except one, the Court "adhered, and remitted to the Lord Ordinary to determine whether any and what expenses ought to be found due to the respondent in respect of the re-revisal of his Case already allowed."

Bowie and Campbell, W. S.—H. Macqueen, W. S.—Agents.

No. 143.

Ramage and Company, Suspenders.
Dr. R. Briggs, Charger.—*Brown.*

Jan. 15. 1831.

2d Division.
Bill-Chamber.
Ld. Moncreiff.
F

Landlord and Tenant—Violent Profits.—Ramage and Company, subtenants in certain premises belonging to the charger Dr. Briggs, but not recognised by him as such, having refused to remove after the principal tenant had given up his lease and agreed to remove, on the ground that they had not received regular warning, although reasonable notice had been given them, the Sheriff of Edinburgh, in a process at the instance of Dr. Briggs, granted warrant of ejection, and decerned against them for double rent, as violent profits, during the time they had opposed decree of ejection. In a suspension the Lord Ordinary remitted simpliciter. Ramage and Company reclaimed, but failed to appear in support of their reclaiming note when put out for advising.

The Court, in respect of no appearance, adhered.

T. M. Moffat, S. S. C.—T. Paul, W. S.—Agents.

No. 144.

Jan. 15. 1831. 2d Division. Dickson v. Magistrates of Dumfries.

J. R. Dickson, Suspender.—*Graham Bell.*
Magistrates of Dumfries, Chargers.—*Marshall.*

Sale—Advertisement.—1.—Advertisement in a mere advertising paper held sufficient compliance with a provision in a bond requiring advertisement in a 'newspaper.'—2.—A meeting for sale of lands, under powers in an heritable bond, having been adjourned to a future day specified; but a new series of advertisements having been commenced for a sale on that day, as for an original exposure—Held that the sale then effected was not liable to objection, from some irregularity in the advertisements prior to the first exposure.

Jan. 15. 1831. 2d Division. Bill-Chamber. Ld. Moncreiff. F.

The suspender Dickson granted to the Magistrates of Dumfries an heritable bond over certain lands belonging to him, with power, in the event of his failure to pay the amount of it after six months premonition,

Single Bills.

Kibbles v. Stevenson.

Expenses—Auditor's Report.—To entitle a party to object to an Auditor's report, he must lodge a note of objections before it comes out to be moved.

Jan. 15. 1831. 2d Division. Kibbles v. Stevenson.

At moving the Auditor's report in this case, it was asked to be allowed to be seen by the pursuers.

A. Dunlop, for the Defender, objected, that as no note of objections had been lodged, it was incompetent to take it out to see, or object thereto.

The Court refused the defender's motion, and approved of the report.

Mackersy v. ——

Spence v. Hoe.

Mackersy v. ——

Expenses—Auditor's Report.—Fee allowed to an Edinburgh agent going to the country to precognosce witnesses preparatory to a Jury trial, and objections to counsel's fees repelled.

At moving the Auditor's report in this cause, which had been tried in the Jury Court—

J. Anderson objected to an item of six guineas allowed to the Edinburgh agent for going to Auchtermuchty to precognosce witnesses preparatory to trial, as this might have been done, either by the party himself, who was a writer, or by a country agent. He also objected to the fees for counsel—ten guineas to the senior, and five to the junior, besides consultation fees.

The Court repelled the objections, and approved of the report.

Spence v. Hoe.

Process—Reponing.—Not competent, on a mere application to be reponed against a decree in absence, to enter into the consideration of how far the party may have been barred, by intervening circumstances, from insisting in his defence.

Decree in absence having passed against Hoe, a party sequestrated, after intimation to his trustee, and he having subsequently obtained his discharge on a composition, to which Spence, the pursuer, consented, he presented a note to be reponed.

Neaves, for the Pursuer, objected that the intervening circumstances barred his now pleading a defence.

Graham Bell.—That goes to the merits of my defence. The only point competent to be looked to here is, whether this be a decree in absence; for if so, the defender is entitled to be reponed.

The Court, while they held that they must repone the party against the decree in absence, did so only under reservation of all objections to his defence.

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to sell the lands "by public roup, on previous advertisement weekly, for at least two months, in at least one Edinburgh and one Dumfries newspaper;" and he bound himself to confirm any sale made by them, and grant the necessary conveyances to the purchaser. After the stipulated premonition, the lands were exposed to sale on the 8th of October 1829; but no offerers having appeared, the sale was adjourned to the 27th of January 1830. In the mean time, it was noticed that the provision as to advertisements had not been duly complied with prior to the 8th of October; and a new course of advertisements, as for an original sale on the 27th of January, was commenced on the 17th of November, and continued weekly, till the day of sale, in the Dumfries Courier, and the North British Advertiser—a paper published gratuitously in Edinburgh, and confined to advertisements. On the 27th of January, the lands were sold; and thereafter the Magistrates charged Dickson to confirm the sale, and grant the necessary dispositions.

Dickson thereupon presented a bill of suspension, on the grounds, inter alia, that the advertisements prior to the 8th of October not being in terms of the bond, and the sale in January being in virtue of an adjournment from the exposure in October, it was affected by the failure properly to advertise prior to the first exposure; and that, even considering it as an original exposure, the advertisements were not in terms of the bond, in so far as the North British Advertiser was not a 'newspaper' within the meaning thereof.

To this it was answered—

Though the minutes of the meeting for sale in October bear an adjournment to the 27th of January, yet a new series of advertisements was commenced as for an original sale; and neither in these advertisements, nor in the minutes of the 27th of January, is any allusion made to the previous exposure or adjournment; and as to the objection regarding the North British Advertiser, that paper was held, in the late case of the Earl of Rosslyn and others,[1] to be a newspaper within the meaning of a statute for the sale of entailed lands, which falls to be much more strictly construed than a bond.

The Lord Ordinary refused the bill, and the Court adhered.

T. Dallas, S.S.C.—J. Hannay, W.S.—Agents.

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[1] June 25. 1830, (ante, VIII. 964.)

No. 145.

Jan. 15. 1831. M'Intyre &c. v. Maxwell.

D. M'Intyre and Others, Pursuers.—*Cuninghame.*
J. A. Maxwell, Defender.—*Skene—A. Dunlop.*

Partnership.—An action against one partner of a dissolved company, concluding, not for a general accounting, but for a balance as arising on certain branches of the business only, is competent at the instance of the remaining partners.

Jan. 15. 1831.

2d Division. Ld. Mackenzie. F.

The pursuers and the defender had been partners of a company which was dissolved in 1827. In 1830, an action was brought against Maxwell by the other partners, setting forth, that in the course of the copartnership he had become indebted to the company in a certain sum, according to special accounts produced, which related to particular branches of the business of the company, and brought out against him the balance sued for as his share of loss &c. on the branches of the business included in these accounts; and the summons concluded, not for a general accounting, but for payment of this specific balance, reserving further claims "on account of the said copartnery concern not yet finally ascertained." To the form of this summons it was objected, that the only action competent between partners of a dissolved company, with reference to their claims inter se as copartners, was an action of general accounting, in which all claims might be ascertained, and complete exoneration obtained; but that one partner could not be sued by the others for a specific sum arising out of certain branches of the business only, as if he were a third party indebted to the company.

The Lord Ordinary repelled this objection, and the Court adhered.

R. M'Kenzie, W. S.—J. and W. Ferrier, W. S.—Agents.

No. 146.

Jan. 18. 1831. Drummond v. Holliday.

William Drummond, Pursuer.—*Skene—H. J. Robertson.*
John Holliday, Defender.—*Ivory.*

Title to Pursue—Stat. 7. Geo. IV. c. 67.—1. The Fife Banking Company, though only existing for the purpose of winding up its affairs when the statute 7. Geo. IV. c. 67. was passed, found entitled to pursue by its cashier.—2.—Circumstances in which it was held that an individual partner, who had subscribed both the original and the renewed and modified contract of a banking company, could not object (when called on for an extra contribution to account of losses sustained under both contracts) that the concerns under each contract were separate, and that his liability under each contract should be established in separate actions.

Jan. 18. 1831.

1st Division. Ld. Newton. S.

The original contract of the Fife Banking Company was for a term of 21 years, commencing in 1802. In 1822, a great number of the partners resolved to continue the company, and enter into a new contract for five years from and after the expiration of the original one. Accordingly a contract was written out, whereby the parties "agreed to extend the said (former) contract for five years," &c., and bound themselves to observe the said contract in all respects, under certain alterations and modifications. These regarded the number of directors, the management and responsibility of the cashier in discounting bills &c., an increased circumspection

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in superintending agencies &c. John Holliday was a partner under the original, and also under the renewed contract. In December 1825, it was discovered that the affairs of the concern were extremely embarrassed, and application for assistance was made to the British Linen Company and National Banks. These banks required immediate security to the extent of £80,000 sterling; and, at an extraordinary meeting of partners on the 12th of January 1829, it was resolved to call up £500 on each share, and to grant a bond for £50,000 sterling more to the banks. At the same meeting Messrs. Cheyne and Mackersy were appointed joint cashiers for the Fife Bank, with full power to use diligence, and sue for debts due to it. The meeting also named a committee to superintend the winding up of the bank's affairs. The call of £500 was paid by almost all the partners, and, among others, by Holliday. On the 8th of May 1826, the committee of the partners, on considering a statement by their cashiers, ordered a fresh call for £500, which Holliday resisted. The cashiers then raised an action against him, libelling on the original and renewed contracts, and their own appointments, and concluding for payment of £500. The action was subsequently insisted in by William Drummond, who succeeded the pursuers in their office of cashier.

Besides defending on the merits, Holliday objected to the title of the pursuers—

1. The Fife Bank had ceased to exist as a company, except to the effect of winding up its affairs, before the statute 7. Geo. IV. c. 67. was passed, to authorize banking companies to sue by an office-bearer on certain conditions. The Fife Bank, therefore, did not fall under that act, and the cashier had no statutory title to pursue. At common law he had no title; and it was a mistake to suppose that the House of Lords held otherwise in the case of the Commercial Bank. In that case, individual partners were in Court, besides the company under its commercial designation.[1]

2. The losses pursued for arose out of two separate concerns, the partners and the conditions of the second contract being different from those of the first. The property and the debts of each concern were separate. It was, therefore, as incompetent for these two separate companies to authorize the same party to pursue for both their alleged debts in one action, as it would be for two, or any other number of unconnected individuals, alleging claims against a defender, to concur in raising one summons against him for the whole.

To this it was answered—

1. It had been expressly decided that the Fife Bank was entitled to the benefit of the statute 7. Geo. IV. c. 67, and could pursue by its cashier.[2] The bank had complied with the conditions required by the act, and was

[1] 3. Wilson and Shaw, 365. [2] Cheyne and Mackersy v. Walker, (ante, VII. 60.)

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entitled to the benefit of it. The cashier's title had also been sustained at common law.[1]

2. The Fife Bank was substantially one concern from the first until now. It was true that a few modifications on the original contract, relative to the duties of the cashier &c., were made at the time of its prorogation, and some of the partners of the first did not belong to the second, but the defender was a partner who had signed both contracts; and the concerns, if not literally one and the same, were at least completely blended together. Besides, Holliday had paid the first call of £500 made in virtue of the same authority which the pursuer possessed.

The Lord Ordinary repelled the objection to the title, and the Court adhered.

Lord President.—After the cases already decided on this subject, it is clear that the Lord Ordinary's judgment is well founded.

The other Judges assented.

J. Shand, W. S.—J. Thorburn,—Agents.

No. 147.

John Liddle, Raiser.—*Gordon—Reid.*
John Grieve, Objector.—*D. F. Hope—Forsyth.*

Inhibition—Fiar and Liferenter.—A liferenter, with power to let leases for any period of duration, having used inhibition against a tenant for securing the prestations of his lease—Held that this inhibition was not, after his death, available to the fiar.

Jan. 18. 1831.

2d Division. Ld. Fullerton. T.

The late John Wilson of Guildhouse, having bought the lands of Fala, took the titles to his second son James in fee, and to himself in liferent, with power, "at any time during his life, to set in tack, for any given time, all or any part of the subjects hereby sold." He thereafter let the lands in question, on a 19 years lease, to Thomas Mowat, who was proprietor of a small property called Braehead; and Mowat having fallen in arrear of rent, and disputes having arisen between them, Wilson, in February 1816, used inhibition against him for securing the obligations in his lease. Wilson died in April thereafter, and was succeeded in Guildhouse by his eldest son John Wilson jun., who also came in right of the arrears of rent due by Mowat for Fala, while James, his second son, as fiar of Fala, entered into possession of it accordingly. In October 1816, Mowat sold his lands of Braehead to Liddle, the raiser of this multiplepoinding, who was a creditor of his by bill for £630, due in July preceding, and who had used inhibition against him in August; the validity of which inhibition, however, was objected to on grounds to which it is unnecessary to advert. John Wilson jun. and James Wilson having both become bankrupt, one Russell was appointed trustee on the

[1] Cheyne and Mackersy v. Little, (ante, VII. 110.)

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estate of the former, and the objector Grieve became trustee on the estate of the latter. Mowat had incurred certain further arrears of rent to James Wilson after the liferenter's death, and the amount of the claims against him by the several parties above mentioned having been fixed by decree-arbitral, Liddle brought a multiplepoinding as to the price of Braehead, (which he still retained,) to have their respective preferences determined,—this matter having been reserved in the submission. Liddle, in his condescendence of funds, claimed to be allowed deduction of the amount of the debt due him by Mowat, in virtue of his right to compensate, and also of his inhibition. To this Russell and Grieve respectively objected, on the ground that their claims for arrears of rent were secured by the prior inhibition used by John Wilson sen. It was scarcely disputed that Russell, as in right of John Wilson jun., (whose claim consisted of rents fallen due to the liferenter John Wilson sen.,) was entitled to be preferred primo loco; but as to Grieve's claim, as representing James Wilson, the fiar of Fala, it was contended that the inhibition used by the liferenter could not cover rents to fall due after his death to the fiar, but was necessarily confined to such as should fall due to himself during his life.

To this it was answered—

That, in the circumstances, the lands having been bought with the money of John Wilson sen., and he having reserved power to let leases, it must be held that he was truly fiar; or, at all events, that the reserved power to let leases implied a power to secure the rent for the whole period for which he was entitled to grant them.

The Lord Ordinary, while he sustained the objections on the part of Russell, repelled those on the part of Grieve;* and the Court adhered.

Lord Justice-Clerk.—I cannot entertain an opinion different from that of the Lord Ordinary. Old Wilson, though he reserved power to let tacks, was still only liferenter. He used inhibition, and undoubtedly he thereby secured every right belonging to himself as liferenter; but I have no conception that he could thereby secure the rights of a fiar not taking through him at all; and the reserved power does not, in my opinion, make any sufficient distinction. I agree, however, with the Lord Ordinary, that this is not so much a question on the effect of the second inhibition, as on Liddle's right to retain.

Lord Cringletie.—I entirely agree. The reservation as to leases was in order to secure the best rent, which could only be done by letting the ground for some certain definite time; and although, if the liferenter had survived till

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* His Lordship added this Note:—"The Lord Ordinary thinks the strongest view for the objector John Grieve is, that the reserved power to let leases implied a power to secure the rent for the whole lease, as well as to take in the lease any collateral security for that rent. But even this the Lord Ordinary does not think sufficient. The Lord Ordinary doubts very much whether the respondent can found at all on the inhibition used by him; but his right to plead compensation seems to be sufficient."

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the issue of the tack, the inhibition would have covered all the stipulations, yet it cannot be good to another party.

LORDS GLENLEE and MEADOWBANK concurred.

THOMSON and ELDER, W. S.—D. FISHER, S. S. C.—Agents.

No. 148.

J. and W. WILSON, Pursuers.—*D. F. [illegible]—More.*

PATRICK M'KAY, Defender.—*Keay—Ivory.*

Messenger at Arms—Citation.—A messenger at arms having, according to common form, returned an execution bearing that he had cited a defender to appear, "place and time specified in the summons," which was, as usual, blank in the day of compearance; and the summons having been called without the blank being filled up, and the Lord Ordinary having dismissed it—Held that the messenger (who declined authorizing the Lord Ordinary's interlocutor to be reclaimed against) was not responsible for the expenses thereby incurred.

Jan. 18. 1831. 2D DIVISION. Ld. Medwyn. R.

THE pursuers John and William Wilson, carpet-manufacturers in Bannockburn, having raised a summons in this Court against Johnstone, a merchant in Dundee, it was by their agents transmitted, in June 1827, to the defender M'Kay, a messenger at arms in Dundee, to be executed. The summons was, as usual, blank in the day of compearance. M'Kay cited Johnstone to appear on the 6th of July, being the first sederunt day after the expiry of the inducie; and he returned an execution according to ordinary form, bearing that he had cited Johnstone to appear, "place and time specified in the said summons," appending however, to his subscription this memorandum—"Cited to 6th July 1827." The summons was thereafter called without Wilson's agents having filled up the day of compearance; and a preliminary defence was thereupon taken that the execution was inept, as truly bearing the party to have been cited to a blank day. The Lord Ordinary (Lord Mackenzie) having sustained this defence, Wilson's agents intimated the judgment to M'Kay, and that they would hold him responsible. They afterwards (still within the reclaiming days) transmitted to him a new summons to be executed, stating their willingness to reclaim against Lord Mackenzie's interlocutor at his expense, if he should wish it. This M'Kay declined, stating, at the same time, that he considered the execution perfectly correct; but that if there was any error, it lay with the agents in not filling up the blanks of the summons before calling. Wilsons thereupon raised the present action against M'Kay for payment of the expenses incurred under the first summons.

The Lord Ordinary reported the cause on Cases.

Pleaded for Wilsons—

It was the duty of the messenger to specify in his execution the day to which he had cited the party, and his omission rendered the execution inept.[1] At all events, this must be held to be the case in this action, having

[1] M'Donald v. M'Intosh, Nov. 26. 1825, (ante, IV. 228.)

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been so decided by the Lord Ordinary, and M'Kay having acquiesced, by declining to avail himself of the offer to reclaim at his expense. He must therefore be responsible for the consequences of his blunder.

Pleaded for M'Kay—

The decision by Lord Mackenzie is, quoad him, res inter alios acta; and he was in no respect called upon to be at the expense of getting it rectified. The form of the execution returned by him is according to universal practice, and is sanctioned by all the authorities,[1] except that of M'Donald v. M'Intosh, which truly does not apply to the case. Besides, if there was any error at all, it was on the part of the agents, whose duty it was, before calling, to fill up the blank in the summons, with the day to which the party had been cited.[2]

Lord Justice-Clerk. — The messenger here just followed the ordinary course of practice, and any blunder was on the part of the pursuers' agents not filling up the summons.

The other Judges concurred.

Absolvitor, with expenses.

Campbell and Mack, W. S.—Ritchie and Miller, S. S. C.—Agents.

No. 149.

William Ewing, Petitioner.—*Jameson.*
Mrs. M'Kenzie or Cullen.—*Wilson.*

Process—Appeal—Stat. 48. *Geo. III. c.* 151. § 15.—The Court refused to allow an appeal from an interlocutory judgment, finding a married woman, living separately from her husband, entitled to pursue an action of damages along with a curator ad litem.

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1st Division.
H.

In the action of damages pursued by Mrs. M'Kenzie or Cullen against Ewing, the Court repelled an objection that the pursuer was a married woman, and had not obtained the concurrence of her husband to entitle her to pursue, and that this could not be cured by the appointment of a curator ad litem.[3] The defender then presented a petition for leave to appeal; but the Court unanimously refused the petition, with expenses.

Wotherspoon and Mack, W. S.—W. Dalrymple, S. S. S.—Agents.

No. 150.

John Hunter, Advocator.—*Keay—G. Napier.*
William Anderson, Respondent.—*Sol.-Gen. Cockburn—Marshall.*

Process—Record—Advocation.—1.—In a competition arising in an application for the sale of poinded goods, a record must be made up.—2.—A party against whom judgment had been pronounced in the Inferior Court having objected, for the first time, in this Court, that no record had been prepared, found liable in the previous expenses.—3.—Circumstances in which it was held by the Lord Ordinary, and acquiesced in, that an advocation was competent, though the debt in dispute was less than £12.

[1] Magistrates of Forfar, Jan. 6. 1742, (not rep.); Stair, 2. 38. 3-4-5.; Ersk. 4. 1. 8; Form of Process (1799), 2. 45; Beveridge, 593; Beattie v. Park, May 22. 1830, (ante, VIII. 784.) [2] Authorities above referred to. [3] Nov. 19. 1830, (ante, p. 31.)

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1st Division.
Lord Newton.
D.

Hunter v.
Anderson.

William Anderson, grocer in Leith, executed a poinding of certain effects as belonging to his debtor Alexander Wilson, candlemaker there. He then obtained from the Bailies of Leith a warrant to sell as much of the poinded effects as the principal debt due, which was then £7. 9s. 6½d. A payment to account afterwards reduced it to £2. 13s. 6½d. John Hunter, merchant in Edinburgh, and Colin Wilson, then presented a bill of suspension and interdict, alleging, inter alia, that the effects poinded were theirs, and did not belong to Anderson's debtor. The Lord Ordinary "remitted to the Bailies with instructions to sist proceedings in the sale until they inquire as to the right of the complainers to the property of the goods in dispute."

Under this remit, without making up a record, a conjunct proof of ownership was led, after which the Bailies found the goods proved to be the property of Alexander Wilson, Anderson's debtor, and renewed the warrant to sell, and found Anderson entitled to expenses. The officers of Excise, under a Crown diligence, now carried off the goods in dispute; after which Hunter brought an advocation, and, inter alia, pleaded, 1. That the advocation was competent, though the sum in dispute was below £12, because it did not properly relate to "a sum of money" in the sense of the acts 1663, c. 9, and 20. Geo. II. c. 43, § 38, relative to advocations. It involved a question of right in the ipsa corpora of moveables, and these moveables were of intrinsically greater value than £12, though poinded for a smaller sum. 2. It was necessary to have made up a record in the Inferior Court, and for want of it the judgment of the Bailies must be set aside. To this Anderson answered, 1. That the advocation was incompetent, the value of the subject in dispute being under £12; and, 2. That a record was not necessary; but, at all events, the advocator was in mala fide to lead a proof without having closed a record in the cause, and then, after finding judgment go against him, advocate on the ground of no record, and insist on setting aside the whole proceedings. Therefore, before being allowed to state this plea, he should pay all previous expenses, or consent to admit the whole proof which had been taken, as still available to both parties under the new record.

The Lord Ordinary, "having heard the counsel for the parties on the objections stated by the respondent to the competency of the advocation, repelled the said objections," &c. Anderson acquiesced. His Lordship afterwards "sustained the reason of advocation founded on the objection that there was no record closed in the Inferior Court; advocated the cause; but, in respect the poinded goods in dispute have been carried off by the Excise, found it unnecessary to proceed further in this Court; found no expenses due to either party in this Court, or in the Inferior Court."

Anderson reclaimed, insisting that he was entitled to his expenses.

The Court having intimated an opinion favourable to Anderson, Hunter stated his readiness to pay part of the previous expenses, and

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was appointed to minute what offer he was ready to make. He then offered to pay the expenses in the Inferior Court, prior to his taking the objection of no record. Anderson answered, that this included the whole expenses of the Inferior Court; and as the subject in medio was carried off by the Excise before the advocation, and Hunter had now been compelled to make a tender of the whole expenses, which were the only subject that could have been affected by any judgment pronounced under the advocation, the process of advocation should never have been brought. The Court then altered in so far as the Lord Ordinary had found no expenses due, and found Anderson entitled to expenses in both Courts.

Advocator's Authorities.—(1.)—1663, c. 9; Marq. of Lothian, Feb. 11. 1761, (374); Steele, Dec. 18. 1776, (375, and App. Advocation, 1.)—(2.)—Burgh Court A. S. Nov. 12. 1825, p. 1. c. 15. § 2.—p. 2. c. 1. § 8.

Respondent's Authority.—20. Geo. II. c. 43.

Deuchar and Knox, S. S. C.—A. Snody, S. S. C.—Agents.

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TAILORS of ABERDEEN, Pursuers.—*Skene—Neaves.*
JOHN MUNRO and Others, Defenders.—*Sol.-Gen. Cockburn.—Rutherfurd—Moir.*

Corporation—King's Freemen—Stat. 56. Geo. III. c. 67.—A discharged soldier, being ignorant of the business of a tailor, not entitled to carry on that trade within burgh by entering into a copartnery with an unfreeman, and employing workmen also unfreemen.

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1st Division.
Ld. Corehouse.
H.

By the statute 56th Geo. III. c. 67. it is provided, that "Whereas there are divers soldiers &c., who, the wars being now ended, would willingly employ themselves in those trades which they were formerly accustomed to, or which they are apt or able to follow and make use of, for getting their living by their own labour, but are or may be hindered from exercising those trades in certain cities &c., because of certain by-laws &c. of those places; for remedy whereof be it enacted, that all soldiers who were at any time in the service since the 22d of June 1802, and who had not deserted, and also their wives and children, may exercise such trades as they are apt and able for, in any city &c., without any molestation &c. of any persons whatever."—"And if any such soldier be sued &c. in any Court for exercising such trade, then the said soldier making it appear to the Court that he has served his Majesty as aforesaid &c., shall, upon the general issue pleaded, be found not guilty." John Munro was regularly discharged from the army in 1814. In 1820 he entered into partnership with John Grant, merchant in Aberdeen, and opened a shop in the burgh, where the business of tailors, as well as clothiers, was carried on for behoof of the firm; but Grant was not free of the Tailors' Corporation. A foreman named David Moir, also an unfreeman, was hired to take the measure of customers, to shape and sew, and to superintend the operations of certain journey-

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men tailors, all unfreemen, who worked for behoof of the firm, though in separate premises.

In April 1828, the Aberdeen Incorporation of Tailors raised an action against Munro and Grant, and their foreman Moir, concluding to have it declared that they had encroached upon the exclusive privileges of the corporation, and should be interdicted in future "from exercising the tailor craft, or any branch thereof, and from shaping, sewing, and making of clothes or wearing apparel, either by themselves, or others not members of the said corporation, for their behoof, or for behoof of either of them, for hire or sale, within the said burgh or royalty of the city of Aberdeen," &c.

The defenders pleaded that Munro was a King's freeman, and therefore entitled by statute to exercise the tailor craft within the royalty of Aberdeen. He was entitled to assume Grant as a partner, though the latter was an unfreeman, and to employ Moir and other unfreemen as journeymen,—all which, they alleged, was a common practice among entered freemen who were master tailors.

After a record was made up, the case was remitted to the Jury Court, and the following issue sent to trial:—"Whether, at several times, between the 2d of April 1824 and the 2d of April 1828, in violation of the privileges granted to the corporation, the defenders, or any of them, by themselves or their workmen, wrongfully exercised the trade of tailors within the said city or liberties thereof, to the loss, injury, or damage of the pursuers?"

By agreement of parties, the Jury found a verdict for the pursuers, subject to the opinion of the Court upon the following case:—"That Munro was and is a King's freeman, but not a member of the Incorporation of Tailors; and that neither Grant nor Moir are members of the said corporation, or are King's freemen;—that Moir was hired, paid, and did work as a tailor, as set forth in the agreement between him and Munro;—that Munro and Grant were in partnership as clothiers, as set forth in their contract;—that Munro and Grant shared in the general profits of both branches of business—viz. of the tailor trade, and of the clothier trade;—that apprentices were taken on the terms set forth in the indenture produced;—that the tailor trade was carried on within the said burgh, and the profits of the said trade divided between the said parties;—that Munro, during the time mentioned in the issue, sometimes went into the workshop, but did not give directions as to the work personally;—that during that period he personally did not do any act as an operative tailor;—that, within a week from the date of the trial of this cause, he did take a measure of Mackenzie, his clerk, and cut a coat for him with a pattern on the table, which coat Mackenzie wore; but that those acts performed by Munro did not produce any alteration in the opinion formed by a skilful tailor as to Munro's knowledge of the business, which opinion was, that Munro did not understand the business of an operative tailor.

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"The questions for the opinion of the Court on the above stated facts are—Whether the defenders, or any of them, violated the privileges of the Incorporation of Tailors of Aberdeen by carrying on the trade of tailors in that burgh; or whether the defender John Munro, by being a King's freeman, was entitled to carry on said trade, and to assume the defender John Grant, as a partner, and to employ the other defender David Moir as a workman in said trade; and whether the said defender John Munro was apt and able to carry on said trade, in terms of the act of 24th Geo. III. c. 6, entitled 'An act to enable such officers, mariners, and soldiers, as have been in the land or sea service &c., to exercise trades?' If the Court is of opinion, on the facts stated, that the said defenders did violate the privileges of said incorporation, judgment to be given for the said pursuers; but if the Court is of opinion that the said defenders did not violate the privileges of the said incorporation, then judgment to be given for the said defenders."

Pleaded by Munro—

1. He did not require to possess fair average skill as a tailor, in order to entitle him to plead the statute; and this was found in M'Kenna's case.[1]

2. The statute did not exact any degree of skill at all as essential for a King's freeman; and accordingly it expressly ordained that he, when sued for encroachment, on "making it appear to the Court that he had served his Majesty," and not deserted, "he shall, upon the general issue pleaded, be found not guilty." Therefore a proof of service and regular discharge was all that was necessary for acquittal; and it was not incumbent on him further to plead skill in the particular craft.

Pleaded by the Corporation—

1. The case imports that Munro is quite ignorant of the business of an operative tailor. He can neither work at it himself, nor bonâ fide superintend other workmen.

2. The statute requires that a discharged soldier shall be apt and able for the trade which he exercises. It does not prescribe any test of fitness; and perhaps it may be enough for the soldier to say that the trade is followed by him, so as to make it the means of a livelihood; but then it must be so followed by means of the personal exertions of the soldier, and not by the intervention of any deputy.

The Lord Ordinary "repelled the defences, and found, prohibited, decerned, and declared in terms of the libel;" and found the pursuers entitled to expenses.*

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[1] June 13. 1828, (ante, VI. 972.)

* NOTE.—"Munro, as a King's freeman, might have carried on the trade of a tailor by journeymen, though he was unable to perform the operative part; but as he did not understand the operative part, he was neither qualified to work, nor superintend the work of others, nor to teach the business to apprentices. It cannot be maintained, therefore, that he was apt and able to carry on the trade in terms of 24. Geo. III.

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Lord Balgray.—There are two proposed ways of interpreting this statute. By the one it receives an effect consistent with common sense; by the other, it would seem to have no foundation in common sense at all. The act merely provides that a discharged soldier, who is apt and able, may carry on a trade; but it does not confer on such a person any privilege superior to that of an entered freeman of that trade. It does not entitle him to join in society with unfreemen. But, even in order to earn that privilege for himself, the precise words of the statute require that the soldier shall be 'fit and able,'—fitness probably referring to mental qualification or skill, and the word ability to such practical manual dexterity as enables the party to be himself the tradesman, and not merely lend his name as a cover to other people. Indeed the leave given by the statute to soldiers and their families is expressly to "exercise such trades as *they* are apt and able for." Accordingly the wife or child of a soldier who attempts to carry on a trade under the act must be apt and able for it, otherwise they are not within its protection. This is the common sense interpretation of the statute, and any other would cut up the corporate rights in all the burghs.

Lord President.—I am of the same opinion. I do not hold that a soldier, before exercising his craft, must perform an essay-piece, or submit to any special trial of his fitness; and indeed the case of M'Kenna goes against such a doctrine. But no point of that sort arises here. Munro is totally unacquainted with the business of a tailor; by his own exertions in that trade he could earn nothing; and as he is not under any modification of the terms either apt or able for this trade, he cannot claim the privilege of the statute. The only use he can make of that privilege is one only intended by the statute, being just to lend his name as a cover to other people.

Lord Craigie.—I concur. The meaning of the statute was to save discharged soldiers and their families from being cut out of the means of earning a livelihood, in consequence of the exclusive privileges of corporations. But it never was intended to bestow on these parties privileges which none of the members of a corporation can acquire by being made free of it.

Lord Gillies.—My opinion is the same. The act was passed for a very laudable object. Let us look at the kind of evil to be removed, and the limit of the remedy becomes apparent. The preamble is, "Whereas there are divers officers, soldiers, &c. who, the wars being now ended, would willingly employ themselves in those trades which they were formerly accustomed to, or which they are apt or able to follow and make use of for getting their living *by their own labour*, but are or may be hindered &c." by the exclusive privileges of corporations. It is for this cause that the freedom was given to soldiers; and wherever they can earn a livelihood at a trade by their own labour, then they may claim the benefit of the statute, and insist that the fact of their thus earning a livelihood is a proof that they fall within the meaning of the act, and that they possess all the aptness and ability which it contemplated. Where they cannot do this, the act does not cover

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c. 6. The case of M'Kenna was different; for it was found there, that although the defender could not work himself, he could judge of work, or give directions in the inferior branches which he carried on. The point raised by the corporation was, whether an ability to perform the manual operations of the trade was not essential by the statute."

them; and any of the decisions which have been quoted as trenching on this principle, show, when examined, that the party pleading the act was able to maintain himself by his own exertions. No. 151.

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THE COURT adhered, and allowed additional expenses.

Pursuer's Authorities.—Coggan, Jan. 14. 1823, (ante, II. 111.); M'Kenna, June 13. 1828, (ante, VI. 972); Glasgow Hammermen, Feb. 18. 1757, (1950); Glasgow Tailors, March 25. 1757, (3. App. Burgh Royal); Perth Shoemakers, Feb. 24. 1790, (2014.)

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CARNEGY and SHEPHERD, W. S.—ÆNEAS MACBEAN, W. S.—Agents.

JOHN MILLER, Pursuer.—*Ld. Adv. Jeffrey—Baird—Keay—Jameson—Shaw Stewart.*
WILLIAM MILLER and CURATORS, Defenders.—*D. F. Hope—Skene—Anderson—Forbes.* No. 152.

Succession — Service. — A party having conveyed his property to trustees, with directions to pay the rents to Joseph during his life, and to convey the property to him, and the heirs of his body, in the event of his marrying and having children; but in the event of his not marrying, and not having children, to convey the property to William, "his heirs and assignees whatsoever;" and William having predeceased Joseph without issue; and Joseph having afterwards died without having been married—Held, in a competition between the heir of line and heir of conquest of William,—1.—That no right had vested in William prior to his death;—and,—2.—That the heir of line was the party entitled to succeed.

THE late John Davidson, W. S., by his deed of settlement, conveyed all his property to trustees, with directions, inter alia,—"to pay the clear rents of my lands and estates foresaid, viz. Stewartfield, Ulston, and acres foresaid, Halltree, Kirkotter Chapel, and Cairntows, to Joseph Davidson, my cousin, Fellow of Cambridge, during his life; and if he marries and has children, then to dispone to him, and the heirs of his body, the said lands and estates, and acres and pertinents thereof; *and if the said Joseph Davidson does not marry, and has not children,** to be disposed by them as follows,—viz. The lands and estate of Stewartfield and Ulston, and acres foresaid, to William Miller, second son to the said Sir Thomas (William) Miller (Lord Glenlee), his heirs and assignees whatsoever; and the lands of Halltree and Kirkotter Chapel to the said Robert Dundas (of Arniston), and the heir succeeding to him in the estate of Arniston, in the precise terms of the entail of that estate; only with this difference, that the said Robert Dundas, and these heirs in their order, may give the liferent thereof to their widows." He further, by a separate clause, appointed his trustees, in the event of Joseph Davidson not marrying, or not having children, to dispone the remaining property of Cairntows to the late Lord Melville. He likewise left legacies of

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* The words in italics were omitted in this part of the deed, but both parties were agreed that it must be so read.

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£2000 to each of the several children of Lord Glenlee, and those of a Mr. Cumming; but by a subsequent codicil he revoked the bequest so far as regarded Thomas Miller and George Cumming, the eldest sons of the respective families, "as they are sufficiently provided for otherwise." Mr. Davidson died in 1797, and the trustees were infeft. Thereafter the rents of his estates were paid by them, in terms of the deed, to Joseph Davidson, who never married, and who died without issue in 1828. William Miller, then lieutenant-colonel in the army, had been killed at the battle of Waterloo in 1815, having left no issue; and, on Joseph Davidson's death, a question arose, whether the pursuer John Miller, William Miller's immediate younger brother, as heir of line, or William, the son and heir of his elder brother Thomas, also now deceased, as heir of conquest, was entitled to succeed to the lands destined to William Miller in Mr. Davidson's deed of settlement. To have this question determined, John Miller raised the present action against his nephew, to which he also called the trustees as parties, concluding to have it declared "that the said Lieutenant-colonel William Miller having died unmarried, the pursuer, his immediate younger brother, has in him the character of heir whatsoever of the said William Miller;"—"that the said William Miller, son of the said deceased Thomas Miller, has no right or title whatever to the said lands and estate; but that the pursuer, the said John Miller, has the only good and undoubted right and title to all and whole the said lands &c. in virtue of the deed of settlement and provision of the said deceased John Davidson; and that the same do belong in property to him, the said John Miller, as holding the character of heir of line or heir whatsoever of the said Lieutenant-colonel William Miller, and not to the heirs of conquest of the said deceased Lieutenant-colonel William Miller;" and further concluding that the trustees should be decerned to denude in his favour.

In defence it was pleaded by the Heir of Conquest—

1. Although the defenders were, according to feudal form, fiars, they were so only in trust; and the beneficial fee under the deed of settlement could not be in pendente, but must have vested in some person.[1] It did not vest in Joseph Davidson, because his right was limited to a liferent, except in the event of his marrying and having children; and although Colonel Miller's right was subject to defeasance in the same event, still the fee vested in him, subject to that defeasance, which never took place. In this view, the heir of conquest must certainly be held entitled to succeed, since, if the right once vested in Colonel Miller, it cannot be doubted that it was conquest in his person.

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[1] Wellwood v. Wellwood, Feb. 24. 1791, (Bell's Cases, 191); M'Dowall and Selkrig, Feb. 6. 1824, (ante, II. 682); Lord Mountstewart v. M'Kenzie, Nov. 13. 1707, (14903); M'Donald v. M'Kinnon, Feb. 14. 1765, (5279); Tait v. Maitland, Dec. 2. 1825, (ante, IV. 247); Smith v. Leitch, June 2. 1826, (ante, IV. 659), aff. in H. of L., (3. Wilson and Shaw, 366.)

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2. The pursuer can only claim as heir of Colonel Miller. The destination to Colonel Miller and his heirs is one single destination; his heirs cannot be considered as conditionally instituted to him; and except for the subsistence of the trust, which enables the trustees at once to dispone in favour of the heir entitled to succeed, the estates in question could only have been taken up by service to Colonel Miller.[1] Now, if Colonel Miller had survived Joseph Davidson one hour, it is indisputable that the heir of conquest must have succeeded, as the heir to whom the estates were destined in the deed of settlement; but the fact of Colonel Miller surviving or predeceasing Joseph Davidson cannot alter the meaning of the destination of the deed, and convert 'heir of conquest' (in which sense the term 'heir' must have been taken, had he survived for the shortest period) into 'heir of line;' so that even if Colonel Miller took no vested interest during his life, still the heir of conquest is equally entitled to succeed as heir of provision under the intendment of the deed; and it is impossible to control the meaning of proper technical expressions by extraneous considerations of what might have been expected to have been the intention of the deceased.

To this it was answered—

1. The principle of the feudal law, which requires that a fee shall not be in pendente, is completely satisfied by the vesting of a fee in trust, so as to give the superior a vassal in his lands; and it is settled that the beneficial interest or jus crediti under a trust may be suspended according to the will of the granter.[2] In the present case, it is plain that no right whatever could be vested in Colonel Miller, till it appeared whether Joseph Davidson should die without lawful issue. The provision in his favour was absolutely conditional on that event, and till then Colonel Miller could have nothing but a mere spes; and having predeceased Joseph Davidson, no right of any kind could by possibility have vested in him.

2. The rule of succession, which brings in the heir of conquest in preference to the heir of line, is a forced deviation from the original principles of our law and natural course of succession, and can only operate in the special cases with reference to which it has been introduced. Originally it was limited to property in which a party had actually been infeft, and it was with difficulty that it was allowed to be extended to property in which he might have been infeft, but in which infeftment had not actu-

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[1] Menzies, Jan. 18. 1803, (not rep.); M'Kenzie, Nov. 24. 1818, F. C.); Creditors of Graitney, July 1727, (14855); Forbes, Aug. 3. 1756, (14859); Peacock v. Glen, June 22. 1826, (ante, IV. 742); Sandford on Entails, 322; Campbell, Nov. 28. 1770, (14949); Colquhoun, Dec. 16. 1828, (ante, VII. 200.)† [2] Burden v. Smith, April 27. 1738, (Craigie and Stewart, 214); Glendinning and Gaunt v. Walker, Nov. 13. 1825, (ante, IV. 237); Downie v. Buchanan, Feb. 12. 1830, (ante, VIII. 516.)

† This case has been remitted by the House of Lords for reconsideration.

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ally been taken.[1] Beyond this, however, it cannot go; and there is no room for its application till property shall exist as conquest in the person of the party whose succession is disputed. Here there is no question as to the succession to Colonel Miller. No right vested in him, and there was no conquest in his person. The pursuer claims as the heir to whom the estates were destined after or on failure of Colonel Miller, viz. his "heirs whatsoever," and not as succeeding to Colonel Miller, to whom a service could only in any case have been necessary for the purpose of establishing the character of heir, but not for the purpose of taking any right. Unless clearly otherwise provided, the heir of line must always be preferred under a destination to heirs whatsoever. According, therefore, to the technical construction of the destination, the pursuer is entitled to the estates in question; and if any evidence were necessary to show the real intention of the truster, it is to be found in the deed itself, where, while the lands of Halltree &c. are specially destined to the heir of entail of Arniston, not only is no intention shown of conjoining Stewartfield &c. with the estates to which Lord Glenlee's eldest son was to succeed as heir to his father, but a legacy of £2000 in his favour is revoked, on the express ground that he was already sufficiently provided for.

The Lord Ordinary, at the request of the parties, ordered Cases, issuing, at the same time, the subjoined note.* His Lordship thereafter, on advising the Cases, "in respect of the reasons assigned in his note," repelled the defences, and decerned and declared in terms of the libel.

The heir of conquest reclaimed.

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[1] Quon. Attach. Rob. Stat., 3. c. 3; Craig, 1. 10. 32; Stair, 3. 5. 10; Ersk. 3. 8. 14; Hope's Pr. 171; Mackenzie, 3. 87; Robertson v. Halkerston, July 7. 1675, (5605); E. of Selkirk v. D. of Hamilton, Jan. 8. 1740, (5015.)

* "NOTE.—On the suggestion of the parties, the Lord Ordinary has ordered Cases; but he thinks it right to intimate to them the opinion which he at present entertains. He does not think that there was vested in Colonel William Miller any right, or even any title, which could afford a proper occasion for a service, or which could possibly be considered as conquest in his person. In one sense, no doubt, the settlement may be viewed as being in favour of William Miller, as such an expression may be, and is, frequently used in regard to every person on whom a deed confers an interest, whether present or postponed, certain or contingent; and so also it may perhaps be loosely said that the heirs of Colonel William Miller claim through him, as it was presumably through the intervention of the favour entertained for him by the disponer that his heirs were called to the succession. But still, considering the terms of the settlement, and the circumstances in which it took effect—keeping in view that by the clause, even as construed by the defenders, the trustees were to dispone the lands to William Miller, only in the event of Joseph Davidson not marrying and having children, and that William Miller died before Joseph Davidson, it is clear that the settlement never had any legal operation in favour of Colonel William Miller himself; and that, consequently, as no right in virtue of it ever existed in his person, his heirs do not take as in his right. The case resembles, as nearly as can well be conceived, that of a legacy bequeathed to a person and his executors, in which, if the legatee predeceases the testator, the executors take in their own right, and not as in right of the legatee. "A

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Lord Justice-Clerk.—This question is brought before us in circumstances of importance, and I regret the necessity we are under of deciding without the valuable assistance of my brother Lord Glenlee. The question to be determined is under the meaning of the deed of Mr. Davidson. The deed is peculiar; but still I think there is not much difficulty in discovering the true purpose of the granter. He vests the whole estate in certain friends, and directs them "to pay the clear rent of my lands and estate," &c. [His Lordship read the destination above quoted.] The words, "if the said Joseph Davidson does not marry, and has not children," are, I apprehend, the precise words to be inserted in the blank. It is to be observed, in passing, that among the legacies there is one to Thomas Miller; and in a subsequent codicil it is revoked, on the ground that he was sufficiently provided for otherwise. Mr. Davidson died in 1797, and the trustees were infeft; and they thereafter paid annually the rents to Joseph Davidson. This gentleman died in 1828; but the material fact is, that in June 1815 William Miller was killed at Quatre Bras. The trustees were in doubt to whom to convey; and this declarator is brought by John Miller to determine to whom Stewarfield &c. is to be dispened. It is necessary to attend to the conclusions of the summons, in reference to the argument of one of the parties. [His Lordship read the conclusions as above recited.] Now it is necessary to consider what is the true import of the provision in the deed of settlement. It appears clear that the trustees were vested in the estate, but under certain injunctions incumbent on them as trustees. If Joseph Davidson should marry and have children, they were to denude in favour of him, and of the heirs of his body. But it is material to observe that his marrying is not sufficient;—he must marry, and have children, before they are to convey the estates to him. So long as he lived, and might have had children, the trustees were to retain the estates, and merely to pay him the rents. They were not to execute any conveyance in his favour till he had children of a marriage. It is extremely important to be satisfied as to the situation of Joseph Davidson. He was not a liferenter, but a mere stipendiary, having no control whatever regarding the property. The fee was in the trustees; and it is of no consequence to say that it was a fiduciary fee. Then, until Joseph Davidson's death, or till he had children, no person had any claim to these estates; and as William Miller died in 1815, the question is, if he then had any claim against the trustees under the deed? I hold it clear, that till Joseph Davidson died without issue, no right arose to William Miller, the emergence of whose right depended on Joseph dying without having married, and had children. Till then, he had nothing but an expectancy or hope,—the trustees

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legacy, when it is devised to a legatee and his executors, is not evacuated by the predecease of the legatee, but passes, after the testator's decease, to the legatee's executors, —not by any right which these executors derive from the legatee, to whom that legacy never belonged, he having died before it could have effect by the testator's death, but in their own right, as conditional institutes in the legacy." According to this principle, and there being on the present occasion a conditional institution of Colonel William Miller, and his heirs, it would seem to follow that the cause in dispute must be held to involve the institution of Colonel William Miller, if he survived the event forming the condition; and if he did not survive the institution of his heirs, in which case, as in that of a direct disposition to the heirs of a particular individual, it appears to the Lord Ordinary that the term must be construed designative, as denoting the heirs of line, the persons to whom the general character of heir, unconnected with any right in the person of the ancestor, would apply."

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being fettered by words having no ambiguity, that so long as Joseph lived, they could not convey to William Miller,—the event not having occurred, on condition of which his right depended. There was no vested right, therefore, in William. He could not have demanded a conveyance to Joseph Davidson, and, in the event of his dying without issue, to him. Then, if so, and if it was impossible to have given him infeftment, subject to a contingency or defeasance, it follows as a necessary consequence that he had nothing in him that he could convey to any human being. We are now brought to consider, in these circumstances, what effect is due to the destination to his heirs and assignees whatsoever. It is said that if William Miller had succeeded, the lands would have been conquest in his person. This is an undoubted truism, whether he was infeft or not; and I assent to all the authorities cited on this point, which nobody disputes. But all the authorities go on the ground that the estate must be one in which the party was infeft, or might have been infeft. There is not the shadow of authority for holding that mere expectancy is a right to be considered conquest. William Miller neither was, nor could have been infeft. Then, if not conquest in William, who is the person entitled to take under the destination to heirs and assignees whatsoever? I think it very clear that it can be no other person than the immediate next brother. He does not take the estate through William. All he says in the summons is, I am the party designated in the deed by the term 'heir whatsoever of William.' He does not claim, however, as heir of William, but as designated by the granter of the deed. Suppose that William had not been called, but that the deed had directed the trustees to denude in favour of his heirs whatsoever, that would have been a good description, and the next younger brother would have been the party, if William had had no issue. If the estate ever had come to William, it would have been conquest in his person; but as there was no right ever vested in him, it seems to be incompetent for the heir of conquest to claim under the words 'heirs and assignees whatsoever.' I think there is no foundation for that, but that the pursuer is entitled to prevail; and I also think it clear that it was the intention of the granter that the trustees were so to denude; and in reference to this, I cannot overlook that he selects the second son of the proprietor of the entailed estates of Glenlee and Barskimming, without the slightest hint of conjoining the lands conveyed with those entailed estates, though he did so as to the lands provided to the heir of the Arniston estates, and also revoked the legacy to Thomas Miller, because otherwise provided for. I concur entirely with the Lord Ordinary, and think his illustration very applicable.

Lord Cringletie.—I have given this case great consideration, and, contrary to my wishes, have formed an opinion opposite to that of your Lordship. I agree, however, that there was nothing in William but a mere spes successionis; but I do not think the case turns there at all. It is entirely a case of destination. The lands are destined to William Miller, his heirs and assignees whatsoever; and the whole turns on who are the heirs of William Miller. Now, I cannot see any intention on the part of the granter to exclude the eldest son. He must have contemplated William Miller's survivance; and as he was a writer to the Signet, he must have known that, if he did survive, the lands would necessarily go to the eldest brother; and yet he uses no expressions to prevent this. Then we are to look at what he did, and what is the meaning of the heirs called. My difficulty is, how, when William's heirs are called, and the heirs of conquest would have taken under that, it can change the interpretation of the words that William died before the condition was

purified. But it is said that 'heirs *whatsoever*,' generally mean heirs of line. If, however, I purchase an estate, and take it to myself and my heirs whatsoever, does that carry it to my heirs of line? Certainly not. I consider heir to be a flexible term, and that it must be interpreted according to the subject to which the party is to succeed. No doubt the right was conditional, but the condition is purified; and does it make any difference in the interpretation from what would have been held, if there had been no condition? I cannot think so; and holding heirs to be heirs of conquest, the estate must go to the defenders. I cannot conceive that Mr. Davidson meant any thing but heir of conquest; and I do not think the recal of legacy affects the matter.

Lord Meadowbank.—Even after what I have heard from Lord Cringletie, for whose opinion I entertain the greatest respect, I cannot doubt the Lord Ordinary's interlocutor; and I have arrived at the opinion stated by your Lordship. The question arises under the settlement of Mr. John Davidson, a most eminent and learned conveyancer; and it affords one of many instances that nothing is more rash than for legal persons to be their own advisers; for I have seldom seen any deed expressing intention in a manner more slovenly. It is even altogether imperfect in the very clause on which both parties must found; and we must supply words there, as to which, however, the parties are agreed. Supplying these words, I cannot doubt the true intention of Mr. Davidson, any more than what he has legally effected. I conceive that he intended to vest in the trustees, not merely a feudal right of the nature of a fiduciary fee, but the whole and exclusive management, so long as Joseph Davidson remained unmarried, and without children; and that they were to hold for whomsoever person might eventually be held to be in right of succession. This is, no doubt, a legal mode of preserving the rights of persons to exist or called to the succession at a future period, and on conditions occurring. This is all that is necessary in order to fulfil the feudal requisites, as it gave a vassal to the superior, and left no fee in pendente; but it left that in pendente which may legally be left in pendente—viz. the jus crediti. I state this, because, the heir of conquest, in a great part of his argument, confounds the fee with the jus crediti, which may always be in pendente. Now, in two events, the right of the trustees was to come to an end:—1. In the event of Joseph Davidson's marrying and having children, they were to devolve the estates on him, without any remainder; and if his heir of the body had died next day, his heirs whatsoever would have come in, to the exclusion of William Miller. 2. In the event of Joseph Davidson's death, unmarried or without heirs, they were to denude in favour of William Miller, his heirs and assignees whatsoever. Both events were equally uncertain; and, in the contemplation of the granter, it was as probable that Joseph Davidson should marry and have children, as that he should not. That indeed is the natural, and consequently the legal presumption; and yet the heir of conquest contends that the testator executed the settlement on the assumption that Joseph Davidson never was to marry or have heirs; and, in fact, that the trustees only held in trust for Joseph Davidson's liferent and William Miller's fee, for which assumption there is no ground whatever. The rights of Joseph Davidson and William Miller were equally contingent, and in pari casu; and it is impossible to hold the right of one of these stronger than the other. Therefore it appears to me that there was no right in either till the condition was purified—the jus crediti remaining till then in abeyance, and the fee in the trustees; and if I were forced to say that the fee was in either, I would rather

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say it was in Joseph Davidson. In short, taking the whole deed, I am satisfied that there was nothing in William Miller but a spes successionis, and no vested right but in the trustees. Now, who is to take? If the above view be correct, it is impossible to hold that any party can take in consequence of a donation conferred on William Miller, as none at all was conferred on him; and therefore the right of the heir of conquest, as it appears to me, is out of the question, as it is essential to his character that he take something vested in the party to whom he claims; for such vesting is preliminary to his taking any thing. Before the heir of conquest, even the heir at law of John Davidson would rather come in; as, if William Miller's heir whatsoever does not take, the destination would be evacuated by William's predeceasing Joseph. But Lord Cringletie puts it in another way, viz. that the heir of William Miller is called, and that, because the granter contemplated, that if William Miller succeeded, the heir of conquest would take under the word *heirs*, it therefore must still be so interpreted. Now I understand that the granter meant to create a substitution, and to call, first, William—and, second, his heirs whatsoever, in the view of no right ever vesting in William and the condition not being purified at his death, and thus to call an heir not to take through William, but independently of him; and the whole deed is in consistency with this. I know no authority for saying that if moveables were left to a person and his heirs, they would have gone to executors. In all the cases, the destination has been to heirs and executors. Here it is to heirs whatsoever; and I cannot give any other interpretation, than that the trustees were to convey to heirs of line. The heir of conquest is an interpolation in our law; and if there was any ambiguity, I should hold that we were bound to give the construction that would bring in the heir of line. But here I see no ambiguity. It is said that a different construction must hold in the cases of land and of moveables. I dispute that, if the feudal requisites are complied with. It is a question of voluntas, and depends on the same principles; and therefore I think the illustration of the Lord Ordinary quite applicable; and I am for adhering to his Lordship's interlocutor.

THE COURT accordingly adhered.

D. CLEGHORN, W. S.—M'KENZIE and INNES, W. S.—Agents.

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J. A. CHEYNE, Petitioner.—*Robertson—Moir.*

CAMERON'S TRUSTEES, Respondents.—*D. F. Hope—Graham Bell.*

J. G. WOOD, W. S., Respondent.—*Marshall.*

Ranking and Sale.—A party having conveyed heritable property to a trustee, with powers of sale; and he having been infeft, and sold part thereof, but without granting any conveyance; and a ranking and sale being afterwards brought, including this property—The Court, on the application of the purchaser's agent, (against whom the purchaser was seeking relief for not having secured her by obtaining titles,) ordered the sale to be suspended hoc statu.

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THIS was another question arising out of the ranking and sale mentioned ante, VIII. No. 470, p. 982, and No. 472, p. 988, (which see.) Some years prior to the raising of this process, Baynes, the common debtor, had executed a trust-deed of certain parts of his property for behoof of his creditors, with powers of sale. The trustee, having taken

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infeftment on this deed, exposed to sale a house, No. 6. Malta Terrace, part of the property conveyed. This house was bought by the petitioner Cheyne as agent for a Miss Brown, on whose behalf he paid up the greater part of the price to the trustee, but without obtaining a disposition, which, it was said, was executed by the trustee, but never delivered, —the trustee having shortly thereafter died. Miss Brown, who had advanced the money to Cheyne, now brought an action for repayment, in respect of his failure to procure for her a disposition; and he thereupon presented a petition, praying to have the house in question, which had been included among the property for which warrant of sale had been granted, struck out of the warrant, no sale as yet having been effected. This was opposed by Cameron's trustees, the raisers of the process, who had a preferable heritable security over the house in question, on the ground that they could not, in this stage of the proceedings, be deprived of the means of liquidating their debt by a party having only a personal right,—and also by Wood, W. S., the common agent in the ranking, who contended, that as the only method left open to the personal creditors in a ranking and sale of making their rights real was by carrying through the process, it would be giving a purchaser, whose right was, like theirs, still personal, an unfair advantage, if the only diligence competent to the creditors were stayed till the purchser's right should be completed by adjudication or otherwise, to their exclusion.

Lord Glenlee.—I am inclined to think the sale should be postponed. No doubt the security of the heritable creditors cannot be impaired by any subsequent transaction, and must still subsist. But in a question whether the sale can proceed, it must be made out that the common debtor remained proprietor of the subject, or there can be no power to sell; and however recent the discovery is that it does not belong to the common debtor, we must immediately stop. Now, how does the case stand here? As to whether the price was paid or not, is of no consequence. It was paid in one sense; but whether to the right person, we do not know. The trust-conveyance was never challenged, and on this trust the trustee was infeft; and if he made a real bonâ fide sale to a third party, did not his infeftment subsist for behoof of the party to whom he sold, taking it out of the common debtor's power? Therefore I cannot consider this subject liable to be sold as part of the bankrupt estate. This would have been the case if Miss Brown had appeared herself; and Cheyne is entitled to come forward and say, this does not belong to the bankrupt, but to Miss Brown, and I have sufficient interest to stop the sale. I would not therefore allow the sale to proceed till the matter is cleared up. This is a stronger case than the one in July, where there was only an adjudication in implement instituted; and what interest has the heritable creditor, whose security subsists, to object. The personal creditors have an interest no doubt; but they cannot interfere, unless they can show that the subject belongs to the common debtor.

Lord Justice-Clerk.—I agree that the proper course is to pause, on the grounds so well explained by Lord Glenlee.

Lords Cringletie and Meadowbank concurred.

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THE COURT accordingly suspended the sale, quoad the house in question, in hoc statu.

J. ARNOTT, W. S.—TOD and ROMANES, W. S.—J. G. WOOD, W. S.—Agents.

No. 154.

Jan. 19. 1831.
Whyte v. Finlay.

THOMAS WHYTE, Advocator.—*Graham Bell.*

JOHN FINLAY, Respondent.—*Keay—Maitland.*

Bill of Exchange—Proof.—Non-onerosity on the part of the drawer of a bill of exchange only proveable by writ or oath, though not pleaded to any other effect than as a reply to a plea of non-notification, equally as if pleaded in defence against payment.

Jan. 19. 1831.

2D DIVISION.
Lord Medwyn.
S.

THE late Mrs. Finlay raised an action against the advocator Whyte before the Sheriff of Lanarkshire (afterwards insisted in by the respondent, her son) for payment of two bills of £500 and £250 accepted by Whyte to her deceased husband William Finlay, whose executrix she was. Whyte pleaded, inter alia, compensation to the extent of £500, in respect of a bill of that amount drawn by William Finlay upon and accepted by one Muir, and afterwards indorsed to Whyte. To this claim it was objected that there had been no notification to William Finlay of the dishonour of the bill, whereupon Whyte averred that the bill had been granted by Muir for the accommodation of Finlay, and craved to be allowed to prove this prout de jure. This the Sheriff refused; and there being no proof by writ or oath, he overruled the plea of compensation, and decerned accordingly. Whyte then brought an advocation, in which he contended that the rule excluding proof of non-onerosity, except by writ or oath of party, was established only with reference to those cases where it was pleaded as a defence against payment of a bill; but that when pleaded, as here, in replication to a defence founded on non-notification, it was competent to be proved prout de jure, just as in the case of trust, which, as between the truster and trustee, could only be proved by writ or oath of party; but, when pleaded for a collateral purpose, might be established prout de jure.

The Lord Ordinary repelled the reasons of advocation, and the Court adhered.

J. WEMYSS, W. S.—J. SOMMERVILLE Jun.—Agents.

No. 155.

Jan. 19. 1831.
Russell &c. v. Cochrane &c.

J. RUSSELL and A. RAMSAY, Advocators.—*More.*

W. COCHRANE and Others, Respondents.—*D. F. Hope—Maidment.*

Landlord's Hypothec—Poinding.—A landlord who consented to a poinding creditor selling his tenant's effects, on condition of being paid out of the proceeds the rents due him, and in consequence did not execute a warrant of sale obtained by himself under a sequestration—Held (in a question with the other creditors claiming a pari passu preference with the first) not to have abandoned his right of hypothec quoad the effects poinded and sold.

No. 155.

Jan. 19. 1831.
2D DIVISION.
Lord Medwyn.
F.

Russell &c. v. Cochrane &c.

THE advocator Russell, in March 1829, sequestrated the effects of Thomson, his tenant in a shop in Falkirk, for payment of the rent due at the Martinmas preceding, and to become due at Whitsunday following—£70 in all. He obtained warrant of sale, but did not carry it into execution; and, on the 18th of May, a poinding was executed by the other advocator Ramsay, a creditor of Thomson, for a debt of about the same amount. On the 19th, Russell again used sequestration, but he immediately afterwards entered into an arrangement with Ramsay, by which he consented that Ramsay should sell the effects poinded, on condition of paying the rent out of the proceeds. Ramsay accordingly sold the poinded effects to the extent of about £100; and having reported the sale to the Sheriff of Stirlingshire, Russell gave in a claim for the amount of his rent. At the same time, the respondents, Cochrane and others, creditors of Thomson, lodged claims for pari pasu preference with the poinding creditor, and objected to the claim of Russel, on the ground that there having been, as they alleged, a sufficiency of effects left on the premises after the sale to answer his rent, he was bound to have exercised his right of hypothec over them to the effect of obtaining payment; and that having neglected to use his warrant of sale, and having allowed the sale under the poinding to take place, he must be held to have abandoned his hypothec quoad the poinded effects, so as now to have lost any claim of preference to the prejudice of Thomson's creditors. The Sheriff sustained these pleas, dismissed Russell's claim, and ordered the proceeds of the sale to be divided among the creditors claiming. Russell and Ramsay thereupon brought an advocation, in which the Lord Ordinary pronounced this interlocutor:—"Advocates the cause, recalls the interlocutors submitted to review, and finds it admitted by the advocator Ramsay that he was permitted to proceed with the sale of the poinded effects, only upon consenting to pay to the landlord the rent for which the bankrupt's effects stood sequestrated;—that such an arrangement between the landlord and the poinding creditor was judicious and expedient, as saving expense to the bankrupt and his creditors;—and that there are no circumstances averred which can imply that the landlord, by such consent, intended to give up the real right he had secured by sequestration, and to betake himself either to the personal security of the poinder, or to restrict his security to the other effects upon the premises;—finds no appearance of collusion between the two advocators, with the view of defeating the rights of the other creditors;—finds, therefore, that the poinding creditor is bound to satisfy the landlord for the rent secured by the hypothec, and the necessary expenses incurred by him; and that, in the report of the sale of the poind, the creditor is entitled to take credit for the same, and for the expenses of the sale, and that the balance will be a fund divisible among the creditors of the bankrupt, according to their rights and interests;—finds the advocators entitled to their expenses in this Court, as well as in the Inferior Court."

No. 155.

Jan. 19. 1831. Russell &c. v. Cochrane &c.

The Court adhered, without prejudice to any claim on the part of the respondents for an assignation by Russell of his right of hypothec over the other effects of the common debtor.

J. Buan, W. S.—J. Jameson, S. S. C.—Agents.

Murray &c. v. Renton.

No. 156.

A. O. Murray and Others, Suspenders.—*Murray—A. Wood.*
James Renton, Charger.—*D. F. Hope—Walker.*

Process—Reparation—Entail.—In a suspension of a sale of wood on the estate of an heir of entail, the heir having died after the record was closed, but before judgment on the merits; and it being thus impossible to cut the wood—Held that a judgment on the merits of the suspension, as originally brought, should still be pronounced in reference to the ulterior claims of damages and expenses.

Jan. 20. 1831.

1st Division. Lord Meadowbank. H.

In 1828, the Honourable Alexander Oliphant Murray and others brought a suspension and interdict of a proposed sale of wood upon the entailed estate of Lord Elibank, which had been advertised by Renton, the trustee for his Lordship's creditors. During the discussion of the suspension, and after a record had been closed and Cases prepared, Lord Elibank died. The Lord Ordinary, "in respect of the death of the late Lord Elibank, sustained the reasons of suspension and interdict; prohibited and interdicted as craved; reserving to the charger all claims of damages against the suspenders and the cautioner in the suspension; and, quoad the point of expenses, appointed parties' procurators to be ready to debate at next calling."

Renton the trustee reclaimed, and argued that although, by the death of Lord Elibank, he was deprived of the right to cut the trees, yet it did not decide whether he had a right to cut and sell them at the time when he was interrupted by the suspension and interdict. But if he had that right formerly, he had now a good claim of damages for the value of the trees against the suspenders and their cautioner. On the question of right, the record was fully prepared in this process; and it was therefore proper to have that right decided in reference to the claim of damages.

The suspenders answered—The only question raised under the process of suspension is the right to have the letters suspended; and by the death of Lord Elibank the question was at an end, for it was admitted that the letters must be suspended. The only point, therefore, which remained in this process, was the question of expenses, as stated in the interlocutor under review.

Lord Balgray thought that the question of right, with reference to the ulterior claim of damages, might be decided in the present process.

Lord Gillies.—I am not sure that this is not the proper action for deciding the liability which was undertaken by the suspenders and their cautioner when they were called on expressly to find caution in the books of Court (as they state, in the close of their letters, they have done,) "for making payment to the respondents of whatever sums shall be found due in name

of damages and expenses in case of wrongous interdicting." I would alter the interlocutor, and find that the merits of the cause should still be determined in this process. No. 156. Jan. 20. 1831. Murray &c. v. Renton.

The LORD PRESIDENT assented.

LORD CRAIGIE.—I would recal the interlocutor, and remit to the Lord Ordinary to hear parties on the point, how far the claim of damages can competently be decided in the suspension. Mackenzie &c. v. M'Leod &c.

THE COURT "recalled the interlocutor complained of; but in respect of the death of Lord Elibank, found that the trees cannot now be cut; and remitted to Lord Corehouse, in place of Lord Meadowbank, to dispose of the merits of the cause, and to do therein as to him shall seem just."

A. ROLLAND Jun. W. S.—WALKER, RICHARDSON, and MELVILLE, W. S.—Agents.

HON. MRS. H. MACKENZIE &c., Suspenders.—*Skene—H. J. Robertson.* No. 157.
M'LEOD &c., Chargers.—*Rutherfurd.*

Process.— A Lord Ordinary, acting for another, having pronounced a judgment in a cause which had previously been remitted by an Act of Sederunt to a third Lord Ordinary—Held that the judgment was null.

THE Honourable Mrs. Hay Mackenzie and others brought a suspension and interdict against Mr. M'Leod of Cadboll and others, to which answers were lodged. The cause appeared, in November 1828, in the Outer House roll of Lord Eldin; but, on account of his Lordship's indisposition, it was called by Lord Meadowbank, acting for Lord Eldin. On the 17th of February 1829, in consequence of the retirement of Lord Eldin, his causes were distributed, by Act of Sederunt, among other Lords Ordinary, and this process of suspension was remitted to Lord Newton. From inadvertency, the cause was still continued before Lord Meadowbank, who, on the 10th of June 1829, pronounced a decree of interdict against M'Leod and others, who did not then make appearance. His Lordship afterwards allowed interim extract of this decree. Jan. 20. 1831. 1ST DIVISION. Lord Meadowbank.

M'Leod &c. reclaimed; and the Court, without entering on the merits, recalled the interlocutor as irregularly pronounced, and of new remitted the cause to Lord Newton.

LORD PRESIDENT.—An interlocutor by a Lord Ordinary, or by a Division of the Court having no authority to pronounce it, is null. If I sign an interlocutor in a cause lying before the Second Division, it is good for nothing. But, for the same reason, a judgment signed by Lord Meadowbank in a cause previously remitted to Lord Newton, is wholly inept.

The other Judges assented.

No. 158.

Jan. 20. 1831.
2D DIVISION.
Ld. Medwyn.
F.

Johnston v. Clark.

Milne v. Scott.

Lyon v. Reid.

GEORGE JOHNSTON, Pursuer.—*Forsyth.*
JOHN CLARK, Defender.—*D. F. Hope—Monteith.*

Special Case relative to a building contract. The Court, with certain findings as to the meaning of the contract, remitted to an architect, who had reported on a remit from the Lord Ordinary, again to report on the footing established by the interlocutor of Court.

A. JOHNSTON, W. S.—W., A. G., and R. ELLIS, W. S.—Agents.

No. 159.

MILNE, Suspender.—*Sandford.*
SCOTT, Charger.—*Cuninghame.*

Bill-Chamber—Juratory Caution—Expenses.—1.—Where a bill of suspension would have been passed on caution in common form, it will be passed on juratory caution, where caution cannot be found.—2.—Competent to award expenses of opposing a reclaiming note against an interlocutor in the Bill-Chamber passing a bill.

Jan. 20. 1831.
2D DIVISION.
Bill-Chamber.

A bill of suspension of a charge on a bill of exchange, presented on the allegation of non-notification of dishonour, having been passed by the Lord Ordinary on juratory caution, the charger reclaimed, on the ground of the total inadequacy of the property given up to afford any security for payment of the sum charged for.

Per Curiam.—If caution had been offered, the bill must have been passed; and till it be declared by statute that juratory caution shall not be received, it cannot be refused.

The Court adhered, and awarded to the suspender the expenses of this appearance, overruling an objection to the competency of their doing so.

No. 160.

PETER LYON, Pursuer.—*Shaw.*
JOHN REID, Defender.—*More.*

Process—Expenses.—1.—A reclaiming note having been presented against an interlocutory judgment, and refused, and the respondent found entitled to the expenses of opposing the note—Held competent for the Lord Ordinary thereafter, at finally deciding the cause, to determine the whole Outer House expenses from the commencement of the process.—2.—A simple adherence by the Court to an interlocutor of the Lord Ordinary awarding expenses of process, carries the additional expenses of opposing a reclaiming note.

Single Bills, &c.

Jan. 20. 1831.
2D DIVISION.

Poor's Roll.—In an application for the benefit of the poor's roll, in an action against the kirk-session of the applicant's parish, the Court remitted to the Sheriff Substitute of the county to receive the declaration and report.

No. 160.

Jan. 20. 1831.
1st Division.
Ld. Corehouse.
S.

Lyon v. Reid.

This was an action of declarator, and count and reckoning, in which a supplementary summons was conjoined with the original one, and thereafter the Lord Ordinary decerned in the declaratory conclusions of the libel; but, before final judgment, appointed a state of claims to be lodged. Against this interlocutor the defender reclaimed; but the Court adhered,[1] and found "the defender liable in the expenses incurred by the pursuer in the present discussion since the date of the Lord Ordinary's interlocutor, and remitted to his Lordship to modify and decern for the same." The process having returned to the Lord Ordinary, the order to lodge a state was renewed; and after a remit to the Auditor to tax the expenses under the interlocutor of Court, they were decerned for, and an interim extract allowed. After some further procedure, the Lord Ordinary "found, decerned, and declared against the defender in terms of the libel, upon payment being made to the defender of £1217. 19s. 7d. sterling, being the balance due by the pursuer to the defender upon the state of payments of rent &c. made by the defender on the faith of the security in question, with interest, &c.; and found the pursuer entitled to the expenses incurred by him in the conjoined action.

Reid reclaimed as to the finding of expenses, and pleaded that it was incompetent for the Lord Ordinary to award any expenses of the Outer House prior to the date of the interlocutor of Court, by which only the expenses of opposing were found due.

Lyon answered, that where a reclaiming note is presented, relative to an interlocutory judgment which did not exhaust the cause, the interlocutor of the Court, awarding or refusing the expenses under the note did not affect the power of the Lord Ordinary afterwards to award the expenses incurred in the Outer House from the commencement of the cause, if, on finally deciding it, he saw fit to do so. This was the rule under the old system, and it had been recognised under the new.

The Court unanimously repelled the objection to the competency, and adhered.

Shaw for the Pursuer.—In the Second Division I understand that some doubt is entertained whether a simple adherence carries the additional expenses of opposing the reclaiming note; I therefore move for them.

Lord President.—In this Division we have no doubt that it does. Your motion is unnecessary.

A. Hutchison,—C. Fisher,—Agents.

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[1] May 25. 1830, (ante, VIII. 789.)

No. 161.

Jan. 21. 1831. Scottish Union Insurance Co. v. Mackintosh.

SCOTTISH UNION INSURANCE COMPANY, Raisers.—*Cuninghame.*
LACHLAN MACKINTOSH, Claimant.—*Rutherfurd.*
COMMON AGENT.—*Skene—Robertson.*

Landlord and Tenant—Insurance.—The tenant of a distillery being entitled, under his lease, to make certain new erections, and to carry them away at the end of the lease, if the landlord did not then take them at a valuation; and having made such erections of a value exceeding £100, and insured against fire for £100 on the distillery premises, and for other sums on his utensils and stock; and the premises, old and new, as well as the stock and utensils, being burnt during the currency of the lease—Held, —1.—That the landlord was not entitled to claim from the insurance office, as an arresting creditor of the tenant, any part of the value of the buildings consumed;—but,—2.—That he was entitled to claim for rents due prior, but not posterior, to the fire.

Jan. 21. 1831.

1ST DIVISION. Lord Newton.

IN 1824, Mackintosh of Raigmore let a lease of certain premises to T. Finlayson and Company, to be occupied by them as a brewery and distillery near Inverness. It was provided in the missives of lease that the tenants should be allowed to make some new buildings, and to carry them off at the end of the lease, if Mackintosh did not then take them at a valuation. They accordingly made such erections, to an extent exceeding £100 in value; and they effected an insurance against fire, with the Scottish Union Office, to the amount of £100 on the distillery, £700 on their utensils, and £200 on their stock in trade. The premises, utensils, and stock were burnt in December 1826; and the tenants made a claim against the Insurance Office, who disputed its correctness. After inquiry, they admitted that the tenants had an insurable interest in the premises to the extent insured under that head. In the mean time Mackintosh the landlord, and others as creditors of the tenants, used arrestments in the hands of the Scottish Union Company, who raised a multiplepoinding. Raigmore lodged a claim, 1. For £200, less or more, as the worth of the premises when delivered over to the tenants at the commencement of the lease, stating himself their creditor for that value, as they were bound by the lease to restore the premises in as good condition, at the expiration of it, as they had received them; and, 2. For the whole rents due, or to become due, under the current lease of the consumed premises.

To this the common agent for the other claimants answered—

1. That if Mackintosh meant to insure his premises against the risk of fire, he was bound to do so for himself. Only £100 was insured on premises, and that sum necessarily referred to certain new erections by the tenants, which were their own, as they were entitled to carry them away at the end of the lease, unless Mackintosh should then purchase them. He did not become a creditor of his tenants for the value of premises let, after the destruction of these premises by accidental fire, any more than he was before it; and,

2. Although it was true that he was a creditor for the rent up to the

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date of the fire, yet, after that date, he was not so, because the subject let had perished, and nothing remained to be tenanted or rented.

The Lord Ordinary "sustained the claim to the extent of the rents due up to the day when the building was destroyed by fire, and preferred the claimant (Mackintosh) for the same from the date of his arrestment in the hands of the raisers; repelled his claim for any subsequent rent, and for the value of the buildings; further, repelled his claim to any part of the sum insured by the tenant on the buildings, in respect that the tenant had expended on the buildings a sum equal to that insured, and that the raisers admitted, after due inquiry, that he had an insurable interest to that extent; but in respect the claim was not disputed, in so far as it has been sustained, found the claimant liable in the expenses occasioned by the discussion of it."

Mackintosh reclaimed; but the Court adhered.

R. Roy, W. S.—J. Stuart, S. S. C.—Agents.

No. 162.

George Alston, Suspender.—*Cuninghame.*
Rev. Patrick M'Beth, Charger.—*Anderson.*

Process—Expenses—A. S. July 11. 1828, § 37.—A suspender having printed his letters and reasons of suspension, and no answers being lodged by the charger; but an intention to lodge answers being intimated by his agents; and they having borrowed six copies of each of the printed papers; and the suspender being allowed his expenses—Held that the charger was not entitled to object that the printing should be disallowed in the suspender's accounts, as an expense which was unnecessary in virtue of A. S. July 11. 1828, § 37.

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Ld. Corehouse.

The 37th section of the A. S. July 11. 1828 enacts, "that in actions in which no appearance has been entered, or in which defences or answers have not been returned where this ought to have been done, it shall not, in the first instance, be necessary to print and box the summons or letters for the use of the Lord Ordinary."

In June 1830, Mr. Alston printed letters of suspension against M'Beth, and also lodged printed reasons. On 6th July, the agents of M'Beth wrote to Alston's agent that they understood the time for putting in answers was prorogated by him till the first box-day; and on 20th and 21st July they asked and received six copies of the printed letters, and six of the printed reasons of suspension. They did not, however, put in answers; and Alston having been found entitled to his expenses, the Auditor, in reference to the preceding section of the A. S., struck out of his account the expense of printing the letters and the reasons, because, as no answers had been lodged, there had never been any necessity to print.

Alston objected to the report, but the Lord Ordinary repelled the objection. He then reclaimed, and pleaded that as M'Beth had taken the benefit of the printing by borrowing six copies, and had thus given the strongest reason to believe that he was to lodge answers, he could

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To this it was answered—The papers were printed long before M'Beth applied for the copies, or gave any indication of entering answers. He only borrowed the copies, because they were previously printed; but, by the A. S., there never was any necessity to print them at all.

Lord Gillies.—M'Beth first takes the full use of the printing, and then refuses to acknowledge the expense of it as a charge for which he can be rendered liable along with the other expenses. This cannot be permitted.

Lord President.—He should not have touched the printed copies, if he meant to object that, by his lodging no answers, there never was occasion to print at all.

Lord Craigie.—I am of the same opinion. He cannot now shake himself free of this expense.

Lord Balgray assented.

The Court therefore altered, sustained the objection to the Auditor's report, and found M'Beth liable in the expense of printing the letters and reasons of suspension.

W. Waddell, W. S.—Tod and Hill, W. S.—Agents.

No. 163. Mrs. Halliburton or Cochrane, Advocator.—*Skene—Brown.*
James Lawson, Respondent.—*D. F. Hope—Pyper.*

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This was a special case, relative to a claim made by James Lawson, tenant in Castle Nairne, against Mrs. Halliburton or Cochrane, as executrix of the late Mr. Gersham Gourlay of Baikie, for an account amounting to £824. 15s. 2d., extending back for many years, and consisting of an infinite number of minute and miscellaneous charges and furnishings, as to which no books or regular vouchers were produced. The Sheriff of Forfarshire, having allowed a proof, sustained the action to the extent of £362. 11s. 3d. Mrs. Halliburton advocated, and the Lord Ordinary assoilzied her entirely; and the Court unanimously adhered.

A. Howden, W. S.—Macmillan and Grant, W. S.—Agents.

No. 164. Joseph M'Christie, Pursuer.—*D. F. Hope—Whigham.*
Mrs. Helen Kea or Fisher, Defender.—*Gillies.*

Wrongous Imprisonment—Act 1701, *c.* 6.—The prescription of actions for wrongous imprisonment, established by the act 1701, does not extend to those founded on imprisonment for civil debt.

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The pursuer M'Christie having, in 1826, been imprisoned at the instance of the defender Mrs. Fisher, whose tenant he was, for payment of his rent, he, in the same year, raised an action of damages as for wrongous imprisonment, on the ground that the diligence against him had been

enforced, notwithstanding the dependence of a sist obtained on a bill of suspension. He also brought a suspension and liberation, in respect of the dependence of which the Lord Ordinary (Feb. 14. 1827) sisted further procedure in the action of damages till the process of suspension and liberation should be finally discussed. On the letters being suspended in that process, as mentioned ante, VIII. 481, M'Christie, in March 1830, raised a summons of wakening of the action of damages, which had fallen asleep, no step having been taken in it since the interlocutor sisting it, dated 14th February 1827. Mrs. Fisher now objected, that not having been insisted in yearly, it had fallen under the prescription of actions for wrongous imprisonment established by the act 1701, which, she contended, was applicable equally to imprisonment on civil diligence as to imprisonment under criminal procedure.

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The Lord Ordinary having repelled "the plea of prescription founded on the statute 1701, c. 6, as a preliminary defence," Mrs. Fisher reclaimed, and argued fully the general question how far the statute applied to the case of imprisonment for civil debt. The Court, however, were clearly of opinion that it did not; and as there was no judgment in terminis deciding the point, they pronounced the following interlocutor:—"Adhere to the interlocutor submitted to review, and refuse the desire of the reclaiming note, in respect that the act 1701, c. 6, does not apply to imprisonment for civil debts."

Authorities.—Gordon v. Hope, Feb. 10. 1705, (17066); Bain v. Dunbar, Aug. 11. 1714; Sinclair v. Sinclair, July 1. 1742, (Elchies v. W. J.); Arbuckle v. Taylor, Dec. 5. 1820, (not rep.)

R. W. Niven, W. S.—W. Spalding, S. S. C.—Agents.

ANDREW DEMPSTER, Pursuer and Suspender.—*Jameson—Anderson.*
MASTERS and SEAMEN of DUNDEE, Defenders and Chargers.—*Ld. Adv. Jeffrey—Sandford.*

No. 165.

Corporation—Prescription.—Circumstances which were held not sufficient to infer a right to corporate privileges on the part of an association.—2.—Circumstances in which a corporation was held not to have acquired right to levy a certain duty on all coals brought into a port.

A society, called the Fraternity of Masters and Seamen of Dundee, has long existed in that burgh. There is no record extant of its original institution; but, from mention made of it in documents subsequent thereto, it would appear to have been a voluntary association, in existence at the beginning of the 17th century, for the relief of indigent and unfortunate members engaged in seafaring pursuits, and of their families, out of contributions and duties agreed to be paid by the members. In 1687, the Privy Council, on a representation by this Fraternity, granted warrant to them to erect lights and beacons on the frith of Tay, "empowering and authorizing them, their boxmaster or boxmasters," to exact, for the

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erection and maintenance thereof, 12d. Scots per ton from all vessels entering the river Tay. In 1766, steps were taken by the Fraternity for getting themselves, as stated in their minutes, "incorporated in a regular legal form and society;" and in 1771 they agreed on the articles and regulations to be embodied in the royal charter which it had been agreed to grant them,—the first of which articles was, "that every person who now stands enrolled as a member of the Fraternity, as a private society, should be deemed and holden a member thereof when made a legal corporation." In 1774 a royal charter was granted, which, after narrating that the society had long existed, and had been recognised by the act of Privy Council above referred to, and bearing further, "quod sub descriptione supra memoratâ societatis contributiones promoverunt, et inter seipsos peramplum fundum stabiliverunt in sustentationem sociorum deficientium," &c.,—and also, "quod, non obstantibus illis circumstantiis, non apparet unquam fuisse ullam legalem constitutionem hujus societatis,"—proceeded to erect the Fraternity into a body corporate with the usual powers, confirming to them the duty granted by the Privy Council for the maintenance of beacons, and generally in common form, "omnia prædia, summas monetæ, jura, commoda, beneficia, securitates, emolumenta, potestates, privilegia, aliaque negotia, et res quascunque, per dictam societatem, vel ullum sociorum ejusdem, pro usu vel beneficio ejusd., quæ adhuc habuerunt, reciperunt, fruiti sunt, jus habuerunt, fecerunt, vel egerunt; tenendas, habendas, recipiendas, exequendas, et potiundas, omnia et singula &c., tam amplo &c., quam dicta societas, vel ullus socius ejusdem, antea tenuerunt, fruiti sunt, et eadem exercuerunt." From an early period, the members of the Fraternity had been in use to pay into their box certain duties on articles imported into Dundee. In 1704, the "masters subscribing" bound themselves, inter alia, "that every ship or bark that livers above six chalders coals shall pay two and a half creill to the seamen's box for each voyage;" and in 1716 they appointed a cellar to be taken for holding these coals. This payment in kind was afterwards commuted into a duty of twopence sterling per chalder, which was levied by the collector of the Fraternity, who appeared to have occasionally raised actions for enforcing payment. The minutes of the Fraternity imposing dues were, in most instances, expressed generally, without specially mentioning the members of the association as the only parties liable therein; but, in the appointment of the several collectors, they were merely authorized to levy the sums "in use to be paid by the different members of the Fraternity, and for which they are bound by their own regulations, in name of poor money and coal money." This duty, which was exacted on Scotch coals only, (a smaller duty being payable on English coals, in terms of a minute expressly limited to members of the Fraternity,) was continued to be levied after the date of the royal charter; and the collection being generally intrusted to the same person who collected the harbour dues, and who was allowed a per-centage on the amount drawn by him, it was very generally paid in a slump

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sum, along with the harbour dues, by individuals not members of the Fraternity; but these, as it appeared, were generally ignorant that part of the slump sum paid by them consisted of the twopence per chalder for the box of the Fraternity. In 1825, however, the pursuer Dempster, who was not a member, having refused to pay this duty, an action was raised against him by the boxmaster before the Sheriff of Forfar. The Sheriff, after allowing a proof, decerned against Dempster for the dues claimed, whereupon he brought a suspension, and at the same time raised an action of declarator of immunity. These processes having been conjoined, the Lord Ordinary reported them on Cases to the Court, who ordered a hearing in presence.

Pleaded for the Fraternity—

Prior to the royal charter of 1774, the Fraternity were a corporate body by prescription, and had been recognised as such by the Privy Council, and also by Courts of Law allowing their office-bearers to sue; and the circumstance of their having sought a royal charter cannot affect their previously existing rights. As a corporation, therefore, they had a title to prescribe a right to levy the duty in question by immemorial usage. At all events, the charter of 1774, which contained a general grant of duties and emoluments, conferred such a title; and they will prove possession by the levying of dues from strangers as well as members, both before and after the royal charter.

Pleaded for Dempster—

Corporate privileges cannot be acquired by prescription, although, where there is no evidence of the original constitution of a society, a charter may be presumed from immemorial enjoyment of such privileges. Here, however, there is sufficient evidence that the Fraternity was merely a private charitable association, previously to their obtaining the royal charter in 1774; and consequently, till then, they could not have a title to acquire the right of levying dues. But even the charter does not confer a right to levy any dues from strangers, except those granted by the Privy Council for the maintenance of lights; and the Fraternity, therefore, could never acquire a right in the face of their own title. Besides, the King has no power to grant a right to levy duties from the lieges, unless for some adequate counter advantage conferred on them, as by the erection of harbours, or the like; and, at all events, the minutes of the Fraternity prove that the duties in question were only leviable from their own members, and not from strangers.

Lord Justice-Clerk.—There has been no proof here, as in a concluded cause; but I do not think further investigation necessary; for when we consider all the steps taken by the society previous to obtaining the charter from the Crown, and the minutes of the society, they amount to an express acknowledgment that previously it was only a private association of individuals. The charter, no doubt, besides confirming the duty granted by the Privy Council for maintenance of the lights, also confirms generally the rights and privileges of the society; but we must look at these as recited in the charter, and I can see

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nothing giving countenance to the idea that they were entitled to levy the duties in question from the public at large. In their directions to their collectors, there is not a vestige of an attempt to levy from the lieges, but only from members, in conformity with the statement in the charter of the nature of the right. That being the case, I am of opinion that they are not in a condition to be allowed to retrace their steps, and say that all this time we have been in error, and we must now be allowed to prove that we were ab antiquo a corporation belonging to the town of Dundee, and as such to prescribe a right to levy a tax on the public. I cannot allow this, and must view the association as first incorporated in 1774. Then I ask if they can prescribe a right to such a tax. It is clear they cannot, as the charter affords no foundation for doing so; and even looking at the proof, I am surprised at the Judge Ordinary coming so easily to the conclusion he arrived at, for it seems to be very contradictory. But it is not necessary to go into the proof, as the charter affords no title.

Lord Meadowbank.—If we were to decide at present, I would arrive at the conclusion of your Lordship, as there certainly is not sufficient proof in any view. Further, if we were to determine whether a private association could prescribe such a duty, I would also agree; but the difficulty I had was, that in 1687, to a particular effect, this society was erected into a corporation, with power to levy duties for lights; and if constituted to that effect, the difficulty I had was, whether it might not give them a title to exceed the duties thereby conferred, and prescribe a right to additional duties by immemorial usage? I cannot hold the mere act of going to the Crown conclusive against the society having previously been a corporate body, as many incorporations have gone to the Crown. But though I have some doubt, it is not sufficient to lead me to differ from your Lordship.

Lord Justice-Clerk.—I view the grant as to lights as if in favour of an individual.

Lord Meadowbank.—I consider them just as I would an individual exceeding the privileges granted.

Lord Glenlee.—I did not think it of much consequence whether the society was previously a corporation or not; for unless they had condescended relevantly on immemorial possession by special facts necessarily inferring that the duties were leviable against the public, though not members, there could be no foundation for their claim. Now every thing in the condescendence imports that they were proceeding on private obligations on the part of their own members, and there is no vestige of any thing else. Their own instructions to their collectors confine these to their own members, and so they are contradistinguished from the duties for lights. I think, therefore, that there is nothing relevantly alleged. The question of title, however, would still remain. Immemorial possession in particular cases may infer a title, though it is ticklish to go upon this. It has been held, even as to a burgh, that immemorial possession will not give right to levy duties from strangers, which is much stronger than this.

Lord Cringletie.—I concur with your Lordship and Lord Glenlee. There are two questions, 1. Whether this was ever a corporation prior to the charter? and, 2. Whether the exactions claimed could be sanctioned. As to the first—This

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was just a fraternity. They apply to the Privy Council, who make a contract with them, not erecting them into a corporation at all, but only making a contract with them for maintaining the lights on the Tay. Now, will any immemorial usage entitle them to prescribe against their title? Where there is no title, it is sometimes presumed from long possession; but here the title is produced, and it can never warrant them to levy any thing beyond it. Then, when we look at the charter from the Crown, it states that they never were a corporation, and that the contributions were merely among themselves. They, no doubt, got a right to levy the duties they had previously done—but what then? Look at their own minutes and directions to collectors, which show that these were leviable from their own members.

THE COURT accordingly in the declarator repelled the defences, and decerned; and in the suspension suspended simpliciter.

Pursuer's Authorities.—Chitty's Prerogatives of the Crown, p. 385; Magistrates of Lauder v. Brown, Nov. 15. 1754; (5. Brown's Supp. 819); Warren v. Prideaux, 1. Mod. Rep. 104; Freeman v. Walghan, 2. Wilson, 296; James v. Johnstone, 2. Mod. Rep. 144.

Defenders' Authorities.—1587, c. 54, and Mackenzie's Obs. on it; Magistrates of Canongate, Feb. 18. 1727, (10908); Oliphant and Co. v. Magistrates of Ayr, Jan. 18. 1775, (1971); Earl of Aboyne v. Magistrates of Edinburgh, March 10. 1775, (1972); Magistrates of Lauder v. Brown, Nov. 15. 1754, (1987); Lord Kennet v. Lady F. Erskine, March 12. 1769, (10781.)

R. and A. KENNEDY, W. S.—BROWN and MILLER, W. S.—Agents.

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BLINCOW'S TRUSTEE, Pursuer.—*Skene—Wilson.*
ALEXANDER ALLAN and Co., Defenders.—*D. F. Hope—Whigham.*

Process.—1.—A summons concluding for reduction of the indorsations of certain bills by a bankrupt to one of his creditors, and for repetition of their contents, insufficient to reach payments in cash by the bankrupt, or the proceeds of a bill indorsed by the bankrupt's brother.—2.—A summons having concluded for reduction of two bank cheques, and repetition of their contents; and the Court having assoilzied as to one, but reduced the other, and remitted to the Jury Court to try an issue relative to the funds against which it was drawn; and a verdict being returned; and a supplementary summons being thereafter raised to reach the cash payments and indorsations above specified—Incompetent to conjoin the actions.—3.—A supplementary action having reference to a transaction falling under the act 1696, but not libelling on the act, and containing no reductive conclusions, dismissed as inept.

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Ld. Moncreiff. D.

THE pursuers raised an action of reduction, on the act 1696, c. 5, against the defenders, setting forth that, in September 1825, the bankrupt William Blincow had granted bond to the defenders, bankers in Edinburgh, for £2500, payable in three instalments of £833. 6s. 8d. each, to fall due respectively on 4th October 1826, and 4th April and 4th October 1827;—that he kept an account-current with them separately from his bond account; and when the first instalment fell due, it was paid by a transference of £833. 6s. 8d. from his credit in the account-current to the bond account;—that the second instalment was paid, after it was due, partly in the same way, and partly by indorsed bills;—that on 12th May he remitted in cash the proceeds of bills discounted by him in Aberdeen, amounting to £342. 8s. 10d., and indorsed bills, which, with an indorsation by his brother Valentine Blincow of a bill for £151. 7s. 8d., and a

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prior balance on the account-current credited by indorsed bills, placed £848 at his credit in that account;—that on that day he drew a cheque on the defenders for £833. 6s. 8d., and £5. 6s. 8d. of interest, and desired the amount to be carried to his credit in the bond account, in liquidation of the instalment which was to fall due on 4th October; and that a transference from the one account to the other was accordingly made. The action was directed against the cheques granted, and the bills indorsed by the bankrupt, and contained, besides the usual reductive conclusions, a demand for delivery of the indorsed bills, or repetition of their contents. One of the bills was described as being for £155, and as drawn by the bankrupt on his brother Valentine, and indorsed by the former to the defenders.

After the record had been closed, the Court assoilzied, except in reference to the appropriation of the last sum of £833. 6s. 8d., and interest, to provide for the third instalment, in regard to which they "found, that in the circumstances of the case, particularly the situation of William Blincow, and the third instalment of the bond not becoming due till the 4th of October 1827, that the payment of £833. 6s. 8d. sterling, and £5. 6s. 8d. of interest accruing thereon, made, on the 12th of May 1827, by means of a cheque or order, was not legal, and is to be considered as an evasion of the statute 1696;"—therefore sustained the reasons of reduction quoad said payment, and reduced and set aside the said cheque or order; but "found that the said sums are to be replaced to the account-current between the parties, in the same way and manner as if the said order or cheque had never been granted; further found that the defenders, besides being creditors by bond, were also the ordinary bankers of William Blincow and Company; that they transacted their business, and discounted their bills, in the ordinary way of trade, and that such transactions do not fall under the sanction of the statute 1696, and therefore assoilzied the defenders on that head, and decerned; but found that they are bound to account to the trustee for the creditors of William Blincow and Company for their intromissions in the ordinary way, reserving the rights of all parties interested, as accords of the law; and, for ascertaining the whole of the said matters, remitted to the Lord Ordinary to proceed, and do further in the case as to his Lordship shall seem proper."[1]

The above instalment being then replaced in the account-current, the defenders maintained that they had a lien over the amount in security and payment of their debt. On the other hand, the pursuer alleged that the money had not been paid to them in the ordinary course of trade, but to give them an undue preference, and therefore that they had no such lien.

The Lord Ordinary having reported the case, the Court "of new remitted to the Lord Ordinary to examine whether the funds in the defenders' hands, against which the cheque for the amount of the third instalment of the bond was presented, were paid to the defenders in the ordinary course of trade, or were deposited with the view and for the purpose of afford-

[1] Dec. 3. 1828, (ante, VII. 124.)

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ing to them an undue preferenceover the other creditors of the bankrupts." [1]

The Lord Ordinary then "remitted to the Jury Court to determine the question referred to in the interlocutor of the Court contained in the said remit;" and an issue was sent to a Jury, "Whether, in terms of the interlocutor of the First Division of the Court of Session, dated 12th June 1829, the funds against which the said cheque was presented were not paid to the defenders in the fair and ordinary course of trade, but were deposited with the view and for the purpose of affording to the defenders an undue preference over the other creditors of the said William Blincow and Company?" The Jury found, "in respect of the matters proved before them, that the funds against which the cheque was presented were not paid to the defenders in the fair and ordinary course of trade, but were deposited with the view and for the purpose of affording to the defenders an undue preference over the other creditors of William Blincow and Company."

At the trial it appeared that the funds against which the cheque was presented, had arisen from indorsations of bills by the bankrupt only to the extent of £354. 4s. 5d., while the rest consisted of cash payments to the amount of £342. 8s. 10d., and an indorsation by Valentine Blincow, the bankrupt's brother, for £151. 7s. 8d. As the summons only concluded for the reduction of the cheques and the bankrupt's indorsation of bills, and for repetition of the contents of the bills so indorsed, the pursuer raised a supplementary summons setting forth the state of the original action, and the verdict of the Jury, as establishing that the funds against which the last cheque was presented had been deposited in the defenders' hands for the purpose of creating an undue preference; and alleging that nevertheless the defenders objected to repeat any part of these funds, except what arose from the proceeds of the bills called for in the first action, in respect the first libel "does not conclude for repetition of any sums of cash or money deposited by the bankrupt," &c.—"Therefore, in addition to the conclusions of the foresaid action, and as supplementary thereto, it should be declared" that the pursuer was entitled to repetition of any funds paid into the defenders' hands within sixty days of the sequestration, and not in the fair and ordinary course of trade; that the funds against which the third cheque was presented had been so paid in, and that the defenders should be decerned to repeat them." The summons concluded also for conjunction with the former process, but it contained no reductive conclusions.

In defence it was maintained—

1. That as the record had been closed in the original action, and it had been terminated by a verdict, no amendment of the libel was competent; and the supplementary action could not be conjoined with it.

2. That neither could the latter be sustained as an independent action,

[1] June 12. 1829, (ante, VII. 753.)

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because, although the transaction was challengeable only on the act 1696, yet it did not libel on that act, and there was no reductive conclusion; and,

3. That it was not competent, in the original action, to decern, under the special terms of the original summons, for repetition of payments in cash or bills not indorsed by the bankrupt.

In the original action the Lord Ordinary "found, in terms of the verdict with reference to the conclusions of the summons in this action, 'that the funds against which the cheque was presented were not paid to the defenders in the ordinary course of trade, but were deposited with the view and for the purpose of affording to the defenders an undue preference over the other creditors of William Blincow and Company;'—that, under the verdict as applied to the summons in this action, there are termini habiles for reducing the transaction by which bills enumerated in the summons were indorsed by William Blincow and Company to the defenders, and funds were thereby deposited in their hands, against which the cheque in question was made and presented;—found it sufficiently ascertained that there were funds in their hands, created by the indorsation of such bills, to the amount of £354. 4s. 5d., and that the pursuer is entitled to decree of reduction, and for payment, to that amount; reduces, decerns, and declares accordingly, and decerns for payment of the said sums of £354. 4s. 5d., with interest, at the usual rate then allowed by the banks, from and after the 14th day of May 1827, the date of presenting the cheque granted as the amount of the third instalment of the bond, till the date of the execution of the summons, and thereafter at the rate of five per cent. till paid;—but in respect that there is a difficulty in applying the interlocutors of the Court, and the verdict of the Jury, to the conclusions of the summons in this action, so as to give any decree to a greater extent, (which difficulty the pursuer has endeavoured to obviate by a supplementary action raised after the issue in this cause had been tried, and a verdict returned,) makes avizandum to the Court with this process quoad ultra, and appoints the parties to lodge, print, and box short minutes of debate, explaining their several views as to this part of the cause; the minutes to be interchanged by the box-day in the ensuing recess, and printed and boxed by the third sederunt day in January next;—found the pursuer entitled to the expenses incurred by him in the Jury Court, and in the trial &c.; and reserves all questions as to the expenses incurred in the Court of Session."

In the supplementary action, the Lord Ordinary at the same time ordered minutes of debate for the information of the Court as to the state of the cause, particularly as to the conjunction of the processes. His Lordship added the subjoined note.*

* "NOTE.—The Court, by final interlocutors, sustained the defence as to the second instalment of the bond, but reduced the cheque drawn for the third instalment. But a question remained as to the right of the defenders to retain the funds in their hands, independent of the cheque, or the payment of it. Holding this to be a separate case,

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Against the above interlocutor the defenders reclaimed, stating that two of the bills falling under the first summons had been eventually dishonoured, and that their amount was £164; that, consequently, there was no balance of £132. 19s. 9d. truly at the credit of Blincow on the day after he drew his second cheque; and that the sum of £354. 4s. 5d., decerned for by the Lord Ordinary, went upon the erroneous supposition that the above balance had been at Blincow's credit, as the proceeds of bills referred to in the summons.

To this it was answered—That as the dishonouring of the bills was not res noviter veniens, it could not now be competently stated.

The Court first took up the supplementary action.

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the Court ordered an issue for trying it; and the issue, in conformity to the interlocutor, was so expressed as to apply to the whole funds against which the cheque was drawn. The verdict is in the same terms. After getting this verdict, the pursuer, on looking into his summons, thought it imperfect, or at least of doubtful effect. After the cheque had been reduced, the question was, whether the pursuer could also, under the act 1696, reduce the transaction by which the funds were deposited, so as to bar the plea of retention. And having this in view, he had concluded in his summons for reduction of the indorsations of a great number of bills particularly enumerated. It now turned out that a considerable part of the funds in the hands of the defenders had not arisen from the indorsations of these bills by Blincow and Company, in as far as a sum of £342. 8s. 10d. had been paid to the defenders in cash, and the last bill mentioned did not exist in the form stated, though a bill of the same amount, accepted by Blincow and Company, and drawn by Valentine Blincow, who was no partner of the company, but one of the cautioners in the bond, had been indorsed by him to the defenders. But the summons contains no conclusions which can be applied to the transaction by which the funds were deposited, otherwise than as they were supposed to arise from the indorsations of the bills particularly stated by the bankrupts Blincow and Company. To supply this defect, the pursuer raised a supplementary action, and moved that it should be conjoined with this action. The Lord Ordinary has seen difficulty in conjoining a new summons with an action which has already terminated in a verdict, and also thinks it impossible to make the summons in the original action effective to the extent of the terms of the verdict, without holding it to apply in a manner contrary to the admitted state of the fact. He has therefore thought it advisable to give decree as far as the summons clearly admits of, and quoad ultra to report the case, in order that the Court may determine the effect of the verdict. If the Court should find the difficulty insuperable in this process, it will remain to be considered how far the case can be extricated under the supplementary action. There may be more doubt as to the application of the original summons to the bill for £155 than as to the cash payment; but there being great difficulty in that also, the Lord Ordinary has thought it necessary to leave the point open.

"NOTE.—In a note to an interlocutor of the same date in the original process, the Lord Ordinary has adverted to the difficulties arising from the form of the summons in the original action, and the objection to conjoining them after verdict. If this supplementary summons should be considered entirely by itself, in so far as its object is not attained by the previous summons, the Court will then have to decide in what manner it ought to be proceeded in. It may be a question whether the verdict in the other cause between the same parties might be held by the Court as conclusive evidence in point of fact excluding the necessity of further proof, and whether they might then consider the

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Lord Balgray.—It is quite impossible to conjoin this with the first action. Such a proceeding would unhinge every principle in our form of process. Then if the supplementary action is to be viewed per se, it is imperfect, as it is meant to operate in virtue of the act 1696, yet contains no reductive conclusion.

Skene.—The cheque which transferred the £833. 6s. 8d. from the account-current stands reduced in the first action. That left it open to us to claim the sum by a petitory conclusion in our supplementary summons, which was the only thing wanting in the original action.

Lord Balgray.—By no means. The decree of the Court in the first action merely reduced the cheque, so as to throw the money back from the bond account into the account-current between the bankrupt and the defenders. Every thing else was entire. The bills, or the cash in the account, remained there in the hands of the defenders, who plead a lien over it, which you cannot overcome without the aid of a farther reductive conclusion. But this summons contains none. The fact of the funds in the defenders' hands having arisen in part from cash payments, was never before the Court at all at former advisings; and although such payments might, in some cases, be reducible as well as bills, it is only after their reduction that room is made for a petitory conclusion. The supplementary summons contains no such reductive conclusion, and is therefore inept.

Lord President.—We cannot conjoin the actions, and in respect thereof we must dismiss the supplementary summons, with expenses.

Lords Craigie and Gillies concurred.

The Court then "sustained the objection to the supplementary summons that it contains no reductive conclusion, dismissed the same, and decern, reserving to the pursuer to bring a new action of reduction and repetition, if otherwise competent; and found the pursuer liable in the defenders' expenses incurred in the supplementary action."

In the principal action the Court adhered, under the qualification of remitting to the Lord Ordinary, in reference to Allan and Company's reclaiming note, to hear parties as to the effect of their statement that there were two dishonoured bills whose full contents could not be made available to the pursuer, as they had not been received by the defenders.

Their Lordships, therefore, "remitted to the Lord Ordinary to hear parties on the defenders' claim for deduction of the sum of £118. 19s., upon which they have not been heard before his Lordship; quoad ultra, adhered to the interlocutor reclaimed against, and refused the desire of the note, and decerned and allowed decree to go out; and be extracted

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case of the money which was deposited in cash, and the bill indorsed by Valentine Blincow, as making a case of law, to be judged of on the assumption of the finding of the jury in point of fact. This may be attended with difficulty. But supposing that difficulty to be overcome, there would still be this separate difficulty in point of form, that the supplementary action contains no reductive conclusion; and this being a challenge depending entirely on the act 1696, it may be impossible to reach the act of paying or depositing the money within the sixty days, without such a reductive conclusion."

ad interim for the sum decerned and found due in the Lord Ordinary's interlocutor, under deduction of the foresaid sum of £118. 19s., and corresponding interest; reserving all questions of expenses incurred in Court of Session."

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Wright &c. v. Logan &c.

Defenders' Authorities.—(1.)—Original Action.—6. Geo. IV. c. 120, § 2. 6. 10. 11; A. S. July 11. 1828, § 115.—(2.)—Supplementary Action.—4. Stair, 40. 8; Lady Monboddo, July 3. 1712, (12151); A. S. 1726; A. S. Feb. 7. 1810; 6. Geo. IV. c. 120, § 10; Webster, March 1. 1823, (ante, II. 260); Sir J. Johnstone's Trustees, June 22. 1824, (2. Wilson and Shaw's App. 461); Scott, Jan. 29. 1829, (ante, VII. 338); M'Dougall, Feb. 25. 1829, (ante, VII. 460.)

J. Pattison junior, W. S.—Allan and Bruce, W. S.—Agents.

John Wright and Others, Pursuers.—*M'Neill.*
Walter Logan and Others, Defenders.—*D. F. Hope—A. M'Neill.*

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Jurisdiction—Statute.—Held, with reference to certain statutes for the improvement of the navigation of the Clyde,—1.—That the judgment of the Sheriff, on the titles of parties claiming right to ground required by the river trustees, was, after the lapse of a certain period, final, to the effect of transferring the ground assessing damages, and ordering payment of them;—but,—2.—That the judgment on the titles was thereafter subject to review, by reduction, to the effect of deciding as between competing claimants, which of them had right to the property, and consequently to the damages.

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The statute of 32. Geo. II. c. 62, was passed for the improvement of the navigation of the Clyde.

By the 4th section it is provided that the parties, whose lands or other hereditaments were injured by the operations of the Magistrates of Glasgow in deepening the river, "in case the said Magistrates shall not agree with the parties so interested, and make payment to them of the amount of such damages to their satisfaction," should complain to the Sheriff-Depute, "setting forth the titles and interests in the lands and other hereditaments, and the damage done to them," and craving redress. After due service of this complaint, the Sheriff was directed to "proceed to hear parties, and finally determine the said matter."

§ 5. "And be it further enacted, that the Sheriff Depute shall have full power and authority to hear and determine upon the import of the titles and rights of the party complaining to the lands and other hereditaments, in respect of which damages are acclaimed; and in case any person interested shall find cause to challenge the judgment of the Sheriff upon the import of such titles, it shall be competent to such persons to apply to the Court of Session by petition, and have such judgment reviewed, altered, or amended; and the Judges of the said Court of Session are hereby required to proceed therein immediately, without abiding the course of any roll."

§ 6. "Provided always that such application shall be made to the Court of Session within 21 days on which the Court shall sit, after the Sheriff Depute has pronounced his judgment upon the import of the said titles; and in case no such application is made to the Court of Session

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within the time aforesaid, or after decree or judgment of that Court declaring the titles and rights of the contending parties in the lands and other hereditaments aforesaid, shall be pronounced and extracted, it shall and may be lawful to the Sheriff Depute, and he is hereby required, to proceed to the ascertaining of the amount of the damages which shall be done or occasioned to any of the lands &c. aforesaid; and to divide and apportion the same amongst the several parties who shall be found to have interest therein as aforesaid, without delay, in manner herein after directed."

The 7th section required the Sheriff to summon a jury to assess the damages and directed the jury "to ascertain the amount of the damages, as to them shall seem just, and also what proportion of the same shall belong to each of the parties interested as aforesaid; and the Sheriff is required, without delay, to give forth his final judgment and decree against the said Magistrates for payment of the sum so ascertained in name of damages, with full costs of suit; and which decree of the Sheriff shall be final, and subject to the review of no Court whatsoever," &c.

By a subsequent statute, 10. Geo. III. c. 104, having a similar object in view, it was provided, as to ground taken or damage done by the Magistrates, that "in case of any difference between the Magistrates and the owners as to the value of the ground, or extent of the damage, the same shall be determined by the Sheriff in manner directed by the said act" of 32. Geo. II. By 49. Geo. III. c. 74, also relative to the Clyde navigation, the provisions above set forth for deciding questions between the Magistrates as river trustees, and the owners of land &c., were continued.

In 1822, a dispute arose as to the value of certain ground lying by the river-side, which was demanded by the Magistrates under their statutory powers. Besides a difference regarding its value, another question occurred as to its ownership. Wright and others, feuars of Clyde street, contended that they were the proprietors in virtue of a disposition from John Maxwell, writer in Glasgow; while Walter Logan and others insisted that the disposition to these feuars conveyed only a right of servitude over the ground in question, described in their titles as "the water-side grass," and that the property of it had been subsequently acquired by themselves from Maxwell. The contending parties being before the Sheriff under the acts above mentioned, he pronounced a judgment in 1824, finding that the titles of the Clyde street feuars did not convey to them any right of property, but of servitude merely. It being afterwards necessary for the river trustees to assume another portion of the same ground, a new judgment of the Sheriff was pronounced, in October 1829, under a separate application at the instance of the trustees, finding that the right of the Clyde street feuars had been formerly determined by him, in 1824, to be merely a servitude; and as that previous judgment had become final by not being reclaimed against, he found, in this process also, that their right was a mere servitude. Wright and others

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then presented petitions to the Court of Session, both against the judgment of 1824 and of 1829. The Court dismissed the former as incompetent, in respect that it had not been presented within the time limited by the statute, but granted the prayer of the latter, and found that the feuars' titles gave them a right of property in the ground called 'the water-side grass,' which had been occupied by the river trustees.[1]

Wright and others thereafter brought a reduction of the Sheriff's judgment of 1824, to which it was pleaded as a preliminary defence, that all parties had acted in conformity with the statutes in that procedure under which the Sheriff's judgment of 1824 was pronounced; and at all events the pursuers had homologated any irregularities which had occurred; that the whole procedure was statutory; the power given to the Sheriff to decide, and to the Court of Session to review his judgment, was entirely statutory; and the only competent mode of review was by petition within a limited time; failing which, all review was cut off. To that effect the mode of review described in the statute was not permissive merely, but imperative. It would defeat a leading object of the statute, if the Sheriff's judgments were open to review in any other than the precise mode therein pointed out. In the same way that the summary process of review made competent in election cases was exclusive of every other, so ought the summary review to be the only one admitted here.

In answer to this, the pursuers,—besides pleading certain irregularities as throwing the defenders out of the protection of the statutes, and contending that they had not homologated, and could not homologate these irregularities,—maintained that the summary review by petition, as allowed in the statute, was granted in words permissive, and not excluding all others. But, at any rate, it was only to a special and limited effect that the power of deciding was given to the Sheriff. His decision was to be pronounced before assessing the damages; it was necessary to assess the damages as at the date of the change of possession of the subjects; and therefore, to avoid delay, his judgment on the titles of parties, unless exposed to summary review under the statute, was to be a sufficient warrant to him to proceed and ascertain the amount of damage, and to order payment of it. For the safety of the Magistrates, this order, as against them, was final and irreversible; but it did not place the right of the party receiving the damages beyond the reach of challenge at the instance of the true owner of the subjects, whose heritable rights could not be held to be conclusively cut off to all effects by a judgment pronounced in so summary a way.

The Lord Ordinary ordered minutes of debate, and "made avizandum to the Court with the question as to the competency of the action," &c.*

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[1] Dec. 15. 1829, (ante, VIII. 247.)

* "NOTE.—The Lord Ordinary is of opinion, 1. That the action of reduction is not excluded by the judgment of the Court refusing a petition and complaint, after the sta-

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LORD BALGRAY.—I arrive at the same conclusion with the Lord Ordinary. It was necessary to take means for giving the Magistrates speedy access to the property which they found requisite for the purposes of the act. The Sheriff was therefore ordered primarily to ascertain the rights of competing parties, so as to enable the Magistrates to deal with a party having power to give them a good title to the ground, and a good discharge for the price. And if the Sheriff's judgment, affecting the import of the titles was to be challenged before steps were

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tutory time, as incompetent; and, 2. That it is not excluded by the statute itself. On this last point, it appears to him that there is an important distinction to be made. The jurisdiction to decide on the effect of the heritable titles is given to the Sheriff for a specific object,—viz. for carrying into effect the purposes of the act, in order to which it was essentially necessary that the damage done on the ground taken should be ascertained and valued at the time when the thing took place, and before the condition of the ground should be changed; and as discussions about the title might have delayed this, the Sheriff is empowered to decide such questions; and it is provided, that if any party be dissatisfied, it shall be competent to him to obtain redress, within twenty-one days, by complaint; and that if no complaint be presented within that time, "it shall and may be lawful to the Sheriff Depute, and he is hereby empowered to proceed to the ascertaining of the amount of the damages," &c. To the effect, therefore, of warranting and requiring the Sheriff to proceed, and even to order payment of the damage or value ascertained, his judgment may be made practically final, if not complained of in the way or within the time pointed out, although no finality is expressly declared. But the statute has gone no further. There is nothing in it which can be held to make the judgment on the heritable titles conclusive, as between parties alleging right to the property, to any other purpose or effect. It does not declare the judgment final at all; and it appears to the Lord Ordinary that it would have been a very strong measure indeed to have made such a judgment of a Sheriff absolutely conclusive on the most important competitions of heritable rights. This is altogether different from the case of the Election Statutes. These statutes relate to matters of public law, not to matters of private right; and the summary jurisdiction given is directly given to the same Court, who might otherwise have tried the matter in another form. By the terms of the statutes, the decision on any complaint necessarily exhausts the whole matter, and ascertains the election made; and the whole object of the statute would be defeated, if another mode of challenge were competent after the statutory period. It is not so in this case. The whole purposes of the act may be obtained; and yet a question of title of the utmost difficulty and intricacy on its final merits may remain to be tried. Further, according to the terms of the clause, it may be doubted whether, if a complaint was presented within the time, and the Court decided on it, the Sheriff would be barred from proceeding by an appeal to the House of Lords. If he would not, the case is again quite different from the case of election; and it would be singular if a man might have his estate adjudged to belong to another, without having the ordinary means of trying the merits of his title; but if an appeal would stop procedure, the object of the clause would be in a great measure defeated.

"The Lord Ordinary takes this view of the matter, supposing the provisions of the statutes to have been observed. But he has some doubts on that point also. The argument of the defender goes chiefly to this, that the pursuers are barred by their own acts and consents from objecting to the regularity of the proceedings; but the Lord Ordinary doubts whether any consent to a proceeding before the Sheriff Court could bar the review by this Court, if that proceeding has not been precisely in conformity to the statute, supposing that it would have been barred, if the statute had been followed."

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taken to assess the damages, this was to be done in a limited time, failing which, the damages were to be assessed, and the parties found entitled to them by the Sheriff could give an irreversible right to the ground in question to the Magistrates. But suppose A. is found entitled by the Sheriff to the ground and its value, and he grants a title to the Magistrates, who pay him for it, but it turns out afterwards that B. is the true proprietor—that circumstance may not indeed hurt the Magistrates, who acquired their property consistently with the provisions of the statute; but it will certainly form a good ground of repetition against A., at the instance of B., for having received money which never belonged to him.

Lord Craigie concurred.

Lord Gillies.—I am of the same opinion. When parties appeared before the Sheriff, he was empowered to decide on their titles, to the effect of explicating the purposes of the statute. His judgment was effectual to this extent, that the subsequent valuation by the jury should be good against the real proprietor, whoever he might be, and that he might not be entitled afterwards to plead that such valuation was res inter alios. But I cannot hold it to have been intended that the Sheriff was empowered, by so hasty a process, to cut off the rights of the true proprietor of the lands, which it was found necessary to deliver over to the Magistrates.

Lord President.—I concur. Suppose that a man had served himself heir to his father, in the belief that an older brother who had gone abroad is dead; the party so served gets into a dispute with another about the ownership of certain land which is required by the river trustees under the act; the Sheriff pronounces a finding that the younger brother is the owner, and this is not reclaimed against within the limited time; but afterwards the older brother comes home, and takes up his father's heritage:—Can he be told by the younger brother that the judgment of the Sheriff, finding him to be proprietor, is final and irreversible, not having been brought under review within the statutory time, and that the true heir is not entitled to repetition of the value of his land conveyed to the river trustees? I conceive the plea to be quite untenable; and though the younger brother may have received the value of the land in the mean time from the Magistrates, and granted them a discharge for the amount, and a title to the land which will be quite unchallengeable as to them, he is liable in repetition to the true owner.

The Court accordingly "found the action competent, and remitted to the Lord Ordinary to proceed in the cause; found the defenders liable in the expenses incurred by the pursuers in discussing the preliminary defences," &c.

Defenders' Authorities.—32. Geo. II. c. 62, § 1. 4, 5, 6, 7; 10. Geo. III. c. 104; 49. Geo. III. c. 74; Young v. Johnston, (Wight, 339); Tod, June 2. 1826, (ante, IV. 658); Cook, May 17. 1823, (ante, II. 317); Campbell, June 28. 1823, (ante, II. 440); Craigie, Feb. 11. 1826, (ante, IV. 447.)

J. Burnside, W. S.—W., A. G., and R. Ellis, W. S.—Agents.

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Jan. 22. 1831.
Gordon v. Fraser.

Miller v. Little.

LIEUT.-COLONEL GORDON, Pursuer.—*Cuninghame.*
JAMES JOHN FRASER, W. S., Defender.—*Robertson.*

Process—Summons.—Where a party executed a summons in which there was a slight error in the name of the defender, and thereafter, without calling it, raised a second, with the same conclusions, referring to the first, but correctly naming the defender, and declaring that he only craved one decerniture for the sums concluded for; an objection to the second summons, that it was supplementary to an inept summons, repelled.

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2D DIVISION.
Ld. Mackenzie.
T.

IN August last, the pursuer Colonel Gordon executed a summons of count and reckoning against the defender Fraser, on which he used arrestment and inhibition. In this summons the defender was, by mistake, designed "*John James* Fraser, writer to the Signet," instead of "*James John* Fraser." On the mistake being discovered, a new summons was executed, which narrated the preceding one, and the mistake committed, and that the new summons was raised "without departing from the conclusions of said action, and to prevent cavil and dispute on the part of the defender;" and it concluded for accounting in terms of the first summons, "it being declared that the pursuer only craves one decerniture for the sums concluded for in this and the said summons before recited." Only the second summons was called; but, in defence against it, Fraser pleaded, inter alia, that the summons was inept, in so far as it "is not a distinct and separate action, but refers to, and is supplementary of, a process to which the defender is no party."

The Lord Ordinary repelled this defence, and the Court adhered.

J. G. BARR, S. S. C.—J. J. FRASER, W. S.—Agents.

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WALTER MILLER, Advocator.—*D. F. Hope—Thomson.*
J. LITTLE, (RAE'S EXECUTOR,) Respondent.—*Keay—G. G. Bell.*

Bill of Exchange—Process—Forgery.—Forgery being pleaded in defence against a summons for payment of two bills specially libelled on—Held competent under such summons to prove that the bills were delivered by the party himself as genuine, and sufficient to entitle the pursuer to decree.

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2D DIVISION.
Ld. Fullerton.
F.

IN the year 1807, the estates of John, Andrew, and James Miller, brothers of the advocator, were sequestrated, and the late George Rae of Newton was appointed trustee. The bankrupts having offered a composition of 8s. in the pound, for which the advocator agreed to become cautioner, an application for approval was made to the Court; but, on the opposition of certain creditors, this was refused. Rae, the trustee, had in the mean time allowed the advocator to intromit with the bankrupt estate, on the faith of the composition being carried through; but on its failure he took measures for recovering possession. On this, an agreement was entered into with the advocator to the following effect:—1. That he and the trustee should grant their joint bills to the landlord of

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the bankrupts in a farm possessed by them, for two years rent, one past due, and the other current. 2. That the trustee should dispose of the stock on the farm, and apply the proceeds, in the first place, to payment of the rents, and the surplus towards payment of a deficiency in the composition still expected to be agreed to, which deficiency was calculated at £847; and, 3. That the advocator should pay to the trustee whatever amount should be necessary to make up this deficiency, and to satisfy the expenses of the sequestration. In terms of this arrangement, the stock on the farm was exposed to sale by the trustee, and bought by the advocator at the price of £840. Thereafter, in November 1809, a meeting took place between the parties, when the advocator handed over to the trustee cash and bills sufficient to pay the rents, and the estimated deficiency in the composition, there being, among the bills then delivered, two of £172. 17s. 10d. each, bearing to be accepted by the advocator, and making together the exact amount of the rent to fall due at Candlemas and Lammas 1810, and being made payable at these terms respectively. On the other hand, the trustee granted to the advocator two discharges,—one for the amount of the price of the stock bought by him at the sale, and the other for "the remainder of the sum agreed to be provided for to answer the balance of the landlord's rent, and to meet the proposed composition to the creditors." The trustee afterwards paid the arrears of rent, and that falling due at the terms above mentioned; and he was further obliged, in certain proceedings at the instance of some of the creditors, to pay them a composition of 9s. in the pound, as that which the estate ought properly to have yielded. In 1813, the trustee raised an action before the Sheriff of Dumfries-shire, concluding against the advocator for the two sums of £172. 17s. 10d. 'contained' in the bills above mentioned, which were alone libelled on. In defence, the advocator pleaded that these bills were forged, and in point of fact it turned out that the advocator's name had been signed by one of his brothers; but it was also sufficiently established in a proof allowed by the Sheriff, and indeed was not explicitly denied, that the bills had been delivered to the trustee by the advocator as his own genuine bills. On advising this proof, the Sheriff found that the bills, not having been truly subscribed by the advocator, could not affect the question, and therefore allowed a proof of the debt independently of the bills. After a great deal of procedure which it is unnecessary to detail, and in the course of which the respondent Little was sisted as a party, as executor of the trustee, who had died, the Sheriff finally decerned against the advocator for the sums concluded for, with interest.

In an advocation from this judgment, it was contended that the action being laid exclusively on the bills, it was incompetent to proceed on grounds of debt not libelled, or even on the allegation that the bills were delivered as genuine; but that as the bills were proved to have been forged, the advocator ought at once to have been assoilzied from the conclusions

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of the action as laid.[1] It was further maintained that there was no legal proof of the bills having been delivered by the advocator as genuine, and that no debt was established independently of the bills.

In answer,—besides maintaining, on the proof, that the delivery of the bills as genuine, and the subsistence of the debt, were completely established,—it was contended that, under a conclusion for payment of the sum "contained in a bill," it was competent to prove the debt apart from the bill; but that at any rate, the bills having been delivered as genuine, it was competent to sue on them directly; and if forgery were alleged, to prove the delivery as genuine in answer to such a plea.

The Lord Ordinary found it "proved that the bills libelled were delivered by the defender (advocator) to the late Mr. Rae, the original pursuer, as authentic documents bearing his the defender's signature, in payment of a debt due by the said defender to the said pursuer;" and therefore advocated the cause, repelled the defences, and decerned,—stating in a note that he did not concur in those interlocutors of the Sheriff sustaining the action as on the debt, independently of the bills.

The Court adhered.

W. Dalrymple, S. S. C.—T. Johnstone, S. S. C.—Agents.

No. 170.

Poor Doctor Batchelor, Advocator.—*Ferguson—Mylne.*
John M'Gilvray, Respondent.—*Deas.*

Process—Proof—6. *Geo. IV. c.* 120, § 40.—Where a proof has been taken in a Sheriff Court, and the judgment brought under advocation, the Lord Ordinary, in reviewing the Sheriff's judgment, should specify the facts which he finds proved, and how far his judgment proceeds on matter of fact, or on matter of law, in terms of 6. Geo. IV. c. 120, § 40.

Jan. 25. 1831.

1st Division.
Lord Newton.
S.

In June 1828, a person named Doctor Batchelor raised an action before the Sheriff of Forfarshire against the Dundee Commercial Society, setting forth that they had hired him as a salesman for a year from 7th March 1828, but had causelessly dismissed him from their service on the 21st of June; he therefore concluded for payment of his wages of 16s. per week until the 7th of March 1829. The Society put in defences, inter alia, accusing Batchelor of misconduct, and alleging that he had failed to find caution to the requisite amount. Batchelor disputed these allegations. A proof was allowed, after which the Sheriff "found that the defenders were justified in dismissing the pursuer from their service, in respect that he had not found proper security for his faithful conduct and intromissions to the extent of £100 sterling; therefore assoilzied the defenders, but found no expenses due," &c. Batchelor advocated, and the Lord Ordinary "repelled the reasons of advocation, and remitted the cause simpliciter to the Sheriff;" but found no expenses due. Batchelor reclaimed.

[1] Dickie v. Gutzmer, Feb. 27. 1828, (ante, VI. 637.)

No. 170.

Jan. 25. 1831.

Batchelor v. M'Gilvray.

Miles v. Finlayson &c.

LORD PRESIDENT.—Before parties speak to the merits of this case, I wish to call the attention of the Court to the shape in which it comes before us. Matter of fact was disputed, and a proof was led in the Inferior Court. But by the 40th section of 6. Geo. IV. c. 120, it is enacted that the Court of Session, on reviewing the judgment of an Inferior Court proceeding on a proof where matter of fact has been disputed, "shall distinctly specify in their interlocutor the several facts, material to the case, which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide," &c. In consequence of this provision, the interlocutor of the Lord Ordinary should have specified the material facts which he found to be proved, and his Lordship should otherwise have pronounced his judgment in terms of the directions of this section. As this has been overlooked, I apprehend that we must remit the case to the Lord Ordinary to remodel his interlocutor in reference to the Act of Parliament.

The other Judges assented, and the case was remitted accordingly.

J. JAMESON,—BROWN and MILLER, W. S.—Agents.

No. 171.

JOHN REID MILES, Petitioner.—*D. F. Hope—Maitland.*
MATTHEW FINLAYSON and PETER MARSHALL, Respondents.—*Ld. Adv. Jeffrey—Sol.-Gen. Cockburn—Ivory.*

Process—Penalty—Stat. 5. Geo. III. c. 49.—A statutory petition and complaint at the instance of a private party, concluding for penalties to the amount of £18,000, for contravention of the statute 5. Geo. III. c. 49, by issuing notes for 5s. or 7s. respectively, dismissed as irrelevant, in respect of the vagueness of the libel.

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1ST DIVISION. S.

BY a judgment reported ante, p. 18, the Court dismissed this action as to Finlay and Co., the object of which was to have them and the other respondents found liable in £18,000 of penalties, for violation of the statute 5. Geo. III. c. 49; and the other respondents having maintained that, in respect of the vague and general terms of the petition and complaint, it was incompetent, the Court allowed them "to give in a minute, stating the practice and procedure in cases of usury, and other cases of a similar nature, either upon a summons, or upon a petition and complaint, as authorized by particular statutes."

Pleaded by Finlayson and Marshall—

Where the conclusions are so highly penal, the complaint requires to be drawn with the same precision as an indictment in the Justiciary Court. But the complaint stated neither when, nor where, nor to whom, nor by whom, any one of the notes was issued. Yet these details were as requisite in this case as in the analogous one of the uttering of a forged note. The complaint should also have had a list of witnesses appended to it. These forms were always observed in cases of usury, or complaints on the head of fraudulent bankruptcy or forgery, though tried in the Court of Session. They were also observed in the

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Court of Exchequer in prosecutions for contravention of revenue statutes and the failure in these essentials was fatal here.

Pleaded by Miles—

He did not pursue ad vindictam publicam, but solely at his own instance, and for his own behoof, in a case where a statute had made a summary complaint competent. He had laid his libel as specifically as the nature of the thing permitted. He had subsumed that the respondents "have been in the habit, for some time, of issuing, or causing to be issued," certain notes &c., contrary to the statute. He had engrossed a copy of one of these notes, and produced it and thirty-five others, which he stated he had received whilst in circulation. It was impossible for him to say which person at the cotton-works issued each particular note; but as each was dated at the Ballindalloch works, and found in circulation, it must be presumed to be issued of its date, and from these works, otherwise the statute might be easily evaded. The notes all bore the signature of one of the respondents, Matthew Finlayson.

Lord Balgray.—The libel is too vague as it is laid. It would not do in a Criminal Court; and the conclusions of this action are in the highest degree penal.

Lord President.—It is not enough for the complainer to say that he finds it difficult to condescend on the time and place where the alleged offences were committed. A statement of these particulars is necessary to enable the individual accused to instruct his defence. In a prosecution for usury, the time and place must always be stated; and to do that may sometimes be as difficult as here.

Lord Craigie was understood to assent,—observing, at the same time, that the respondents had got rid of a very dangerous complaint.

Lord Gillies.—We cannot assoilzie the respondents, but should merely dismiss the complaint. The libel is too vague. The time and place of issuing are not specially stated; and it is not enough to say that we may get at these essentials by an inference from the date of the notes. We must have the time and place more expressly libelled, if the libel is to be relevant.

The Court then dismissed the complaint as irrelevant, and found the respondents entitled to expenses, subject to modification, as the objection of irrelevancy was not taken by them in the outset.

Respondents' Authorities.—2. Bell, 599. 529; Aitken, Dec. 11. 1810, (F. C.); Macdonell, June 12. 1824, (ante, III. 131); 1. Hume, 158, 159. 500, (2d edit.); Guthrie, May 15. 1810, (F. C.); Watt v. Ritchie, Feb. 16. 1811, (not rep.); Morrison, Nov. 24. 1808, (App. Usury, 2); Paul, Jan. 20. 1824, (ante, II. 626.)

J. Cullen, W. S.—Gibson-Craigs, Wardlaw, and Dalziell, W. S.—Agents.

MRS. DONALDSON and TRUSTEES, Pursuers.—*D. F. Hope—Marshall.*
JOHN BANNATYNE, and Others, Defenders.—*Sol.-Gen. Cockburn—Ivory.*

No. 172.

Jan. 25. 1831.
Donaldson &c. v. Bannatyne, &c.

Process.—In a count and reckoning against parties resident in England, they having, when the record was nearly about to be closed, given in a new plea, founded on the English statute of Limitations, which had not been stated in defence—Held,—1. That they were entitled to have this plea added;—but,—2.—That they were only so entitled on paying the expenses already incurred by the pursuer in preparation of the record, reserving right to them to claim repetition, should the plea be repelled, and the cause decided on their statements and pleas already on record.

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2D DIVISION.
Ld. Mackenzie.
F.

IN the action of count and reckoning at the instance of Mrs. Donaldson and her trustees against Bannatyne and other individuals resident in London, mentioned ante, VII. 130, (which see), the defenders, after the record had been nearly completed, in re-revising their answers to the pursuers' condescendence, added a new plea, founded on the English statute of Limitations, which had never previously been alluded to. On this the pursuers enrolled the cause, and moved the Lord Ordinary to order this plea to be withdrawn. This motion the Lord Ordinary refused, reserving to the pursuers any claim for expenses they might have on account of its being added.

The pursuers reclaimed, and contended—

1. A defender's pleas must be in support of his defence; and as the defenders here have not in their defences rested on the statute of Limitations, they are not entitled to the benefit of this, which is not properly a new plea, but a new defence; and,

2. At all events, they cannot be allowed to insert it without first paying the expenses of making up a record on the merits, which, if this plea were sustained, would be rendered totally useless.

To this it was answered—A new plea may, under the Judicature Act, be added at any time before closing the record, or even after that, with leave of the Court; and although that now objected to had been stated at first, the same expense would still have been incurred in preparing the record, which must necessarily have been made up on the whole cause before any judgment could have been pronounced on this, which is a peremptory defence; and the claim for extra expense occasioned by the addition of the new plea is reserved to the pursuers.

THE COURT recalled the interlocutor of the Lord Ordinary; found that the defenders were entitled to add the new plea, but only on condition of paying the expenses previously incurred in making up the record; reserving to them, however, to claim repetition of the same in the event of the new plea being repelled, and the cause being decided on the statements on the merits contained in the record.

A. SCOTT, W. S.—Æ. MACBEAN, W. S.—Agents.

No. 173.

Jan. 25. 1831. Underwood's Trustee v. Bell &c.

JAMES BARBOUR, (UNDERWOOD'S TRUSTEE,) Pursuer.—*Jameson—Marshall.*

THOMAS BELL and CAUTIONERS, Defenders.—*D. F. Hope—G. G. Bell.*

Implied Assignation—Title to Pursue—Trust.—1.—An assignation to a lease held to carry right to a depending action of removing from the subjects comprehended under it, and also to a claim for violent profits for subsequent retention of possession, and to a bond of caution for the same lodged in the process of removing.—2.—A trust-deed for creditors not acceded to, not sufficient to divest the granter, so as to invalidate a subsequent conveyance, the trustees not competing therewith.

Jan. 25. 1831.

2D DIVISION. Lord Fullerton. F.

THE defender Bell, in January 1817, executed in favour of one Linton a conveyance of a long lease of certain property held by him. The entry of Linton was declared to have commenced at Whitsunday preceding; but Bell continuing to retain possession, Linton, in February 1818, brought an action of removing against him before the Sheriff of Dumfries-shire, in which action, although there was no conclusion for violent profits, a bond of caution was lodged (Dec. 1818) by Masterton, one of the defenders, binding himself that Bell should pay to Linton whatever violent profits might be awarded; and Smith, the remaining defender, became attestor for Masterton.

In defence, Bell pleaded that the conveyance to Linton, though ex facie absolute, was truly redeemable; but having completely failed to establish this, decree of removing was pronounced against him in June 1820, and a bill of advocation was thereafter refused for want of caution. In October 1818, pending this process, Linton had conveyed the lease in dispute to one Underwood, with entry at Martinmas thereafter, but without any special assignation to the action against Bell. In February 1821, Underwood produced his assignation from Linton in the process of removing, and craved that decree might be allowed to go out in his name. In this he was opposed by certain individuals claiming right to the premises in virtue of a prior disposition omnium bonorum by Linton in their favour as trustees; but, after a protracted litigation in this Court, it was finally decided, in 1825, that Underwood's right was preferable, and he thereupon had the decree of removing extracted in his name. In that year Underwood executed a trust-deed for behoof of his creditors, but none of them appeared to have acceded thereto; and in 1827, having been incarcerated for payment of debt by the pursuer Barbour, he took the benefit of the Act of Grace, and on this occasion executed in favour of Barbour, under an obligation to account, a general disposition of all his property, heritable and moveable, but without specifying the claim for violent profits against Bell and his cautioners. Founding on this disposition, Barbour raised an action against these individuals, and also against Linton's trustees, concluding against the former for violent profits from Martinmas 1818 till Whitsunday 1821, and against the latter for violent profits or damages from that term till 1825, when judgment was finally pro-

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nounced in Underwood's favour in the competition with them, and the decree of removing allowed to be extracted in his name. Linton's trustees having been at once assoilzied by the Lord Ordinary, and his judgment having been acquiesced in, it is only necessary to advert to the case of Bell and his cautioners, who pleaded in defence, inter alia—

1. The conveyance by Linton to Underwood did not include or carry the claim in question; and although it had, the same is not included in the disposition by Underwood to Barbour.

2. Underwood's trust-deed, executed in 1825, so divested him, as to render inept the subsequent disposition in favour of Barbour; and,

3. The defender was not in mala fide, but had probabilis causa litigandi.

To this it was answered—

1. The conveyance by Linton to Underwood of the subjects in question necessarily carried the claim for violent profits, and the action of removing, together with the right to the bond of caution, as accessories, without the necessity of a special assignation;[1] and the general disposition by Underwood was likewise sufficient to carry this claim to Barbour.

2. The trust-deed of 1825, never having been acceded to by the creditors, nor acted upon, was no bar to the conveyance in 1827. At all events, the defenders have no title to object, if the trustees grant a concurrence to the discharge, which concurrence will be obtained; and,

3. Bell having totally failed to establish his defence in fact that his conveyance to Linton was redeemable, was undoubtedly in mala fide to maintain such defence.

The Lord Ordinary found the defenders liable in violent profits as libelled, adding the subjoined note.*

The Court adhered.

W. Dalrymple, S. S. C.—W. Martin, S. S. C.—Agents.

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[1] Kyle v. Kyle's Trustees, Nov. 30. 1821, (ante, I. 215.)

* "Note.—It does not appear to the Lord Ordinary that the trust-deed granted by Underwood in the year 1825, and to which none of his creditors seem to have acceded, effected such a divestiture of the granter as to invalidate the disposition omnium bonorum forming the title of the pursuer in the present process. All that the defenders can require, is security against any claim that may be founded on that prior trust-deed; and that is sufficiently provided for by the proposed concurrence of the trustees under that prior deed. Upon looking at the Inferior Court process in the action of removing against Thomas Bell, the Lord Ordinary is satisfied that he is not entitled to the character of a bona fide possessor during the period libelled."

No. 174.

Jan. 25. 1831. Earl of Fife's Trustees v. Cumming.

EARL of FIFE'S TRUSTEES, Pursuers.—*Ld. Adv. Jeffrey—Miller.*
LACHLAN CUMMING, Defender.—*H. J. Robertson.*

Et è contra.

Commonty—Prescription.—The rights in a muir of two proprietors of lands adjoining thereto, having been determined, by an old decree, to be of property in the one, and servitude in the other—Held that no possession by the latter, (whose titles bore 'parts and pertinents,') consistent merely with a right of servitude, could confer on him, as by prescription, a right of property in the muir.

Jan. 25. 1830.

2D DIVISION. Ld. Fullerton. R.

AFTER the judgment mentioned in the former report of this cause, mentioned ante, VIII, (which see,) it returned to the Lord Ordinary, who ordered Cases to the Court. From the proof previously taken in the cause, it appeared, 1. That, for more than 40 years prior to the raising of the action by the late Earl of Fife in 1798, the predecessors of the defender Cumming had exercised the same sort of right, in regard to pasturage and cutting fuel, with the Earl of Fife and his predecessors; and, 2. That, subsequent to a letter, in 1761, from the late Earl of Fife to Mr. Innes, (the father of Cumming's author,) agreeing that whatever part of the muir each should improve, it should fall to their share respectively. Innes had, on a division, taken in a considerable extent of the muir.

Cumming contended, 1. That this possession, proceeding on titles to adjoining lands, with a clause of 'parts and pertinents,' was sufficient to give him, by prescription, a right of common property in the muir; and, 2. That the letter of Lord Fife, and the improvements which followed thereupon, precluded the pursuers from now objecting to his title as a proprietor of the muir.

On the other hand, Lord Fife's trustees maintained, 1. That his Lordship had a special infeftment in the muir; and it had been found, by a decree in 1676, that the right of Cumming's predecessors was merely that of servitude, requiring a subsequent prescriptive possession by them, inconsistent with the right of property in the Earls of Fife, and only capable of being attributed to a right of property on their part, in order to establish such right of property contrary to the decree; but that the proof established no prescriptive possession, prior to the raising of the action in 1798, which was not sufficiently authorized by the right of servitude. 2. That as to the letters of the late Lord Fife, they could not convert a right of servitude into a right of property.

THE COURT found that the proof did not establish any dereliction, on the part of the Earls of Fife, of the old decree; but again remitted to the Lord Ordinary to hear parties as to the effect of the correspondence, and of the improvements made on the faith thereof.

H. INGLIS and DONALD, W. S.—MACKENZIE and INNES, W. S.—Agents.

J. BERRY and W. SANDERSON, Pursuers.—*Skene—Pyper.*
J. and R. WATSON, Defenders.—*Jameson—Christison.*

No. 175.

Jan. 26. 1831.
Berry &c. v. Watsons.
Lang v. Allan and Co.

Arbitration—Expenses.—1.—Parties having submitted a cause depending in the Jury Court, and prepared for trial, as a "concluded cause,"—Held that the arbiter was entitled to allow a proof.—2.—An arbiter has power to award expenses, without any special clause to that effect in the submission.

THIS was a reduction of the decreet-arbitral, a bill of suspension of a charge on which had been refused by the Court, as mentioned ante, VII. 256, (which see.) The Lord Ordinary, after the record was made up, reported the cause to the Inner House, stating in a note his opinion (contrary to that expressed by the Court on advising the bill of suspension) that the terms of the submission excluded further probation, and that the decree therefore was invalid. In this view Lord Meadowbank concurred; but the other Judges retaining their former opinions, the defenders were assoilzied.

Jan. 26. 1831.
2D DIVISION.
Ld. Moncreiff.
T.

MACMILLAN and GRANT, W. S.—W. RENNY, W. S.—Agents.

THOMAS LANG, Suspender.—*Skene—Cuninghame.*
ALEXANDER ALLAN and Co., Chargers.—*Sol.-Gen. Cockburn—Whigham.*

No. 176.

Bill of Exchange.—It is not relevant to suspend diligence by a company, onerous indorsees of a bill, for the acceptor to allege that one of the partners was a member of a committee of creditors of the drawer, and as such was participant in preventing delivery of the goods for which the bill was accepted, and that he had brought an action of damages against that partner and the other members of the committee.

THOMAS LANG, flesher in Glasgow, bought cattle at a roup of Mr. Rennie of Phantassie, recently before that gentleman's bankruptcy, and granted to Rennie a bill for £300 as the price. The bill was indorsed by Rennie, for full value, to Alexander Allan and Company. On the bankruptcy of Rennie, a committee of creditors was appointed; and Lang, alleging that they had unwarrantably obstructed him in receiving delivery of the cattle, raised an action of damages against them. One of their number was Mr. Thomas Allan, a partner of, and acting, as Lang alleged, on the part of Alexander Allan and Company. On this ground Lang suspended, on caution, a charge by Allan and Company for payment of the bill, and insisted that his suspension should be remitted, ob contingentiam, to the process of damages. A record having been made up in the suspension, the Lord Ordinary remitted it "to the roll of Jury causes, to be there discussed ob contingentiam of a process of damages presently depending before this Court at the instance of the suspender against the chargers and others." Allan and Company re-

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Ld. Corehouse.
S.

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claimed, and insisted that, as onerous indorsees of a bill, their diligence could not be delayed till the issue of an action of damages, founded on the proceedings of a committee of creditors, of whom a partner of theirs was one. Even if the committee had unwarrantably detained the cattle, and Lang had a good claim of reparation against them, he could not in the mean time refuse to pay his bill in the hands of onerous indorsees.

The Court altered, found the letters orderly proceeded, and Lang liable in expenses.

Greig and Morton, W. S.—Allan and Bauer, W. S.—Agents.

No. 177.

David Clyne, S. S. C., Advocator.—*D. F. Hope—Boswell.*

James Murray, Respondent.—*Maitland.*

Messenger.—A messenger having disobeyed instructions to use arrestments for a debt due by a party who was his cautioner, found liable in a fine, and in the expenses of a complaint to the Lyon Court against him.

Jan. 27. 1831.

1st Division.
Lord Newton.
H.

On the 23d of April 1828, David Clyne, S. S. C., as trust-assignee of a Mr. Adamson, wrote to James Murray, messenger in Wick, transmitting letters of horning against Lord Duffus for a debt of £393. 3s. 7d., and desiring Murray to charge his Lordship, (who was one of Murray's cautioners,) and also to use arrestments in the hands of his tenants. Murray gave the charge, but wrote to Clyne that a sist on a bill of suspension had been intimated to him, so as to prevent him from using arrestments. Clyne, on the 1st of May, again wrote Murray, requiring him to use the arrestments, to which the sist was no impediment, and stating that his former refusal had subjected him and his cautioners in payment of the debt. Murray, on the 5th of May, wrote, refusing to proceed with the arrestments till the sist was recalled, as he conceived he should thereby subject himself in damages. Clyne then raised an action in the Court of Session against Murray, as liable for the debt, and for certain relative expenses. He also presented a petition and complaint against him in the Lyon Court, with consent of the procurator-fiscal, concluding for deprivation, fine, or other censure.

Pending this complaint, Lord Duffus paid the debt for which arrestments were to have been used, and Murray paid the expenses already incurred in the action by Clyne in the Court of Session. These expenses amounted to £30. In these circumstances, the Lyon Depute, "found that the respondent James Murray did wrong in declining to execute the arrestments libelled on, notwithstanding the intimation of the suspension, and therefore found him liable in the expenses incurred in this petition and complaint, and remitted to the Clerk of Court to tax the same; but in respect that the respondent seems to have acted

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from an error of judgment only, refused, quoad ultra, the desire of the complaint."

Clyne reclaimed; but his petition was refused on answers, with expenses. He then brought an advocation, and pleaded that as Lord Duffus was cautioner of Murray, and the messenger's error was a very gross one, it was to be presumed not to have arisen from pure ignorance, but from a corrupt motive; and it was peculiarly important, in so remote a district as Wick, where there were few officers, that any culpable deviation from duty should be severely punished.

Murray answered, that he had erred from mere ignorance, and had been sufficiently punished by being subjected in the expenses of the action in the Court of Session, and also of this complaint. It was peculiarly vindictive in Clyne to persevere in the complaint after recovering full payment of his debt, especially as it was only as a trustee that he had any interest in the debt at all.

The Lord Ordinary repelled the reasons, and remitted simpliciter, with expenses.

Clyne reclaimed.

Lord Balgray.—A messenger stands in a peculiar situation, as he not only lies under the general obligation to obey the instructions of his employer on the one hand, but also to avoid illegal acts, although commanded by his employer, on the other; and if he deviate from his duty on either side, he incurs a heavy responsibility. There are some departments of the law connected more immediately with his own routine of business, which it is peculiarly incumbent on him to know. This messenger ought to have known a little more of the law than he did; and, from his obstinacy in refusing to do what was his duty, I think the Court are called upon to express their displeasure. This is more especially necessary, because, in the remote district where he officiates, the lieges have small choice of messengers, and some of the gentlemen there are too apt to entertain the idea that they must not be touched with the wand of the law, and may treat legal diligence with contempt. It is proper to teach messengers that they are bound by their office to do their duty fearlessly against all and sundry; and as the backwardness of the messenger here was most blameable, and of bad precedent, I would incline to mark our opinion of it strongly; but perhaps this expression of our censure, together with the infliction of the costs of this and the preceding action, may suffice without further penalty.

Lord President.—The terms of the Lyon Depute's judgment sufficiently mark the illegality of the messenger's conduct. To that we adhere; and I conceive that the addition of the expenses will amount to a fine sufficient to render it unnecessary for us to inflict any other penalty. But it is proper for us to mark strongly our sense of the irregularity of the messenger's conduct, which is touched with circumstances of strong suspicion. This was not an ordinary case of employment. He was called on to do diligence against his own cautioner, Lord Duffus; and the temptation thus held out to him to

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be lenient towards the debtor ought to have made him doubly circumspect in his proceedings, and resolute to do full justice to the interests of his employer.

Lord Gillies.—The case is not free from difficulty. Upon the whole, I feel myself bound to deal with this question as if the messenger had acted bonâ fide, and from a mere error of judgment. Still the error was gross, and it was obstinately persisted in; and I think the Lyon Depute, to be consistent, should have gone a little further. He should not only have found Murray liable in the expenses of the complaint, but should have inflicted some penalty, though perhaps a small one, for the repression of such irregularity in future. Clyne and the fiscal were entitled to ask for this; but when they do so, it is not only refused, but Clyne is subjected in all the subsequent expenses. This is most unreasonable; but, on looking at the case as it now stands, if we recal the interlocutor complained of, to the effect of subjecting Murray in the whole expenses of this process, I believe we shall dispose of the complaint in a satisfactory manner, as there is an express finding in the interlocutor of the Lyon Depute, stating the irregularity of the messenger's conduct.

Lord Craigie.—This is a case of some difficulty and importance. In cases of this sort, the Lyon Depute is generally the best judge, and I would require strong grounds to be shown before recalling his judgment. It is right that the Court should mark its sense of the error and irregularity of this messenger; but the terms of the Lyon Depute's judgment do this, and the messenger was already pretty smartly amerced at the date when it was pronounced. After that, I think Clyne was justly subjected in the expenses of the subsequent proceedings, because his complaint was a great deal too broad in craving the suspension or deprivation of the messenger. I cannot therefore concur in the alterations proposed to be made upon the interlocutor under review.

The Court then altered, found that the messenger did wrong, and was liable to a fine; but, in respect of the previous expenses incurred by him, limited the fine to five shillings, and found him liable in the expenses of this process.

Advocator's Authorities.—A. S. Jan. 16. 1789; A. S. March 10. 1772, Art. 2, 3. and 14.

D. Clyne, S. S. C.—G. L. Sinclair, W. S.—Agents.

ROBERT RUSSELL, Petitioner.—*D. F. Hope—Marshall.*
JOHN DAVIDSON, Respondent.—*Ld. Adv. Jeffrey—W. Bell.*

No. 178.
Jan. 27. 1831.
Russell v. Davidson.

Curator Bonis—Process.—Where a curator bonis on the estate of a defunct had been appointed without notice to a party interested, and that party, after opposition by the former applicant and the curator, got another person appointed—Held that this necessarily superseded the appointment of the former curator, and that he was bound to deliver up the whole effects to the new curator.

Jan. 27. 1831.
1st DIVISION.
H.

ON the death of the late John Hay, leaving a son Dr. Hay, and a daughter Mrs. Stalker, a dispute arose, whether a trust-deed in 1828, or a later trust-settlement, should regulate his succession. In the former, Dr. Hay was more favoured,—in the latter, (which was alleged to be reducible on various grounds,) Mrs. Stalker was more liberally provided for. The trustees named under the last settlement having refused to accept, Mrs. Stalker petitioned the Court for the appointment of a curator bonis, and John Davidson, S. S. C., was appointed. This was done without intimation to Dr. Hay, who lived in Bristol. Mr. Davidson was about to make a sale of some of the effects, when Dr. Hay obtained an interdict, and presented an application for the appointment of a curator bonis, setting forth some of the grounds on which he conceived the last settlement of his father to be reducible, and also the necessity of having the succession placed under the administration of a neutral person during the discussion of its validity. Appearance was made for Mrs. Stalker and Davidson, who opposed the petition, inter alia, because no recal of Davidson's appointment was craved in it; but the Court granted the prayer, and named Mr. Robert Russell as curator. Mr. Davidson, conceiving that Russell's appointment was only of a limited and partial kind, and was made chiefly to enable certain perishable subjects to be sold, declined to surrender the curatorial estate and papers to him, except to a very small extent. Russell then presented a petition and complaint, enumerating the articles thus detained, and praying for an order on Davidson to deliver "all the articles, cash, and documents, which were before particularly specified." This was opposed on the above ground; and that as there was still no prayer for the recal of his appointment, the petition was incompetent.

LORD BALGRAY.—Russell was appointed as a neutral person to take charge of the whole estate and papers. The first appointment had been obtained under very unusual circumstances, and, I think, was got obreptione. If the appointment of Russell be not enough to supersede Davidson, how many appointments must we have for this purpose?

THE LORD PRESIDENT assented.

LORD CRAIGIE observed, that this case was surely best fitted for extrajudicial arrangement.

LORD GILLIES.—The merits are not before us. The appointment of Russell

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would be merely futile, unless he could call on Davidson to make a complete surrender of the curatorial estate into his hands.

THE COURT then ordained Davidson "to deliver to the petitioner, as curator bonis and factor foresaid, all the papers and documents called for, and particularly before specified; quoad ultra, remitted to the junior Lord Ordinary to proceed further," &c.

THOMSONS and ELDER, W. S.—J. DAVIDSON, S. S. C.—Agents.

No. 179.

JOHN DYE and MANDATORY, Pursuers.—*Jameson—Cowan.*
ALEXANDER REID, Defender.—*Forsyth—Ivory.*

Proof.—Part of the deposition of a haver, being of the nature of evidence in the cause, ordered to be delete.

Jan. 27. 1831.

2D DIVISION.
Ld. Mackenzie.
F.

IN the examination of a haver abroad, part of the deposition taken down was of the nature of evidence in the cause as by a witness. On the commission being reported, the Lord Ordinary ordained this part of the deposition to be delete. Against his Lordship's interlocutor the defender Reid reclaimed, and craved that it might be allowed to remain on the record, so as to be available as evidence, in case it might prove impossible to procure the attendance of the haver as a witness. The Court refused his reclaiming note.

J. DONALDSON, W. S.—M'CALLUM and DALGLEISH, W. S.—Agents.

Single Bills, &c.

CUMMING, Petitioner.

Poor's Roll.—Application for the benefit of the poor's roll remitted to the lawyers and agents for the poor, though the certificate of the kirk-session merely bore that the truth of the applicant's statement rested on his declaration alone, and that they knew no reason to doubt his credibility, but without bearing positively that they knew him to be worthy of credit.

Jan. 27. 1831.

2D DIVISION.

IN an application by Cumming for the benefit of the poor's roll, he produced a certificate by the kirk-session of St. Andrews, where he resided, bearing that they were not personally cognisant of the truth of the facts stated in his declaration, but that they knew of no reason for believing that he was not worthy of credit,—not, however, setting forth that they knew him to be worthy of credit.

Maitland, for the adverse Party, objected to this certificate as insufficient, in respect it did not bear that the applicant was worthy of credit, which he contended was necessary under the A. S. to entitle a party to the benefit of the poor's roll.

To this it was answered—That although the A. S. required the kirk-session to state whether the applicant was worthy of credit, it did not render their positive certificate to this effect essential to his obtaining the benefit of the roll, which construction would exclude almost all members in dissenting congregations in large towns, who could not be personally known to the members of the kirk-session.

The Court, holding the certificate to be sufficient to entitle the applicant to a remit to the lawyers and agents for the poor, remitted accordingly.

WILLIAM CALDER and Others, Suspenders.—*Cuninghame—Pyper.*
WILLIAM C. LEARMONTH and Others, Respondents.—*Anderson.*
Also,
A. MUNRO and Others, Advocators.
W. C. LEARMONTH and Others, Respondents.

No. 180.
Jan. 27. 1831.
Calder &c. v. Learmonth &c.

Road Statute—Brevi Manu,—1.—Proceedings of road trustees held null, in respect of deviation from the forms prescribed by the statute under which they act.—2.—An obstruction built across a road, and interfering with a right of servitude thereon, without proper authority, may be immediately removed by the parties having right to the servitude.

Jan. 27. 1831.
2D DIVISION.
Ld. Fullerton.
F.

THE suspenders, Calder and others, have right to a servitude of road through the commonty of Tarduffmuir. Several years ago, the proprietors of the muir entered into a submission of division, and the arbiter marked out on the plan a new line of road to supersede the old servitude road, but without consulting those having the right of servitude, who were no parties to the submission. One of the proprietors, the late Thomas Young of Crownerland, began to enclose his allotment of the muir; and having drawn a hedge and ditch across the servitude road, the obstruction was immediately removed by the suspender Calder's servants.

Young thereupon raised a process of interdict and damages before the Sheriff of Stirlingshire. The Sheriff refused the interdict, and Young having died, an agreement was entered into in the form of a minute, whereby his representatives were taken bound that the line of road as laid down by the arbiter "shall be made passable, that the works and other obstructions therein shall be removed, so as to allow horses, carts, and foot-passengers to travel along the same, and that within the space of three months from the date of this agreement;" and the suspenders, on the other hand, agreed to accept this new line in place of the old road, and to go round by the same whenever it was made sufficient to supersede the latter. The old road continued to be used by the suspenders, because, as they alleged, the new line was not completed in terms of the minute of agreement. Matters were in this state, when James Young, son of the former proprietor, presented, in 1826, a petition to the Justices of the Peace and road trustees of the 7th district of the county of Stirling, setting forth that he had completed a new road in terms of that agreement, and praying for authority to shut up the old one. This application was made in virtue of the road act for the county passed in 1810, which statute directs, that on a petition being presented to a district meeting of the trustees for such a purpose, the meeting shall "name a committee of at least three trustees, two of them being Justices of the Peace of said county, to inspect such roads, and to report their opinion of what is proposed to be done to a subsequent district meeting; and upon such report being made to such district meeting, they shall hear all parties having interest therein, and they are hereby empowered, if they shall see

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just cause, to ordain the direction and course of such road or roads to be altered or changed, and also to ordain such superfluous or useless roads to be shut up." The district meeting of trustees at first remitted to a committee, only one member of which was a Justice of the Peace. To remedy the error, another meeting added "Mr. Baird of Manual-mill to the committee, and any other trustee who is a Justice of the Peace, and who shall attend." A meeting of this committee was subsequently held, at which two Justices were present, and they reported to a general meeting of trustees "that the road petitioned against should be shut up, and the new one used in its stead, as soon as it is properly metalled." Upon this, the general meeting "authorized the old road to be shut up so soon as the committee appointed to attend to this matter shall be satisfied that the new road is properly metalled." Thereafter three members of the committee, only one of whom was a Justice of the Peace, met and subscribed a report, stating that "they had carefully inspected the new road made by Mr. Young; and having found the said road properly metalled, and fit for the public use, are fully satisfied that the old road may now be shut up, and the new one used in its stead." There had been regular advertisements to all concerned of these proceedings of the committee; and this last report was approved of by another general meeting, duly inserted in their minutes, and the old road declared to be shut up by advertisement on the kirk-stile. The proprietors of Tarduffmuir then proceeded to enclose their respective lots, and in particular the respondents Learmonth and Dick intersected the old road with a stone wall, which was thrown down and removed by the advocators Munro &c., servants of the suspenders Calder &c.

Learmonth and Dick thereupon presented a petition to the Justices of Peace of the county of Stirling, praying for interdict and damages, in which the Justices granted interdict. Munro &c. having brought an advocation, a suspension and interdict was also raised on the part of Calder &c., in order to try the question upon the trustees' proceedings, and concluding to have Learmonth &c. prohibited from interrupting the servitude road.

The Lord Ordinary in the suspension pronounced this interlocutor, adding the subjoined note:*—"Finds that the old road in question has

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* "The application by the respondents for shutting up the old road could not have been maintained on the ground of the agreement with Young, even if that application had been made to a competent Court, and had been made originally with Young's concurrence,—because the line which it was proposed to substitute for the old one is confessedly different from that which the suspenders agreed to accept; but, besides, the application was made to the road trustees, and the case of the respondents must rest exclusively upon the due observance of the statutory rules. Now, in the first place, it appears to the Lord Ordinary very questionable whether the trustees are, by the statute, empowered to pronounce an order prospectively for shutting up a road, so soon as a committee shall be satisfied of a particular circumstance, and without hear-

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not as yet been legally shut up by the road trustees of the county of Stirling, in terms of the statute;—therefore, and to that extent, sustains the reasons of suspension, and grants the interdict as craved for, and decerns; finds no expenses due."

In the advocation, his Lordship advocated ob contingentiam of the suspension; and in respect of the interlocutor quoted, finding that the road had not been shut up by the trustees in terms of the statute, assoilzied with expenses.

Both interlocutors were reclaimed against.

The respondents maintained, 1. That the suspenders had become parties to an agreement by which they were personally barred from objecting to the proceedings of the trustees, and from opposing the shutting up the old road; and, 2. That the trustees had substantially and fairly, if not literally, complied with all the requisites of the statute in their proceedings.

The Court, without hearing the suspenders' counsel in reply, unanimously adhered, for the reasons stated in the Lord Ordinary's note.

W. Waddell, W.S.—Pearson, Wilkie, and Robertson, W.S.—Agents.

No. 181.

Kenneth Fraser, Pursuer.—*D. F. Hope—Boswell.*
John Andrew, Defender.—*Rutherfurd.*

Reparation—Messenger—Cautioner.—Circumstances in which a messenger having blundered the execution of a diligence for a small sum, which gave rise to a series of lawsuits involving the messenger, his cautioner, and his employer, the employer was found entitled only to partial relief of the expense against the messenger's cautioner.

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ing parties, and expressly confirming the report of the committee in that particular. But, secondly, and even on the supposition of that being competent, the prospective order has not yet taken effect. It is provided by the statute, that the committees to be appointed to inspect and report must consist of at least three trustees, two of them being Justices of the Peace. Accordingly it is admitted by the respondents that the nomination of the first committee, in which there was only one Justice of the Peace, was irregular; and it is said that that was remedied by afterwards adding another Justice of the Peace, and the appointment 'of any other Justice who is a Justice of the Peace, and shall attend.' Now the meeting of the 24th of May 1828, after considering the report, 'authorized the old road to be shut up, as soon as the committee appointed to attend to this matter shall be satisfied that the road is properly metalled.' But this condition has never taken effect; for the only report obtained is the report, not of the committee 'appointed to attend to this matter,'—clearly meaning the committee legally appointed, and consisting of at least two Justices of the Peace,—but a report of the three gentlemen first appointed, only one of whom is a Justice of the Peace; so that, even according to the resolution of 24th May 1828, being the only decision appearing, from the minutes produced, to have been pronounced by the trustees on the subject, the old road must be held to be still open."

No. 181.

Jan. 28. 1831. 1st Division. Lord Newton. H.

Fraser v. Andrew.

Kenneth Fraser employed Barnetson, a messenger, in September 1823, to charge John Reid, writer in Thurso, for payment of a bill for £20. 16s., of which a partial payment had been previously made, reducing the debt to £18. 13s. 6d. Barnetson gave a blundered charge, against which Reid, in October, presented a bill of suspension. The bill was passed, and the charge was turned into a libel, by a judgment of the Inner House, on the 4th of February 1825, reserving the question of expenses till the issue of the cause. Fraser reclaimed against this last judgment; but his petition was refused, with expenses.

In January 1824, Reid raised an action of damages, founded on the irregular diligence, against Fraser, Barnetson and his cautioners, one of whom was John Andrew. The summons, which libelled the blunder in the diligence, was served on Andrew, as well as the other defenders. Andrew gave his copy of citation to Barnetson, who transmitted both it and his own to David Clyne, S. S. C., agent for Fraser, and defences were lodged in name of all the defenders. The process was afterwards remitted to the Jury Court.

Thereafter a process of reduction-improbation of the execution of citation in Reid's action of damages was raised in name of Fraser, Barnetson, and Andrew, and concluding for damages against Reid. Before instituting it, Clyne wrote to Barnetson, that "the consent and concurrence both of Fraser and your cautioner shall be required." Barnetson promised the concurrence of his cautioner (Andrew), but did not procure it. Andrew disclaimed this process on the 12th of May 1825; and, about the same time, obtained from Reid a discharge of the action of damages for payment of £35. Eventually Reid was assoilzied with expenses, which were awarded against Fraser and Barnetson. Upon this decree, Reid charged Fraser and Barnetson, poinded their effects, and obtained warrants of sale. They brought a suspension and interdict, after which Barnetson extrajudicially settled the process, so far as he was concerned.

Reid, on the dependence of his action of damages, had arrested in the hands of Lord Duffus, as Fraser's debtor; and his Lordship brought a multiplepoinding, which issued in a decree of preference in favour of Clyne, the agent of Fraser, claiming as Fraser's creditor.

Fraser then brought the present action against Barnetson and his cautioner Andrew, setting forth that the whole of the proceedings had originated in the blundered charge of Barnetson, and were carried on at the desire and for the behoof of Barnetson and Andrew, as well as, for the most part, in their names; and he concluded that they should be found liable to him in payment of £18. 13s. 6d. as the balance of the bill of £20. 16s., and of upwards of £400 of expenses incurred by him in the above actions.

Barnetson did not appear; but in defence Andrew pleaded—

1. That he could not be liable for the bill, because, till the issue of

Reid's suspension, it could not be known whether he was liable for it; and if he were so, he must first be discussed.

2. That he knew nothing of the actions, except the process of damages; that he was never consulted in regard to them; that he had disclaimed the action of reduction, and settled the claim of damages; and that if Fraser had intended to make a claim against him for the expenses of any of the proceedings he should have intimated them to him.

To this Fraser answered—

1. That as the diligence had been suspended in consequence of the messenger's blunder, Andrew, as his cautioner, was liable for the debt, and that Reid was now bankrupt.

2. That both the original suspension by Reid, and Reid's subsequent action of damages, were known to Andrew, because the summons in the latter process narrated the first, and was served on Andrew; that Andrew's copy citation was given by him to Barnetson, who sent it, with his own, to the agent, who lodged defences for both, and also for Fraser; that for the expenses of these actions, therefore, he was clearly liable to relieve Fraser, since it was the interest of Barnetson and his cautioner to carry them on for their own safety in protecting Fraser and themselves from the consequences of Barnetson's blundered diligence; that the proceedings were expressly authorized by Andrew; that the rest of the litigation was the unavoidable sequel of the first, and the expense of it was part of the damage occasioned by the messenger's misconduct, for which he and his cautioner were equally liable.

The Lord Ordinary* "found the defender liable in the sum of £18.

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* Before pronouncing this interlocutor, the Lord Ordinary issued this note of his opinion:—"1. The first conclusion, which is for the sum in the bill, appears to him to be premature while the question of Reid's liability depends on the process of suspension at his instance. The defenders may be liable for the loss occasioned by the messenger's misconduct; but it is not enough to say that the sum in the bill is still resting owing. It must be lost before the defender can be called upon. Now, as in the suspension the charge has been turned into a libel, reserving all question as to expenses, it is uncertain whether decree may not still be recovered for the sum. Neither does it seem fair that the pursuer, after having entered into this litigation without consulting the defender, should now demand the subject in dispute, leaving the defender to carry on the action. If this were to be done at all, it ought to have been done at the outset, when the defender would have had it in his power to judge whether he should resist the temptation or no. 1. As to the expenses already incurred in the suspension, the Lord Ordinary does not think that the mere want of intimation will of itself liberate the defender, considering that the defence maintained in this process was known to and authorized by Barnetson, the principal. Yet as the defender, who was no party, can be subjected only on the ground of this expense being in rem versum, he will be liable only in so far as the steps taken were reasonable and prudent in the circumstances. But the Lord Ordinary doubts if it was prudent or proper to have reclaimed against the Inner House interlocutor of the 4th of February 1825. He inclines, therefore, to find the defender liable in these expenses, subject to modification.

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18s. 6d., being the balance due of the pursuer's bill in question, with the legal interest of the same since the 14th of June 1825, when the bill became payable; and also the sum of £1. 5s. 4d. as the expense of raising letters of horning;—found the defender liable in the expenses incurred by the pursuer in the process of suspension and interdict at Reid's instance, but subject to modification;—found him also liable in the expenses incurred by the defenders in the action of damages at Reid's instance, up to the 12th of May 1825, but in no part of the expenses subsequently incurred in that process, and assoilzied him from all claim for such subsequent expenses; assoilzied him also from the claim for the expenses incurred in the action of reduction-improbation in the suspension and interdict at the instance of the pursuer and Barnetson, and in the conjoined actions of multiplepoinding and suspension, all libelled on."*

Both parties reclaimed.

Lord Balgray, after expressing his regret at the complicated litigation which had arisen from so small a matter, was understood to say that, in general, the liability of the cautioner to relieve a messenger's employer, both of the damages and expenses occasioned by the messenger's misconduct, went just as far as the liability of the messenger himself. His Lordship felt inclined to

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Indeed, another ground for modification appears from the reasons of suspension stated by Reid. One of these is, that the charge was given for the whole sum in the bill, without giving deduction of a partial payment which had been made. Now, as this omission is said to have arisen from the fault of the pursuer, and not of the messenger, the defence may have been required on the pursuer's account, and cannot be said to have been altogether for behoof of the defender. 3. As the pursuer's agent was entitled, on the receipt from Barnetson of the defender's copy of citation in the action of damages at Reid's instance, to suppose that the defender concurred in the defence, the Lord Ordinary is disposed to find him liable in the expenses of this process incurred previously to the 12th of May 1825, when he intimated his disclamation of the proceedings, but to assoilzie him quoad ultra. 4. There seems no sufficient ground to subject the defender to the expenses incurred in the action of reduction-improbation. Mr. Clyne, in his letter to Barnetson of 4th June 1824, states correctly, that, before instituting this action in the defender's name, his consent and authority would be required; and although Barnetson answered that the consent would be got, there is no evidence that it ever was so, or that the defender was aware of the action till long afterwards. 5. If the defender is not responsible for the process of reduction-improbation, still less can he be so for the expenses incurred in the suspension and interdict, at the instance of the pursuer and Barnetson, of a charge given them for Reid's expenses in defending himself in that process. 6. The Lord Ordinary entertains as little doubt of the defender's right to be assoilzied from the conclusions relative to the expenses of the multiplepoinding,—the matter at issue being one in which he had no sort of concern."

* "Note.—The Lord Ordinary has already, in his former note, explained the grounds on which he has been led to pronounce the greater part of this interlocutor. He has only to say further, that he has deemed for the sum in the bill, on the understanding that Reid the debtor is bankrupt, and that there is no chance of recovering any thing by following out the suspension. For the same reason, he thinks it quite unnecessary to give any deliverance on the last conclusion in the summons for relief of any future expenses in that action, or in the other action of damages."

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decern against Andrew for the whole expenses of the first suspension and action of damages; but he concurred with the Lord Ordinary that Andrew's express consent to the raising of the action would have been requisite to subject him for the expenses of the action of reduction-improbation against Reid; and as that had not been obtained, his Lordship was not disposed to hold Andrew liable for the expense of that or the subsequent actions.

Lord Craigie, expressed strong disapprobation at the extent of litigation which this case unfolded. His Lordship conceived that if Fraser was to maintain a claim against Andrew as liable for the expense of these proceedings, he was bound to have fully communicated them to him, as well as to Barnetson. For proceedings to which Andrew was not made a party, Fraser could only claim against him on the footing of a negotiorum gestor, and was entitled to subject him for the expense of such proceedings solely as were in rem versum of the cautioner. His Lordship, on that account, was not disposed to carry the cautioner's liability so far as Lord Balgray, and would not subject him further than it could be shown that he went hand in hand with Barnetson, his principal.

Lord Gillies.—This is a case of some difficulty. The messenger does his duty so ill, that Reid presents a well-founded suspension of the diligence. He directs this solely against Fraser, the messenger's employer; and he was not bound to direct it against any other. It was then the creditor's duty to intimate this to the messenger. He does so, and is he bound to go further? It is, I apprehend, the duty of the messenger to make intimation to his cautioner. But then there really was intimation here; for, just after the suspension, Reid raises an action of damages narrating the suspension, and serves this on Andrew the cautioner, as well as on the messenger and Fraser. It was then the duty of the cautioner, seeing the action well founded, and his own liability clear, to come forward and relieve those parties to whom he was bound in relief; but, instead of that, he joins in maintaining an ill-founded action. This proves the inlet to that painfully-protraced litigation which has just been laid before us. On the whole, I concur with Lord Balgray, and would subject Andrew in the expenses of the first suspension and action of damages; but I do not see any ground for going further.

The Lord President expressed his concurrence in the opinions of Lords Balgray and Gillies; and the Court "altered the Lord Ordinary's interlocutor, in so far as to find the defender liable in interest upon the balance of £18. 13s. 6d. from the 14th day of June 1823, and upon the sum of £1. 5s. 4d. as libelled; and also in so far as to find the defender liable in the expenses incurred in relation to the process of suspension and interdict at Reid's instance, and the process of damages at his instance, with interest, as libelled; ordained the defender to relieve the pursuer of these processes; found no expenses due in the Inner House, and remitted to the Lord Ordinary to hear parties as to the previous expenses in the cause, and proceed further in the cause as shall be just."

Their Lordships, at the same time, refused Andrew's counter note.

D. Clyne, S. S. C.—G. L. Sinclair, W. S.—Agents.

No. 182.

Jan. 28. 1831. 2D DIVISION. Lord Medwyn. R.

Glass v. Campbell &c.

Jeffrey v. Clyne.

MRS. JANE FORRESTER or GLASS, Pursuer.—*Sandford.*

J. CAMPBELL and J. ARNOTT, W. S., Defenders.—*More—Hamilton.*

Expenses.—The expenses of successful defenders in an action of count and reckoning limited to those incurred subsequent to a period at which their accounts were first sufficiently elucidated before the Lord Ordinary.

D. FISHER, S. S. C.—J. CAMPBELL, W. S.—Agents.

No. 183.

JAMES JEFFREY, Raiser.—*Ivory.*

D. CLYNE, S. S. C., and Others, Claimants.—*Boswell.*

Expenses—Multiplepoinding.—1.—Where the necessity of a multiplepoinding is imputable solely to the raiser, and he is the party who substantially derives benefit from the decree therein pronounced, he will not be allowed his expenses out of the fund in medio.—2.—The date of an interlocutor from which expenses were intended to be found due, having been erroneously written out in that awarding the expenses—Held, that in auditing the account, it might be limited to the true date.

Jan. 28. 1831. 2D DIVISION. Ld. Fullerton. T.

AFTER the multiplepoinding mentioned ante, Vol. VIII. 230. 491. (which see,) had returned to the Lord Ordinary, and a record had been made up, his Lordship pronounced the following interlocutor, adding the subjoined note*:—"Finds the raiser liable only in once and single payment of the sum libelled; grants warrant to the claimant David Clyne to uplift the fund in medio consigned, upon producing a confirmation as executor-creditor of Gall, if required by the raiser, and ap-

* "In determining the question of expenses, the Lord Ordinary holds himself bound to inquire, first, to whom the necessity of the process is truly imputable? And, secondly, who substantially derived the benefit from it? Now it appears to him that, in this particular case, the raiser stands in both those predicaments. For, in the first place, there could have been no competition, but for the circumstance of the raiser granting an indorsable document to Simms, without inquiring into his title as Gall's executor; and, secondly, in virtue of the conclusion for once and single payment, and of the decreet of preference in favour of Clyne, in competition with the other defenders called, the raiser has clearly secured himself from all claim founded on the indorsable document which he had unwarily granted. Indeed this seems to have been the very object of the process of multiplepoinding. If Clyne had held back from this competition as a creditor of Simms, decreet of preference must have gone out as a matter of course in favour of Milne, and the raiser would then, according to his own admission, have been obliged to pay the same sum again without deduction to Clyne, on his producing confirmation as executor-creditor of Gall; and since Clyne has appeared in competition with the other defenders called, and has thus afforded to the raiser the means of excluding, by the decreet in this process, all claim on the part of Simms or his indorsee, it would seem contrary to every principle of equity to give that benefit to the raiser at Clyne's expense, which would be the necessary consequence of giving him his expenses out of the fund in medio.

"If the raiser has a claim for expenses, it must lie, not against Clyne, but against the other parties called as defenders."

points the clerk to deliver to him the deposit-receipt for that purpose; further, in respect that the necessity of the present process must, as regards the said David Clyne, be held to be imputable to the raiser, and that the raiser has truly had the benefit of the decreet pronounced in it, repels the claim of the raiser to his expenses out of the fund in medio, and decerns, reserving to the raiser his right to move for his expenses against John Milne, or any of the other parties called as defenders, and to those parties their objection against such claim; finds the raiser liable to the said David Clyne in the expenses incurred since the interlocutor of the 20*th* of *January* 1830;* allows an account thereof to be given in, and remits the same to the Auditor to tax and report."

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Jan. 28. 1831.

Jeffrey v. Clyne.

Wood v. Thomson.

Jeffrey reclaimed in so far as regarded expenses, but the Court adhered.

H. Inglis and Donald, W. S.—D. Clyne, S. S. C.—Agents.

JOHN WOOD, Petitioner.—*A. M'Neill.*

DR. JOHN THOMSON, Respondent.—*Robertson.*

No. 184.

Bankrupt—Sequestration.—Circumstances in which the Court recalled a sequestration.

ON the 6th of July 1830, sequestration was awarded of the estates of Dr. John Thomson, residing in George's square, Edinburgh, on an application presented the day before, with concurrence of his brother James Thomson, stating himself as a creditor, under a promissory note, for £146. 15s. The note was granted by one Jones to Dr. Thomson; it was dated the 18th of July 1825, and payable three months after date. It had been discounted by Dr. Thomson with Sir William Forbes and Company, and, when it fell due, was dishonoured by Jones, but was retired. This, it was now alleged, had been done by the Doctor's brother James; but no protest was taken against the Doctor, and in October 1825 he did diligence on the note against Jones,—repeatedly imprisoned him for the debt, and, on the 15th of September 1826, the letters of caption at his instance stated the amount at £50. On the 29th of September, the jail record bore that Jones was discharged in default of aliment. In 1828 the Doctor executed a trust-conveyance of his effects, and made out a list of his debts to his trustee; but he did not give up his brother James as a creditor under the note in question. James did not claim as a creditor for it on the trust-estate, and made a purchase of the Doctor's furniture from the trustee, without setting off against the price

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1st Division. D.

* This was a mistake for the 20th of *June* 1830, there being no interlocutor of the 20th of *January*. At auditing Clyne's account, he claimed the whole expenses incurred by him, as carried by the terms of this interlocutor; his appearance in this process having been subsequent to January. The Lord Ordinary reported this point verbally, when the Court instructed his Lordship to allow the expenses only from the true date of the interlocutor intended by his Lordship.

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a composition of three shillings per pound which the other creditors were receiving out of the trust-estate. There was no trace, in any of the papers given up to the trustee, of James being creditor under this note.

In these circumstances, Mr. John Wood of London, and mandatory, applied for recal of the sequestration, stating that the brother James was not a creditor; that he never had been so; but even if he had, all recourse against the Doctor, as a debtor under the note, was lost by its not being protested against him; that the sequestration was a mere fraudulent device, concocted between the brothers to get a discharge; that the estate was too insignificant to be a fit subject of sequestration; and that the Doctor had not been connected with any trade since 1826, when his share in a concern for the retail of medicine was paid up to him, and he withdrew from it.

Dr. Thomson answered, that his brother had retired the bill from the bank; but, not choosing to protest it against him, had allowed him to use diligence against Jones, which had proved fruitless; that the debt in the letters of caption was understated, to prevent jail fees; that his brother had not claimed on the trust-estate, merely to avoid distressing him, but was entitled to use the debt to the effect of supporting his concurrence in the petition for sequestration. He further stated that he had been a partner in a firm trading in the retail of medicines, whose affairs were not yet wound up, nor was his connexion with it yet dissolved.

THE COURT recalled the sequestration, and found the Doctor and his brother liable in expenses.

Respondent's Authority.—Kid, Feb. 12. 1830, (ante, VIII. 510); 2. Bell, 333.

H. GRAHAM, W. S.—W. POLLOCK, S. S. C.—Agents.

No. 185.

GEORGE M'NEAL, Pursuer.
D. S. GALBREATH, Defender.

Et è contra.

Jan. 29. 1831.

2D DIVISION.
Ld. Fullerton.
R.

Expenses.—Question of expenses, in which the Court adhered to the Lord Ordinary's interlocutor repelling objections to the Auditor's report.

J. DUNLOP, W. S.—J. JOHNSTON,—Agents.

No. 186.

HARFORD, BROTHERS, and COMPANY, Advocators.—*D. F. Hope—J. Anderson.*
JAMES ROBERTSON, Respondent.—*Robertson.*

Sale—Acquiescence.—A delay having occurred in furnishing goods according to agreement; and the purchaser having in consequence demanded a reduction in the stipulated price; but the sellers having intimated, on sending the goods, that they would not agree to any reduction; and the purchaser having thereafter accepted them without objection—Held bound to pay at the price originally stipulated, and not entitled to found on an alleged deficiency in weight, of which he had not complained tempestivè, as a ground for an aba tement.

No. 186.

Jan. 29. 1831.
2d Division.
Ld. Fullerton.
F.

Harford, Brothers, and Co. v. Robertson.

In an action before the Magistrates of Glasgow, at the instance of the advocators, Harford, Brothers, and Company, against the respondent Robertson, for payment of the balance of the price of certain furnishings of iron made by them to his order, Robertson stated in defence, that in consequence of delay on the part of Harford, Brothers, and Company, he had refused to take the iron, except at an abatement of price to the amount of the balance now claimed; and further, that he was entitled to a deduction in consideration of a deficiency in weight, of which, however, he had not complained at the time.

The Magistrates assoilzied Robertson; and Harford, Brothers, and Company brought an advocation, in which the Lord Ordinary pronounced the following interlocutor, which sufficiently sets forth the facts of the case: —"Finds that by the correspondence terminating in the respondent's letter of the 12th February 1827, the respondent ordered from the advocators a quantity of iron at the prices mentioned in that letter; that although the respondent subsequently complained of the delay in executing the order, and did, in his letters of the 8th, 16th, and 27th of March 1827, found upon that circumstance a demand of some abatement of price, such demand was not complied with on the part of the advocators; that the advocators, in their letter of the 24th of March 1827, enclosing the invoice of the iron, and in their letter of 31st March 1827, explicitly intimated to the respondent that no abatement was to be allowed, and that the iron was sent in terms of and at the prices specified in the respondent's letter of the 12th of February; therefore that there was no new agreement between the parties altering the prices of the iron originally fixed, and that the respondent was bound either to take the iron at those prices, or to reject it, if he considered himself set free from the contract in consequence of the alleged delay in its execution on the part of the advocators; that he did not so reject the iron, but that, on the contrary, having, some time before its arrival, received the advocators' letter of the 31st of March, stating that it was sent at the prices originally fixed, and no other, he took possession of the iron without making any answer, or stating any objections to the contents of that letter until the 4th of May, at which time a second demand had been made upon him by the advocators for payment according to the prices originally fixed; that, in these circumstances, the respondent, by his acceptance of the iron, and his failure to answer the letter of the 31st of March, must be held to have departed from any objections on the ground of the alleged delay on the part of the advocators in executing the contract, and to have accepted the iron on the terms on which it was sent by the advocators; also that the respondent's objections, in regard to the alleged deficiency of weight of the iron furnished, were neither made at the time nor in the terms requisite to enable him to state them as a competent defence in the present action; and, in respect of the reasons above set forth, advocates the cause, alters the interlocutor complained of, and decerns in terms of the libel; finds

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Jan. 29. 1831. Wood v. Thomson.

M'Neal v. Galbreath.

Harford, Brothers, and Co. v. Robertson.

a composition of three shillings per pound which the other cre
receiving out of the trust-estate. There was no trace, in any
given up to the trustee, of James being creditor under th

In these circumstances, Mr. John Wood of London,
applied for recal of the sequestration, stating that the
not a creditor; that he never had been so; but ev
course against the Doctor, as a debtor under th
not being protested against him; that the se
fraudulent device, concocted between the bro
that the estate was too insignificant to be a
and that the Doctor had not been connec
when his share in a concern for the re
him, and he withdrew from it.

Dr. Thomson answered, that his
the bank; but, not choosing to pro
use diligence against Jones, whi
in the letters of caption was u
brother had not claimed on
him, but was entitled to us
currence in the petition
had been a partner in
affairs were not yet w

THE COURT recal
brother liable in

Respondent's

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2D DIVISION. Ld. Fullerton. R.

E.
Lor

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BAND, Claimants.—*D. F. Hope—More.*
spondent.—*Jameson—Anderson.*

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M'Queen &c.
v. Nasmyth.

r, in the marriage-contract of his eldest
his death, such share of his estate
one of his other daughters might
er his death; and having, in
ry her £2000 six months
t the interest must be
to which the eldest

. the year 1813, the
who was the eldest of
contract of marriage, which
ved of covenant. After recit-
. for the said intended marriage, did
er the said Jane Anne Nasmyth should
m his lifetime, such proportion of the pro-
. his decease as shall be equal to the portion or
er of his daughters shall have or become entitled
. him by any means, either in his lifetime or after his
. paid to or vested in trustees upon the trust herein after
-the deed proceeded thus:—" Now this indenture witnesseth,
onsideration of the said intended marriage, the said Sir James
yth for himself, his heirs, executors, and administrators, doth cove-
and agree with the said Charles Scott Murray and Gilbert Mathi-
n (the trustees,) their executors and administrators, by these presents,
that if the said intended marriage shall take effect, and whether the said
Jane Anne Nasmyth shall survive, or shall happen to die in the lifetime
of the said Sir James Nasmyth, then the heirs, executors, or administra-
tors of him the said Sir James Nasmyth shall, within the space of six
calendar months next after his decease, well and truly pay and transfer,
or cause to be paid and transferred, unto, and legally vested in, the said
Charles Scott Murray and Gilbert Mathison, their heirs, executors, ad-
ministrators, or assigns, such sum or sums of money out of the estate,
property, or effects which he the said Sir James Nasmyth shall die pos-
sessed of or entitled to, or such share or proportion of such estate as shall
be equal to the portion or fortune which any one of his other daughters
shall have or become entitled to through or from him by any means,
either in his lifetime or after his death."

On the marriage of a younger daughter to Mr. Dalrymple in 1815, Sir James, in the contract of marriage, bound himself to make payment to the trustees therein appointed " of the sum of £2000 sterling, and that at the first term of Whitsunday or Martinmas after his death, with a [illegible] more of penalty in case of failure, and the legal interest of the

Jan. 29. 1831.

2d Division.
Lord Medwyn.
R.

No. 186.

Jan. 29. 1831. Harford, Brothers, and Co. v. Robertson.

the advocators entitled to expenses, allows an account thereof to be given in, and remits the same to the Auditor to tax and to report."*

Both parties reclaimed,—Robertson on the merits, and Harford, Brothers, and Company, in so far as the interlocutor did not expressly award them the Inferior Court expenses.

The Court adhered on the merits, and inserted an express finding of the expenses in the Inferior Court, in favour of the advocators.

CAMPBELL and BURNSIDE, W. S.—STEUART and SPROT, W. S.—Agents.

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* "NOTE.—The Lord Ordinary has not found it necessary to determine the question whether or not, according to the terms of the original contract, there was any undue delay in its execution by the advocators. That circumstance, though it might warrant the rejection of the iron by the respondent, evidently did not authorize him to take it at a lower price. The question then truly at issue between the parties is, whether, at the time when the iron was sent by the advocators, and received by the respondent, the terms of the original contract had, in that particular, been altered? If, therefore, the Lord Ordinary had been satisfied, as the Magistrates were, "that the pursuers, by making the shipment after receipt of the defender's said letter of the 8th of March 1827, tacitly acquiesced in the terms of the new bargain in point of price therein proposed, and subsequently confirmed that bargain by transmitting the bill of lading, and by retaining and using the remittances made by the defender upon the footing thereof," he must have concurred in the judgment. But it appears to him that that finding is directly at variance with the facts of the case. The advocators, so far from acquiescing in the proposal in the letter of the 8th of March 1827, and confirming it by transmitting the bill of lading &c., expressly and repeatedly rejected that proposal, 1. in their letter of the 13th of March; 2. in their letter of the 24th of March 1827, enclosing the invoice, and demanding a remittance in terms of the letter of the 12th of February; and, lastly, when the respondent, in answer to the letter of the 24th, enclosed a remittance to a certain amount, and claimed a deduction from the price originally fixed, in terms rather resembling the request of a favour than the assertion of a right, he was definitively informed, in the letter of the 31st of March, that no abatement of the price would be allowed. It is clearly proved, then, that there was no new bargain in regard to price. The advocators made the shipment exclusively on the terms of the original bargain, and intimated that they accepted the remittances merely as a partial payment; and therefore, although the respondent might have rejected the iron, if he considered himself set free by the delay of the shipment, or might even have held it in security of the remittances he had previously made, he clearly could not do so without giving due notice; and having taken possession of the iron without giving such notice, and having left unanswered the advocators' letter of the 31st of March for five weeks, he must be held, according to the ordinary rules, to have accepted it on the terms mentioned in that letter.

"The objection of the deficiency of weight stands pretty nearly, though not quite, in the same situation. The iron arrived in Glasgow about the middle of April, and the witnesses called by the respondent to prove the deficiency of weight establish that it was weighed within three or four days after its arrival. But no objection on that score was communicated to the advocators until the 4th of May, when the respondent was disputing his liability for the price as originally fixed; and even in that letter the circumstance is not stated in terms sufficient to apprize the advocators that it was seriously intended to be made the ground of a specific claim of deduction."

MRS. M'QUEEN and HUSBAND, Claimants.—*D. F. Hope—More.*
SIR JAMES NASMYTH, Respondent.—*Jameson—Anderson.*

No. 187.
Jan. 29. 1831.
M'Queen &c. v. Nasmyth.

Marriage-Contract—Clause.—A father having, in the marriage-contract of his eldest daughter, become bound to pay, six months after his death, such share of his estate as should be equal to the 'portion or fortune' which any one of his other daughters might have or become entitled to from him during his life, or after his death; and having, in the marriage-contract of another daughter, bound himself to pay her £2000 six months after his death, but with interest from her marriage – Held that the interest must be considered part of her portion or fortune, in determining the share to which the eldest daughter was entitled.

Jan. 29. 1831.
2d DIVISION.
Lord Medwyn.
R.

On the marriage of Mr. and Mrs. M'Queen in the year 1813, the late Sir James Nasmyth, father of the lady, (who was the eldest of his six daughters,) became a party to the contract of marriage, which was executed in form of an English deed of covenant. After reciting that Sir James, "in the treaty for the said intended marriage, did agree that on his decease, whether the said Jane Anne Nasmyth should survive him, or happen to die in his lifetime, such proportion of the property he should leave at his decease as shall be equal to the portion or fortune which any other of his daughters shall have or become entitled to from or through him by any means, either in his lifetime or after his death, shall be paid to or vested in trustees upon the trust herein after declared,"—the deed proceeded thus:—"Now this indenture witnesseth, that in consideration of the said intended marriage, the said Sir James Nasmyth for himself, his heirs, executors, and administrators, doth covenant and agree with the said Charles Scott Murray and Gilbert Mathison (the trustees,) their executors and administrators, by these presents, that if the said intended marriage shall take effect, and whether the said Jane Anne Nasmyth shall survive, or shall happen to die in the lifetime of the said Sir James Nasmyth, then the heirs, executors, or administrators of him the said Sir James Nasmyth shall, within the space of six calendar months next after his decease, well and truly pay and transfer, or cause to be paid and transferred, unto, and legally vested in, the said Charles Scott Murray and Gilbert Mathison, their heirs, executors, administrators, or assigns, such sum or sums of money out of the estate, property, or effects which he the said Sir James Nasmyth shall die possessed of or entitled to, or such share or proportion of such estate as shall be equal to the portion or fortune which any one of his other daughters shall have or become entitled to through or from him by any means, either in his lifetime or after his death."

On the marriage of a younger daughter to Mr. Dalrymple in 1815, Sir James, in the contract of marriage, bound himself to make payment to the trustees therein appointed "of the sum of £2000 sterling, and that at the first term of Whitsunday or Martinmas after his death, with a fifth part more of penalty in case of failure, and the legal interest of the

No. 187.
Jan 29. 1831.
M'Queen &c. v. Nasmyth.

said £2000 from the term of Whitsunday in the present year 1815, and payable half yearly until payment of the said principal sum."

To the same effect, subsequent to the marriage of a third daughter, Mrs. Villiers, he directed his agents to pay her and her husband annually £100 a year, which he stated to be 'the allowance' settled on her,—she being also entitled to claim, under his deed of settlement, £2000 on his death.

Sir James died in December 1828, having burdened his entailed estate of Posso, for payment of the provisions to his younger children, to as great an extent as is allowed by Lord Aberdeen's Act. His son, the respondent, declined to represent him, and raised this process of multiplepoinding in regard to the sums with which the entailed estate was burdened. In it Mrs. M'Queen lodged a claim to be preferred to an amount equal to the principal sum of £2000, to which Mrs. Dalrymple and Mrs. Villiers were respectively entitled, and also to the interests or annuity which had respectively been drawn by them since their marriage.

In support of this claim she contended, that it was the clear meaning of her contract of marriage that she should be placed on an equal footing with whichever of her sisters should be best provided for; that the interest of the principal sum was as much a part of the portion provided to Mrs. Dalrymple or Mrs. Villiers as the capital sum itself; and that she was therefore entitled to draw a like amount as had been paid to them.

To this it was answered, that the clause in the contract contemplated only the capital sum provided to any of the younger daughters; that if no stipulation had been made in Mrs. Dalrymple's contract as to interest, but Sir James had paid down to her the £2000 on their marriage day, no claim could have arisen to Mrs. M'Queen,—her portion, whatever it might be, being expressly declared only to be payable six months after Sir James's death; and that the payment of interest from the marriage was simply equivalent to the portion having been paid down at that date.

The Lord Ordinary found, "that, under the deed of covenant, the claimant Mrs. M'Queen is only entitled to the sum of £2000, payable six months after her father's death," and repelled her claim quoad ultra; but, on a reclaiming note for Mrs. M'Queen, the Court altered,—found that she had a claim for as much as was paid or payable to Mrs. Dalrymple, and remitted to his Lordship to proceed accordingly.

Cranstoun and Anderson, W. S.—J. Bridges, W. S.—Agents.

No. 188.

Feb. 1. 1831.
Wilson v. Agnew &c.

REV. DAVID WILSON, Pursuer.—*Baird—Marshall.*
COLONEL PATRICK VANS AGNEW, Defender.—*Jameson—Shaw.*
MRS. ANN ROBERTSON, Defender.—*Pyper.*

Warrandice—Teinds—Entail—Glebe.—1.—A superior, who had right, as a subtacksman, to intromit with his teinds, having agreed, in a feu-contract, that the teinds due out of the lands feued should be taxed to £10. 13s. 4d. Scots, besides feu-duty, and that he should free the vassal "of all teind and public burden payable forth of the lands in all time coming;" and having disponed the lands to be holden for payment of a feu-duty, and also the above sum "in name of teind duty, and public burden;" and bound himself to relieve the vassal "of all teinds, parsonage and vicarage, and public burden, payable forth of the said lands, for payment of the foresaid sums, and that for ever hereafter; with power to the vassal to intromit with and receive from the tenants the teind and public"—Held that the superior was liable to relieve the vassal from future augmentations.—2.—Lands mortified by a private individual, as a glebe &c., to the ministers of a parish, not teind-free.—3.—An obligation of warrandice by a superior, possessing an estate in fee-simple, and making that obligation inherent in a feu-contract, as the counterpart of an annual payment under which the vassal was to hold his lands, held binding on an heir who took up the superior's estate in virtue of a subsequent onerous and feudalized mutual entail,—the heir being the lineal representative of the granter of the obligation, and having taken up his estate, including the above superiority.—4.—The liability under this obligation attaches to each heir, only for the sums accruing during his own possession.

Feb. 1. 1831.

1ST DIVISION.
Lord Newton.
S.

IN 1688, Mr. Andrew Agnew, proprietor in fee-simple of the estate of Sheuchan, obtained from Lord Stair, tacksman under a lease from the Bishop of Galloway, a right to the teinds of his estate for payment of a teind-duty. Part of this estate lies in the parish of Leswalt; and in 1691 Mr. Agnew feued a park containing several acres, and lying within that parish, to Gilbert M'Haffie, who became bound to pay a feu-duty of £32 Scots per annum, and also to free Mr. Agnew of the teinds and public burdens payable forth of the land. In 1715, M'Haffie subfeued the park to Mr. Walter Lawrie, then minister of the gospel at Stranraer; and in 1716 Mr. Agnew granted a charter of confirmation and novodamus to Mr. Lawrie, which, after reciting the feu-disposition to M'Haffie, the subfeu, and the payment to Mr. Agnew of the bygone teinds, proceeded in these terms:—"It is agreed betwixt the said Andrew Agnew and the said Mr. Walter Lawrie, that the foresaid teind, parsonage and vicarage, and public burdens, should be liquidated and taxed to the sum of £10. 13s. 4d. Scots yearly, to be paid by the said Mr. Walter Lawrie, by and attour the said sum of £32 money foresaid of feu-duty; and that the said Andrew Agnew and his foresaids should free and relieve the said Mr. Walter Lawrie of all teind and public burdens due and payable furth of the said lands in all time coming;—therefore I the said Andrew Agnew ratify, approve, and confirm the foresaid contract of feu, sasine thereon, and disposition thereof in favour of the said Mr. Walter Lawrie, and of new dispone, heritably and irredeemably, to the said Mr. Walter Lawrie,

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all and haill the foresaid park or piece of enclosed ground, together with that longshot and little croft of land bounded and lying in manner foresaid,—to be holden of me the said Andrew Agnew in feu-farm, for payment yearly of the said sum of £32 of feu-duty, payable at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning &c.; and sicklike of the said sum of £10. 13s. 4d. Scots yearly, payable in manner foresaid, in name of teind-duty and public burdens foresaid: And I the said Andrew Agnew further bind and oblige me to free and relieve the said Mr. Walter Lawrie of all teinds, parsonage and vicarage, and public burden payable forth of the said lands for payment of the foresaid sums, and that for ever hereafter; with power to the said Mr. Walter Lawrie to intromit with and receive from the tenants the teind and public, he always paying to me the duty foresaid."

In 1736, Mr. Lawrie mortified the lands by a deed, disponing them to his "successor in office, minister of Stranraer, and elders and remanent members of the said kirk-session, as trustees, subject to the direction of the presbytery of Stranraer, for the uses," &c. These uses were, that the subjects should be possessed as a glebe &c. by the minister for the time; and it was provided that each succeeding clergyman should enter with the superior, and pay a relief as on the entry of a singular successor.

Mr. Lawrie was succeeded by the Rev. Mr. Blair, who was infeft under a precept of clare constat from the successor of Mr. Agnew in the estate of Sheuchan. The precept narrated the original feu of 1691, the renewal in 1716, and the deed of mortification; exonered Mr. Blair of all arrears of feu-duty, and declared the holding to be "of me and my heirs in feu-farm and heritage, for payment-making of £32 Scots of feu-duty yearly, and of £10. 13s. 4d. Scots of taxed teind, parsonage and vicarage, publics, payable at two terms," &c.

Mr. Blair was succeeded by the Rev. Dr. Coulter; and, after Dr. Coulter's death, the Rev. David Wilson succeeded him. Each of these gentlemen was infeft under similar precepts of clare from the superior.

During the incumbency of Dr. Coulter, the minister of Leswalt raised, in 1805, a process of augmentation, in which he called Dr. Coulter in respect of his possession of the mortified lands. He obtained an augmentation, and also raised a process of valuation of teinds of certain lands in the parish, including, among others, the mortified lands. These lands were thereby valued at £17. 4s. of teind. In 1818, a charge was given to Mr. Wilson, the incumbent holding the mortified lands, by the minister of Leswalt, for £283. 3s., being the amount of arrears of stipend due under the decree of locality, corresponding to the value of the teinds of the ground. Mr. Wilson then raised an action of relief against Mr. John Vans Agnew, who was in possession of the estate of Sheuchan, founding on the contract between Mr. Andrew Agnew and Mr. Lawrie, and concluding for payment of the above sum, and also for relief from all future teind-duty and public burdens, and the expenses of the decree of valuation.

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Mr. Agnew denied that he represented Andrew Agnew, and stated that he held the estate under an onerous and singular title as an heir of entail. With reference to this plea, it appeared that Andrew Agnew had left a son, Robert, who took up the estate under a marriage-contract destining it to heirs-male; that Robert had an only child, Margaret, who married Mr. Vans of Barnbarroch; and that afterwards, in 1757, he and Mr. Vans made a mutual entail of their respective estates primarily destined in favour of Mr. and Mrs. Vans, and the survivor, and the issue of their marriage. This deed proceeded on the narrative of the payment of £3000 by Mr. Agnew to Mr. Vans, who, in consideration thereof, and of the disposition of the estate of Sheuchan, renounced all claim, for himself and his wife, against Mr. Agnew,—sold and disponed his estates of Barnbarroch, in conjunction with that of Sheuchan, in the manner above mentioned, and sunk his family name in that of Agnew. Mr. Agnew retained the liferent of his estate, and the entail was recorded in 1758. He was predeceased by his daughter; and he himself having died in 1774, Mr. Vans, who had previously assumed the name of Agnew, was infeft under the mutual entail in 1775.

On the death of Mr. Vans Agnew, his son Robert made up titles, and was infeft as heir of entail. During his possession, part of the entailed estate was judicially sold at the instance of creditors of him and his father. On his death in 1809, he was succeeded by his son John Vans Agnew, by whom these sales were challenged as ultra vires and irregular, and they were set aside, in 1822, by a judgment of the House of Lords.*

After the present action was brought, John Vans Agnew granted a precept of clare in favour of the pursuer Mr. Wilson, in terms similar to the former one, and in virtue of which Mr. Wilson was infeft.

The case having come before Lord Alloway, and Mr. Vans Agnew having, in addition to the defence of non-representation, pleaded that the clause founded on did not import an obligation to relieve from augmentations posterior to the date of the deed, and that the lands, having been mortified, became teind-free, his Lordship reported the case on informations. The Court at first repelled the defences; but, on a petition, remitted to the Lord Ordinary to hear parties further.

On the death of Mr. John Vans Agnew in 1825, his immediate younger brother, Colonel Patrick Vans Agnew, made up titles as heir of entail. Mr. Wilson then raised an action of transference against Mrs. Anne Robertson, the executrix of John Vans Agnew,—and against Colonel Agnew, "immediate younger brother, and nearest lawful heir at law, or of provision or tailzie, to the said John Vans Agnew, or as otherwise representing her brother on one or other of the passive titles known in law,—to the effect the pursuer may have such action and execution against the

* See 1. Shaw's App. Ca. p. 320.

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said Mrs. Ann Robertson and Colonel Agnew, as he would have had against the said John Vans Agnew in his lifetime," &c.

Colonel Agnew pleaded in defence—

1. He did not represent his brother, Mr. John Vans Agnew. But the action of transference was solely directed against him as "heir at law, or of provision &c., or otherwise representing his brother."

2. The pursuer had no title to pursue. The right of Mr. Andrew Agnew to his lands was quite distinct from his right to the teinds as derived from the titular's tacksman. He not only disponed the land, but assigned a right of intromission with the teinds to Mr. Lawrie. These were separata tenementa, and that gentleman was entitled to mortify as much or as little of either of them as he chose. His deed of mortification related to the *land* alone; all right of intromission with the teind, therefore, remained still in his hæreditas jacens.

3. The defender was not liable, as he did not represent Andrew Agnew, the granter of the feu-contract libelled on. He acquired the estate of Sheuchan as the heir of a singular successor, his grandfather Mr. John Vans. By the onerous contract of entail in 1757, Mr. Agnew substantially sold his estate, while Mr. Vans, on the other hand, sold his. The parties taking the lands as disponees under this deed of sale and entail held a jus crediti against both parties to the contract, which was made real by infeftment in 1775. The daughter of Mr. Agnew had never taken any thing under the entail, having predeceased her father, who granted it. Her son, and her grandson the defender, did not make up titles through her, but through her husband Mr. Vans, who died infeft in the estate of Sheuchan, which he had onerously acquired. By the judgment of the House of Lords it had been found, that so far from John Vans Agnew representing his predecessors, he had a real right in the estate which could not be defeated even by purchasers, and the present defender stood in the same position.

4. The lands were mortified as a glebe, and were therefore teind-free. It was the duty of the pursuer to have pleaded this against the minister of Leswalt; and having omitted to do so, the consequences must fall on himself.

5. In the clause of warrandice of the contract 1716, Sheuchan did not specially warrant against future augmentations. Such augmentations, being a natural and notour burden on the dominium utile conveyed to the minister, were not within the superior's warrandice, unless specially expressed. From this principle the Court never swerved, where there was a conveyance of right to intromit with the teinds. Such right of intromission was conveyed here, and the disponee took it, for better or for worse, at his own hazard.

6. Teinds are debita fructuum, not fundi. The defender took the

estate as heir of entail, and was not liable, at all events, for any arrears of teinds which had accrued before his entry.*

The pursuer answered—

1. The action against Mr. John Vans Agnew was laid on his liability for the obligations of his ancestor Andrew Agnew. When he died, the action of transference could only be directed against his younger brother, so far as representing him as heir of entail, or otherwise; but the transference was only craved "to the effect of having such action and execution against the defenders, as the pursuer would have had against the said John Vans Agnew, if in life." This was clearly a competent transference.

2. In the feu-contract of 1716, Mr. Agnew disponed the lands for a feu-duty of £32 Scots, and he warranted them teind-free for £10. 13s. 4d. Scots additional. This was just taking an additional reddendo, being the estimated value of the teinds, and making the right of relief to the vassal, and the relative obligation on the superior, inherent conditions of the feudal contract. Mr. Lawrie took infeftment, and then mortified the lands in favour of his successors in office, who had been successively entered and infeft by the heir of Sheuchan for the time, and had all paid the feu-duty of £32 Scots, and the additional reddendo of £10. 13s. 4d. It was impossible, therefore, for the defenders to maintain that the right of enforcing relief from teind, being the counterpart of the payment of £10. 13s. 4d., was in hæreditate jacente of Mr. Lawrie. It was an accessory of the right to the land, and was taken up by each vassal entering under the destination of Mr. Lawrie, and paying yearly in terms of the contract.

3. The defender Colonel Agnew was not a singular successor in this obligation. The contracting party was Mr. Andrew Agnew, who held the estate of Sheuchan in fee-simple. Colonel Agnew was his lineal representative, as well as heir under the subsequent entail, and was liable to fulfil his obligations. The judgment of the House of Lords did not touch this liability. Besides, he could not take the annual payment under the contract, and yet refuse implement of the counter prestation.

4. Though Mr. Lawrie, a private individual, mortified certain land for behoof of the ministers, his successors in office, that land could not be teind-free, like a glebe regularly designed by the presbytery.

5. The warrandice was to free and relieve "of all teind, parsonage and vicarage, and public burdens payable forth of the said lands, for payment of the foresaid sums, and that for ever hereafter." Mr. Agnew was not proprietor of the teind; but, for the sum of £10. 13s. 4d. Scots, he undertook to free his vassal from all teind payable out of the land for ever after. This was quite a different case from a sale of teinds, in which a purchaser took the subject under all its natural burdens, and required special warrandice against future augmentations, if the seller was to be

* The other defender, Mrs. Ann Robertson, (executrix of the late Mr. John Vans Agnew,) concurred in the above pleas.

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liable for them. In this case there was merely an insurance undertaken for a certain sum to keep the land teind-free for ever, and under that obligation the present action was well founded.

6. The defender, as the representative of Andrew Agnew, was liable for all the arrears of teind. He could not plead against the pursuer non-liability as an heir of entail.

Lord Newton, before whom the action now depended, ordered Cases, and reported them to the Court.*

Lord President.—My only difficulty was, whether the warrandice undertaken by Mr. Andrew Agnew of Sheuchan reached to future augmentations. But, on looking at the facts, it appeared to me that he just undertook, for a certain annual prestation, to keep the land for ever teind-free. He became a sort of insurer to this extent, and I conceive his representative is liable to relieve of all claim for teind, on receiving payment of the sum stipulated in the contract.

Lord Balgray.—I am of the same opinion. There is a great deal of good law pleaded, which is not applicable to the questions really at issue. These are just three: 1. Has Wilson the title to insist? 2. Is the present heir of entail liable to fulfil the warrandice of the contract of 1716? and, 3. What is that warrandice? I have no doubt on any one of these points.

In the first place, the deed of mortification by Lawrie dispones to the members of the kirk-session as trustees for behoof of the clergyman, and at the same time correctly provides that each successive clergyman should enter with the superior as a singular successor. This is a well-devised system for preserving the feudal relation of superior and vassal entire. Pursuant to Lawrie's destination, the pursuer is now a regularly-entered vassal by Mr. Agnew of Sheuchan, and as such is entitled to maintain this action.

Secondly, The defender Colonel Agnew represents the original party to the contract, who was proprietor in fee-simple of the estate, and the father of the entailer. It would be new law if an heir of entail could take up the estate of the entailer, and yet maintain that he did not represent him in his obligations. He represents the defender out and out as long as such obligations exist. The

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* "Note.—The reason which has chiefly led the Lord Ordinary to report the case is, that the parties differ entirely in what they allege to have been the views taken by the Court formerly respecting the main question, or the effect of the warrandice contained in the deed 1716 in regard to future augmentations of stipend. The pursuer asserts that the opinion of the Court was clear on this point, and that the cause was only sent back to the Lord Ordinary in consequence of some new and separate defences being brought forward in the reclaiming petition; while the defender maintains that the remit was made in consequence of the attention of the Court having been called to some parts of the deed 1716, as importing a conveyance of the teinds to the vassal, which had not been previously noticed.

"The Lord Ordinary is disposed to think that none of the separate defences can have the effect to preclude the consideration of the question as to the import of the warrandice; but he entertains very considerable doubt whether, considering the conveyance which the deed contains of a right to intromit with the teinds, the clause of warrandice which follows can operate an obligation to relieve from future augmentations of stipend."

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superiority of this land, for which the feu-duty and teind-exemption duty were paid, is part and parcel of the entailed estate. By taking up the estate, the defender has right to these annual prestations from the pursuer, and has received them. But no heir of entail can take up a part of that estate as superior, and yet attempt to shake himself loose from the obligations incumbent on him as superior towards his vassal.

Thirdly, The contract of parties seems to me to make the superior liable to keep the land absolutely free of payment of teind for ever for the sum of £10. 13s. 4d. Scots. Some judgments of the Court have gone too far in exempting augmentations from the warrandice, where the special word 'augmentation' was not used. Synonymous words, and the expressions of the context may be so strong and unequivocal, as to be quite equivalent to the use of this expression. This was well considered, and so decided in the latest judgment of the Court. Here the superior bound himself in relief against all claim for teind. He undertakes, on being paid a certain annual sum, to relieve the vassal of all such claims. He just, as your Lordship has expressed it, makes a contract of insurance with his vassal against a claim of teind. I consider that the superior is liable, therefore, in the obligation of relief libelled on.

Lord Craigie.—The negative prescription has no place here to cut off the claim under the warrandice in the contract. As soon as the necessity for relief emerges, the warrandice comes into operation. It was probably a very fair arrangement between the parties, at the time, that the superior should free the vassal of all teind for the sum stipulated, though the relative value of land and money has now so greatly altered. My only difficulty is as to the liability of Colonel Agnew for the expense of the decree of valuation.

Lord Gillies having generally concurred, and the Court having intimated an opinion that Colonel Agnew's liability could only commence from and after Whitsunday 1825, the period of succession—that the prior arrears were due by the executors of the former heir of entail—and that the question of liability for the expenses of the decree of valuation required further expiscation,—they "repelled the defences, (with the exception of that against the conclusion for payment of the expense of the process for valuing the teinds of the mortified lands in question,) and decerned and declared in terms of the libel against the defender, the executrix of John Vans Agnew as such, for the arrears in question from the year 1809, when the said John Vans Agnew succeeded to the estate of Sheuchan, to the term of Whitsunday 1825, the term previous to his death, when the other defender Patrick Vans Agnew succeeded to the said estate, and against the said Patrick Vans Agnew for the arrears since the said term of Whitsunday 1825, and for the stipend in future; found the defenders jointly and severally liable in the expenses incurred by the pursuer since the date of the interlocutor finding the pursuer entitled to previous expenses, &c.—reserving to the defenders their relief as accords; and remitted to the Lord Ordinary to hear parties further on the expenses of the process of valuation of teinds, and to do therein as shall be just."

Pursuer's Authorities.—(1.)—Earl of Dumfries, June 13. 1795, (12008.)—(2. and 3.)—Kyle, Dec. 30. 1821, (ante, I. 193); Orr, Feb. 16. 1634, (9767); Forbes, March 23. 1636, (9771)—(4.) Arbuthnot, Jan. 19. 1821, (F. C.); Hailes, p. 464; Bells, June 14. 1814, (F. C.);

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Murray, Jan. 26. 1815, (F. C.); M'Leod, W. and S.'s App. Ca. 213.—(5.)—Earl of Hopetoun, July 3. 1811, (F. C.); Low, Jan. 31. 1821, (F. C.); Cuningham, Jan. 27. 1829, (S. and D.'s Teind Cases.)—(6.)—Campbell, Nov. 29. 1815, (F. C.)

Defenders' Authorities.—(1.)—Fraser, Feb. 23. 1830, (ante, VIII. 585); Ewing's Trustees, Feb. 25. 1829, (ante, VII. 464.—(3.)—Agnew, July 31. 1822, (1. Shaw's App. Ca. 320.)—(4.)—1578, c. 62; 1621, c. 10; Burnet, June 9. 1676, (15640); Dunlop's Par. Law, 154; Wilson, Feb. 8. 1826, (S. and D.'s Teind Cases, p. 88.)—(5.)—Craig, 207, § 3; Stair, p. 234; 2. Ersk. 3. 29. 31. and 46; 1. Bankton, p. 577; 1. Bell, 644; 2. Ersk. 10. 38; 2. Connell, 472; Drummond, March 28. 1549, (16565); Simpson, March 14. 1563, (16565); Boyd, Feb. 15. 1565, (16586); Watson, July 15. 1667, (16583); Auchentoul, July 1. 1676, (16073); Linthill, Jan. 24. 1694, (4. Fount. Supp. p. 263); Cuningham, Jan. 27. 1829, (S. and D.'s Teind Cases, p. 187); King's College, Aberdeen, July 8. 1803, (15712); Plenderleith, Jan. 31. 1800, (16639); Alexander, June 9. 1812, (F. C.); Earl of Hopetoun, Dec. 8. 1819, (F. C.); Low, Jan. 31. 1821, (F. C.); Hamilton, June 13. 1823, (ante, II. 403); Elliot, Dec. 2. 1824, (ante, III. 348.)—(6.)—Anstruther, June 26. 1827, (S. and D.'s Teind Cases, 133.)

J. R. Skinner, W. S.—J. B. Gracie, W. S.—Tod and Hill, W. S.—Agents.

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THOMAS JOHNSTON, Pursuer.—*Sol.-Gen. Cockburn—D. M'Neill.*
GEORGE ROME, Defender.—*Skene—Marshall.*

Et è contra.

Agent and Client—Pactum Illicitum—Pactum de Quota Litis.—Circumstances in which the Court set aside a transaction whereby a client had become bound to divide the subject of a lawsuit with his legal adviser, reserving all claim for a suitable remuneration for trouble.

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2D DIVISION.
Ld. Mackenzie.
T.

THOMAS JOHNSTON, writer in Dumfries, became the legal adviser of George Rome, a poor man brought up in the lower ranks of life, and assisted him in the recovery of a small property called Frankfield near Dumfries, of about 16 acres of extent, and £70 of yearly rent. This property had belonged, about 50 years ago, to Rome's great-granduncle, Lieutenant Francis Graham, who died intestate, and was succeeded by his two sisters, Hester and Martha Graham, as heirs-portioners. Hester, who was Rome's great-grandmother, never made up titles to her share. Martha, however, obtained an entry in the whole property, which she conveyed to the late Mr. M'Craken, a writer in Dumfries. Rome was ignorant of the existence of his right until the year 1819, when he first heard of it from Howat, a writer in Dumfries, who investigated the matter, and obtained him served heir-portioner to his great-granduncle. Howat failed to retour the service, and otherwise neglected the business; and he was afterwards murdered in the house of a Mrs. M'Kinnon in Edinburgh. Before the murder of Howat, Messrs. Armstrong and Martin, writers in Dumfries, had interested themselves in the matter, and endeavoured unsuccessfully to obtain the defender's papers from him; and some correspondence passed betwixt Rome and these agents, in which the claim was still further elucidated. In this state of matters, the case was taken up in 1825 by Johnston, who

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exerted himself to obtain every possible information on the subject necessary to make out the claim. After a correspondence which it is unnecessary to quote, Johnston wrote the following letter:—"Sir, I write you at this time, to request you to come up this length as soon as possible; and it may be proper to apprize you of my reason for calling you up. I have had prodigious trouble with this case of yours in regard to Frankfield, and no small expense; and this, after all, I must say, and that solemnly, that all in regard to it is involved in doubt and uncertainty. Your title, they say, is by no means good. I think they are wrong, but not certain. It is said that on the debt of Lothian or Story per £345 sterling, due in the year 1771, an adjudication followed, and thereupon possession, and that therefore the property is feudally vested in the heirs of the bond in virtue of said adjudication; or that they have still a claim for the principal, and the interest due thereon since 1771 till this day, except for the time the property was in their own hands. And, again, people speak of a debt of Dickson of Glengaber. But let us suppose that these claims exist not, and therefore cannot eat up the property and the rents; then we may naturally expect that Mr. M'Craken and his heir must account for the rents they have received. But here, again, this depends on what title they may produce; for if this be such as cause the Court to hold him as having possessed in bona fide, then and in that case no rents will fall to be paid by him. Moreover, the property will be liable for his claims as to improvements; but, on the contrary, he must account for said rents.

"Now having stated the situation of your case as clearly and fairly as the information received and gathered by me will admit, my next duty is to submit to your consideration, and the consideration of your friends, if you think proper, the terms on which, under all these doubtful circumstances, I will undertake your action against the present ostensible proprietors of Frankfield. First, then, if in this action I ultimately prove unsuccessful, I will not charge you or yours with one penny of the expenses that may be incurred, whatever their amount. Next, if fortunate, I shall be entitled, for my risk and hazard, to half of your share of the land. If any debts come against it, my share shall be liable to them as well as yours; and if any debts be due, these debts, so far as I can recover them, will be due to me in name of expense and trouble &c. in the prosecution of the action.

"Having considered all above written, I beg that you will come up, that we may talk over the matter, and enter into an agreement—say on Friday first. You need not make any noise about the affair till we see how we are like to come on. I am, Sir, your most obedient servant," &c.

An answer in the following terms, prepared by Johnston, was thereafter signed by Rome:—"Sir, Having some time ago met you in the village of Springfield, and there said to you, that as I conceived I had a good claim in the character of heir to the one half of the property of Frankfield near Dumfries, and as I had not wherewith to carry on the

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proceedings that had been commenced in order to redeem the property from the heir of the late Mr. M'Craken of Lochvale, I would give you the half of my one-half of said property, if you would undertake to bring the matter to an issue. Having also been made aware that you in consequence made all inquiry in your power as to the grounds of my right, and having received a letter from you, of date 29th October 1825, a copy of which I have signed as being an exact duplicate of said letter, showing the result of these inquiries, and stating the terms on which you would undertake the cause, and in which you requested me to weigh well the matter, and to consult my friends thereanent, and thereafter to come up to Dumfries, that an agreement might be entered into between us,—I now do, from a conviction of the uncertainty of the issue of this action, having full confidence in your integrity, from a sense of the risk you run in being thrown into expense, which I can never pay, and am not bound to pay, and after mature deliberation and consultation with my friends, do hereby agree to the terms in said letter, except in so far as regards your being allowed to recover and keep the whole of the rents that may be found due to me as heir aforesaid. As to this, I will not agree; but to this I am perfectly willing, that you shall have right to the equal half of these rents;—and seeing you have consented to this alteration, I hereby solemnly bind myself and my heirs, and all belonging to me that may succeed me, to fulfil the whole of this agreement to you. I am, Sir, your most obedient servant," &c.

An action of reduction and declarator having thereafter been instituted in this Court in Rome's name against the possessors of Frankfield, they, after a record had been made up, consented to decree being pronounced in Rome's favour as to his share of the property; and they afterwards agreed to a verdict for £600 of bygone rents. Johnston thereupon brought an action against him for one-half of the property, and rents recovered; while Rome, on the other hand, raised a reduction of the missives above quoted. These actions were conjoined, and reported on Cases by the Lord Ordinary.

Pleaded for Johnston.—The transaction in question was a fair and legal agreement betwixt the parties, fully implemented by the pursuer, and homologated by the defender; and the remuneration was no more than equivalent to the risk. The transaction was neither struck at by the statute 1594 against the purchasing of pleas, nor by any doctrine of pactum de quota litis known in the common law. The statute expressly regards a depending action; and at the date of the agreement there was no depending action, and there might never have been one. Further, the statute is directed against practitioners who purchase pleas in the Courts where they practise; and the pursuer does not fall under that denomination, nor has he purchased any plea. The common law of pactum de quota litis also, according to the definitions of Lord Stair and others, is applicable only to such practitioners; and the pursuer did not, in this case or any other, hold that particular status.

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Pleaded for Rome.—The general complexion of the whole transaction is fraudulent. An agent, by means of his superior knowledge and opportunities, has insidiously obtained from his client, an uninformed person, the obligation in question, by which one-half of a subject of considerable value was to be paid as the remuneration for assisting a plea which was never doubtful, and in which the pursuer ran no adequate risk. The obligation was obtained, as the correspondence proved, by false representations of the doubtful issue of the plea, and of the risk incurred by the pursuer. The paction upon which the pursuer founded his claim, is in its own nature null as a pactum de quota litis. All pactions are rejected as contra bonos mores, in which legal advisers stipulate for the whole or part of the disputed funds, which they are professionally employed to vindicate for the clients who confide in them. This is the common law of Scotland, as well as the statute law; and the statute 1594 applies to every species of legal adviser or law-agent. The pursuer's status is not only within the compass of this denomination, but his own letters afford complete evidence that the parties stood in the relation of agent and client.

Lord Justice-Clerk.—The first consideration is, how we are to treat this case. If we are to view it as a question of fraud, it must go to a Jury. Of this, however, I have not the smallest doubt, that the pactum de quota litis of the Roman law is our common law also; and that there is no necessity for bringing this case under the statute 1594. Any bargain whatever, for a half or for any share of the subject under litigation, made betwixt agent and client, may come under this doctrine. Practitioners make themselves masters of all the minute particulars of a client's case, and then, taking advantage of ignorance or inexperience, make such a bargain. I have no doubt whatever of the application of our common law. Have we a case of the kind before us? Much has been said about this Mr. Johnston not being an agent, or having the legal status to bring him under the doctrine; but in the case of Carruthers v. Johnston, lately before us, this very person took the designation of writer he now disclaims; and as for the other pretext, that he was not the particular agent conducting the case, all country agents may say so, who find it necessary to employ a writer in Edinburgh. I think there is nothing in all this; and unless your Lordships are for sending the case to a Jury on a question of fraud, we may proceed to the consideration of whether this be a pactum de quota litis.

Lord Glenlee.—I have my doubts if the statute applies in this case, or if this be pactum de quota litis. But I am much inclined to think there is that in the transaction which may be set aside as unjust. If one party having access, as agent, to all the circumstances of a case, takes advantage of his superior knowledge and capacities, and thereby induces his client to make such a bargain, unless it be made to appear that the transaction was very reasonable indeed, I think it may be set aside. If Johnston was not the agent in this case, he was at least his legal adviser. This is rather an old-fashioned phrase, but very expressive of Johnston's agency here. Rome might furnish the facts, but all the capacities were with his legal adviser. As to the risk, I see none that Johnston incurred. Both as to risk and expenses, he made the best pos-

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sible bargain for himself. There may be risk as to the result of a nice point of law, but I do not understand the meaning of risk in establishing the matter of fact of Rome's right. Decree for expenses would follow the establishment of the right; and I see Johnston takes care not to engage to relieve Rome from incurring expenses in any event. I think, under all the circumstances, that the transaction may be set aside as unjust. We might send the case to a Jury; but I do not well see what a Jury could make of it. What could they make of the question of the extent of Johnston's risk in assisting to establish a matter of fact?

Lord Cringletie.—I perfectly agree with what has been said. There is in our law such a thing as pactum de quota litis, and it is essential to the purity of our law that the doctrine be recognised. This agent seems to have been a sharp clever fellow; and as for the pretext of having no professional status, I would apply the principle of the maxim, malitia supplet ætatem. I am for setting aside this transaction at once. Let the agent be paid fairly or liberally, but do not let us countenance any such proceeding as this. I think it falls under the statute 1594, and our common law too. Such is the opinion of Stair and our lawyers; and this Court has confirmed the doctrine in the case, I am sorry to say, of a Lord of Session—Lord Cranstounriddle. I certainly cannot understand how the Court in that case came to the conclusion, that although the case came under the statute, to the effect of deprivation of office, the transaction itself must be held to subsist. I think such a view contrary to the express terms as well as spirit of the statute; and when I find a decision opposed to a statute, I consider myself bound to follow the statute, and not the decision. No one can doubt, on looking at the correspondence, that this is a case of agent and client. Legal adviser is the very phrase I had marked on my papers. I am not inclined to put the case on the footing of fraud; but it is a pactum de quota litis, both at common law and under the statute.

Lord Meadowbank.—Although your Lordships certainly differ in opinion from me, yet I think it my duty to state what mine is, after the most careful attention. If this case is to be sent to a Jury as a question of fraud, I can have no objection; but I must say, in common fairness and justice to the party, that, after carefully reading and considering the whole case, I do not think the matter so clear against Johnston as your Lordships think it is. It is obvious that the other agents employed by no means considered Rome's case a clear or certain one; and as for Rome's own capacities, really, when I read his letters, I cannot fancy him ignorant or uninformed. But this is for a Jury to determine. If, however, we are now to decide the question, I must say I see no sufficient evidence of fraud. But there is here another very important question of law as to pactum de quota litis. I do not agree that this is adopted in our common law. The very words of the statute prove this; for it says expressly that *in time coming* it shall not be leisum, &c. There is no evidence in our books that the law, with us, has any other foundation than the statute; and Sir George M'Kenzie, in his Observations, clearly takes this for granted. I think the statute totally inapplicable to this case. I should rather think, that as the statute fixes a specific punishment of deprivation for the offence, this must operate as a bar to any other effect. But all our books, and the case of Cranstounriddle, lay down this, that it must be a plea under dis-

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cussion. And when I find the opinion of Lord Stair, Sir George M'Kenzie, and a decision of this Court one way, I cannot set up my own opinion in opposition to such authority. I see no allegation that Johnston, though a writer, comes under any of the denominations of the statute. He is not an advocate, nor advocate's servant, nor member of the Supreme Court. There is no averment on the record sufficient to bring him under the statute. Now this is a question of penalty. This is a penal statute, and it must not be extended one iota. But although I think that, as pactum de quota litis, this case comes under neither statute nor common law, yet I have no objection to the question of fraud going to a Jury.

Lord Justice-Clerk.—I gave my opinion without being certain that your Lordships were to go fully into the consideration of the case, and think it my duty now to state it more at length. I certainly agree that the statute 1594 is not applicable to this case, and it is material for your Lordships to look to the terms of it. It does not refer to bargains betwixt agent, or lawyer and client, for division of the subject of the plea;—it is levelled against purchasing of pleas. I am clear it equally applies to agents in Inferior Courts; but I think it has no application to Mr. Johnston in this case, as he did not purchase the plea. But, independently of the statute, have we no law to reach this case? The pursuer fairly attempts to grapple with this in his argument; but Lord Stair is quite clear as to the common law of pactum de quota litis. So is Lord Bankton. We have ample evidence before us, in the correspondence, to prove the nature of this transaction. Independently altogether of the view of fraud, I think we ought to set this transaction aside as an illegal compact, but without inflicting further punishment or penalty.

Lord Meadowbank.—All our authorities clearly consider the statute 1594 to mean pactum de quota litis.

The Court pronounced the following interlocutor:—"In the action at the instance of Thomas Johnston, sustain the defences, assoilzie the defender, and decern,—reserving to the said pursuer to insist in any competent form for payment of a suitable remuneration for his trouble as agent for the defender in the case referred to in the pleadings; and in the action of reduction repel the defences, find in terms of the conclusions of the libel, and decern."

Pursuer's Authorities.—Lord Cranstounriddell, July 30. 1635, (Mor. 9496); Home, Dec. 15. 1713, (9502); Stair, 1. 14. 2. and 17. 14; Bankt. 1. 11. 11; 1594, c. 216; Nisbet, Feb. 24. 1675, (Mor. 9496;) Rucker, Feb. 9. 1826, (ante, IV. 438.)

Defender's Authorities.—ff. lib. 6. ad Legem Juliam de Vi Privata; Kames' Principles of Equity, 2. 1; 4. Blackstone, 185; 1594, c. 216; Stair, 1. 10. 8; Bankt. 1. 11. 11, and 4. 3. 23; Nisbett, Jan. 6. 1676 (Mor. 9497); Ruthven, June 23. 1680, (Mor. 9499); M'Kenzie, July 23. 1774; (Brown's Supp. V. 522); Brashe, March 9. 1820, (F. C.); Clyne, Jan. 26. 1830, (ante, VIII. 391); Ballantyne, Nov. 1682, (4391); Long, June 3. 1821, (2. Shaw's App. 23.)

J. M'Craken,—J. Pattison, W. S.—Agents.

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E. of Glasgow &c. v. Miller.

EARL of GLASGOW and Others, Suspenders.—*D. F. Hope—Speirs.*
ANDREW MILLER, Charger.—*Murray—Penney.*

Church—Expenses.—1.—Same judgment as in the case of Methven, (ante, VI. 791.) —2.—The collector of an assessment for enlarging a church, under decree of a presbytery, found liable in expenses to the suspender of a charge given by him, reserving his relief against those who might have authorized him to proceed.

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Ld. Fullerton.
R.

SUSPENSION by the Earl of Glasgow, and other heritors of the parish of Neilston, of a charge on a decree of the presbytery, for enlarging and repairing the parish church, given them by Miller, the collector appointed by the presbytery. The present church, according to the report of tradesmen, was perfectly capable of being sufficiently repaired, and in fact had been completely repaired since the date of the decree, which found that it was "not in a good state of repair, either in the wood or walls," but proceeded chiefly on its insufficiency to accommodate the inhabitants, and which ordained additional accommodation to be provided for 2362 persons, being, with the 830 which the church was capable of holding, two-thirds of the examinable population. The grounds of suspension were the same as in the Methven case, (ante, VI. 791,) the decision in which was pronounced before the charge brought under suspension was given.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note:*—"In respect that it was not proved by the reports of the tradesmen employed, and has not been found by the presbytery of Paisley, on considering those reports, that the church of Neilston was in such a state of dilapidation as to require to be rebuilt, or to be repaired to an extent substantially equivalent to rebuilding,—finds that it was incompetent for the presbytery to order an enlargement of the said church, on

* "NOTE.—It was determined in the case of Methven, 14th May 1828, that heritors cannot be called upon to enlarge a parish church when in good repair, on the ground of its inadequacy to accommodate the increased population of the parish; and according to the opinion of the consulted Judges in that case in regard to the former practice of the Court, even the permanency of the increased population 'does not appear to have been considered by the Court as warranting a demand to enlarge the church, unless the church, at the time of the demand, was so ruinous as either to render it necessary to rebuild it, or to give it such extensive repairs, that an addition became a matter of little moment in adding to the expense.' Now, in the present case, the reports of tradesmen, obtained by the presbytery do certainly not appear to the Lord Ordinary to support a demand for the enlargement of the church upon that ground; and accordingly all that is found upon that point by the presbytery, in their resolution of 30th August 1827, is, 'that the church is not in a good state of repair, either in the wood or the walls'—a finding falling very far short indeed of what would be requisite, according to the fair construction of the rule laid down in the case of Methven, to subject the heritors to the obligation to enlarge it. In short, it appears to the Lord Ordinary, on looking into the whole proceedings, that the resolution of the presbytery cannot be maintained on the state of the church, but truly rested on the state of the population."

account of its inadequacy to accommodate the increased population of the parish; and therefore suspends the letters simpliciter, and decerns; finds no expenses due."

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E. of Glasgow &c. v. Miller.
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Both parties reclaimed,—Miller on the merits, and the heritors in so far as they were not allowed expenses. Against the claim for expenses it was contended by Miller, that being merely a collector appointed by the presbytery, he ought not to be subjected; but the Court, while they adhered on the merits, altered as to expenses, in which they found Miller liable, reserving to him his relief against such parties as might have authorized him to proceed.

J. Murray, W. S.—W. Patrick, W. S.—Agents.

John Mure Steel, Advocator.—*D. F. Hope—Anderson.*
W. Catherine Smith, Respondent.—*Jameson—Penney.*

No. 190.

Jurisdiction—Poinding.—Where a poinding has been executed in virtue of a precept on decree by Magistrates of a royal burgh, but not reported, it is competent for the Sheriff of the county, on the application of a third party claiming the goods, to grant interdict against proceeding with the poinding.

John Mure Steel, writer in Glasgow, held a bill for £100 against Thomas Buchanan, merchant there, which he protested, and registered the protest in the Burgh Court books. Having obtained an extract containing the usual warrant for execution, he caused a town-officer, on the 25th of August 1829, to poind certain effects as belonging to Buchanan. On the 28th, and before the poinding had been reported by the officer, Mrs. Smith, a daughter of Buchanan, presented a petition to the Sheriff of Lanarkshire for interdict against Steel from removing or otherwise interfering with the poinded effects, alleging that they belonged to her, and not to the debtor. The Sheriff granted interim interdict, and ordered answers. Steel, besides, pleading to the merits, contended that the Sheriff had no power to stop the execution of warrants or decrees granted by the Magistrates of a royal burgh having a co-ordinate jurisdiction with himself. Mrs. Smith answered, that the application to the Sheriff was not to review the decree of the Burgh Court, but to protect her property against being illegally taken from her.

Feb. 2. 1831.

1st Division.
Ld. Corehouse.
H.

The Sheriff Substitute found "that the object and true intent of the present action is not to interrupt or interfere in any manner of way with the defender's proceedings under the extract registered protest, No. 5, and execution indorsed thereon, to the effect of attaching furniture or other goods, the property of the defender's debtor Thomas Buchanan, but to prevent effects which, it is averred, belong to the pursuer, a third party, from being taken in execution, and sold towards payment of a debt due by Thomas Buchanan;—that the pursuer produced sufficient primâ facie evidence of her right of property in the effects in question for warranting her in presenting the petition No. 1, and the Court

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in entertaining that application, and granting the interdict ad interim; —that it is not denied by the defender that his place of residence is outwith the jurisdiction of the Burgh Court of Glasgow, or that the pursuer's petition was served on him personally, as set forth in the officer's execution; and in the whole circumstances of the case as applicable to the dilatory defences, repels these defences, and sustains the action as competent before this Court."

Steel having brought an advocation, the Lord Ordinary "repelled the reasons, and remitted simpliciter," with expenses. *

Steel reclaimed; but the Court, without hearing the respondent's counsel, adhered.

LORD PRESIDENT.—There was no report of the poinding made to the Magistrates before the interdict was granted by the Sheriff. It was thus quite open to him, as Judge Ordinary, to hear the complaint of the respondent that her property was about to be illegally carried off. I concur with the Lord Ordinary in the grounds on which his Lordship rests his opinion.

The other Judges assented.

Advocator's Authorities.—54. Geo. III. c. 137, § 54; Smith, March 8. 1634, (7484); Adamson, July 21. 1631, (7484.)

J. M'GILL,—CAMPBELL and MACDOWALL, W. S.—Agents.

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* "NOTE.—The process by which a debt is constituted, and a warrant for execution obtained, terminates when the decreet is extracted. The diligence which follows upon a decree is a process entirely distinct. If a poinding is resorted to, the messenger or officer employed performs a double function, which, before this diligence was remodelled by the 54th Geo. III., completed the process by a transference of the moveables, or their price, to the creditor-poinder, though it was subject to review on the ground of error. By that statute, the messenger or officer can proceed no further than to adjudicate the effects poinded to the creditor, and he must report his poinding to the Judge Ordinary before a warrant of sale can be obtained, or the effects, if not sold, delivered over to the creditor. But neither the power of reviewing the officer's proceedings, nor that of receiving the report of the poinding, is confined to the tribunal before which the debt was constituted. Indeed, in many cases, as in that of the Commissary Court and of the Justice of Peace, the debt may be constituted where the diligence following upon it can in no shape be the subject of cognizance; but, by an express enactment in the statute referred to, the report of a poinding must in every case be made to the Sheriff or Judge Ordinary. Neither is it any bar to the report being received, that the officer employed derived his employment, not from the Judge to whom he reports, but from the Crown or some other authority. It seems a necessary inference, therefore, that if there is any legal ground for stopping a poinding which does not impeach the decree or warrant on which it proceeds, any Judge Ordinary within the bounds is competent to grant an interdict. By doing so, he creates no collision between his own jurisdiction and that of the Court who gave the decree, and no inconvenience is likely to result from the practice. If, indeed, the poinding has been reported to one Judge Ordinary, and a dependence thereby created before him, it is alike inconsistent with principle and expediency that another Judge Ordinary should be entitled to interfere."

WILLIAM ALLEN FLOWERDEW, Pursuer.—*Rutherfurd—Ivory.*
DUNDEE, PERTH, and LONDON SHIPPING COMPANY, Defenders.—*Keay—Baxter.*

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Flowerdew v. Dundee Shipping Co.

Partnership—Clause.—A clause in the contract of a shipping copartnery, relative to the division of "free profits," held to imply gross profits under deduction of repairs on the vessels &c., and of a sum equivalent to the loss caused by their annual deterioration from age; although a limited sinking fund was provided "for upholding the number of vessels necessary for carrying on the company's trade, and meeting any risks which the company may have incurred," &c.

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1ST DIVISION.
Lord Newton.
D.

BY the contract of copartnery of the Dundee, Perth, and London Shipping Company, the capital stock was originally declared at £38,045. Of this sum £34,200 was real capital, or input stock. In providing for the annual division of the free profits, the contract contained the following clause:—"Declaring, that in fixing the amount of the said free profits for division, the committee shall have power, and they are hereby directed, to set aside twenty-five per cent. of the amount of the said free annual profits as a sinking fund for upholding the number of vessels necessary for carrying on the company's trade, and meeting any risks which the company may have incurred, or to which they may be liable; but declaring, that if the said sinking fund shall at any time exceed £5000, no part of the profits thereafter shall be set aside, so long as it remains at that amount." The free profits of the company from May 1828 to May 1829 were stated in the books at £6429. 4s. 11d. But, before bringing out this sum as neat profit, a sum of £1291. 15s. 3d. had been struck off the gross profits, as the estimated deterioration of the shipping stock during the year, over and above the actual outlays which had been necessary for repairing the vessels. The above sum of £6429. 4s. 11d. also consisted in part of £2079. 8s., being profit arising under an insurance account kept separately in the books of the company,—they having resolved to save premiums of insurance by taking their sea-risks upon themselves. After a deduction from the £6429. 4s. 11d. of twenty-five per cent., or £1607. 6s. 3d., there remained £4821. 18s. 8d., which it was proposed to divide among the partners at the rate of £4 per share. The deducted sum of £1607 was added to the sinking fund, which was previously £3200.

To this dividend Mr. William Allen Flowerdew, writer in Dundee, and a partner of the company, objected, that, under the contract, a larger sum than £4821. 18s. 8d. was divisible as free profits. He contended, that after charging for all proper repairs on the shipping, it was not justifiable to deduct £1291 further, as its deteriorated value, before bringing out the fund divisible as free profits; that the 25 per cent. of deduction from the whole free profits was designed to create a sinking fund, not exceeding £5000, which should "uphold the number of vessels, and meet any risks," &c.; that three-fourths of the sum of £1291 should therefore have been divided, as well as three-fourths of £6429; and that if the fourth of these two sums created a surplus over the

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£5000 of the sinking fund, the whole surplus should have been divided also He accordingly raised an action against the company before the Magistrates of Dundee, concluding for an addition to the dividend corresponding to the enlarged amount of what he maintained to be truly divisible as free profits under the contract.

The company answered, that their ships, or stock in trade, though receiving constant repairs to keep them fit for sea, were, of necessity, wearing out from year to year; that in valuing their stock fairly, therefore, it was necessary to estimate the annual deterioration of their shipping, and to deduct its amount from their gross profits, in the same way that they deducted all their other losses or expenses; that it was only the balance that was free profit, and the whole of that had been divided, under deduction of 25 per. cent. for the sinking fund; and that the sinking fund, limited to £5000, was chiefly meant for hazards and unusual losses, and was neither intended nor fitted to supply the constant annual decay of the shipping stock.

The Magistrates pronounced this interlocutor:—"Find that it is reasonable, and in the spirit of the contract, and according to the known usage and daily practice of traders, manufacturers, and ship-owners, to state against their gross profits the deterioration which has arisen during the year upon the instruments employed in their business—for example, in the case of ships, to state against the gross freights the depreciation of the vessel by tear and wear; for otherwise the apparent profits would be fictitious, the diminution in value being in many cases more than equal to the produce, and so there may be in truth a loss, although the accounts (when the depreciation is not deducted) show in appearance a considerable gain;—find that it is only after such deduction from the gross apparent profit that the true result or free profit is ascertained;—find that the sinking fund stipulated under the defenders' contract of copartnery to be maintained by retention of a portion of the free profits, is not intended to be placed against the natural depreciation of tear and wear; but, as the contract itself bears, 'for upholding the number of vessels necessary, and meeting any risks which the company may have incurred, or to which they may be liable;'—that is to say, it is intended to meet any extraordinary event, as, for example, the total loss of any of their vessels, or the destruction of their warehouses;—find, therefore, that the defenders were entitled, in making their balance or abstract, to set aside from the gross profits the sums necessary for covering the natural deterioration during the year, the balance so appearing being the free profits, and they were entitled also to set apart 25 per cent. of the free profits towards the sinking fund;—find it admitted that the balance, being free profits, was £6429. 4s. 11d., of which they were entitled to set apart 25 per cent.—that is, £1607. 6s. 3d., leaving of free profits for division £4821. 18s. 8d.;—finds it admitted that they accordingly divided £4800, the balance, being £21. 18s. 8d., being carried to the next year's account;—find, therefore, that the acknowledged dividend was all that the com-

pany were bound or entitled to divide, with the exception of the fraction which might have been paid on each share by the division into 1200 parts of £21. 18s. 8d.; and the pursuer has stated that it is not this fraction which he seeks to recover;—therefore, on advising the whole case, assoilzie the defenders, and find the pursuer liable in expenses."

Flowerdew advocated. Pending the advocation, the company resolved to increase their capital stock from £38,045 to £50,000. Shortly before this, Flowerdew had raised a declarator against the company, seting forth that they were accumulating a capital stock beyond the value of £38,045, and £5000 of a sinking fund, as fixed in the contract, which surplus ought to be instantly divided among the partners, and concluding to have it found—

"1. That the said company have not, at any time since the date of their said contract, been, and are not now, entitled to possess or hold a capital stock of greater value than £38,045, nor a sinking fund of larger amount than £5000; nor altogether to accumulate and keep in their hands, for the purposes of their business, or otherwise, an amount of funds, effects, or property, of whatsoever description, of greater value, taken at any one time, than £43,045.

"2. That in so far as, from the profits and proceeds of their business under the said contract or otherwise, the said company shall at any time accumulate, and have in their possession, or in any way belonging to them, a capital stock and sinking fund, or an amount of funds, effects and property generally, to a greater extent and value than the sums severally above mentioned, they are bound to distribute the whole surplus, in name of free profits of the company's trade, absolutely, and without reserve, among the partners in proportion to their several shares in the concern, and that in such way and manner, and at such times, as are provided in the 15th article of the said contract.

"3. That even where the capital stock and sinking fund, and the funds, effects, and property of the company generally, shall at any time fall short of the amount severally above mentioned, still the said company are bound to make a full and absolute distribution of the whole free annual profits of the company's business under the said contract, subject only to a reserved power to set aside 25 per cent. of the amount of the said free annual profits, as a sinking fund for upholding the number of vessels necessary for carrying on the company's trade, and meeting any risks which the company may have incurred, or to which they may be liable; but so always, that if the said sinking fund shall at any one time amount to £5000, no part of the profits thereafter shall be set aside, so long as it remains at that amount; and so also that, in the distribution of the said profits, it shall not be competent in any one year first to withdraw and set aside a part of the said profits in order to meet an alleged or even a real deterioration or deficiency of the said capital stock and sinking fund, or of the funds, effects, and property of the company generally, with a view to restore and bring back the same to the amounts severally above

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mentioned, and thereafter, and over and above, to set aside the foresaid stipulated proportion of 25 per cent. in name of sinking fund; and,

"4. That the profits of the said trade or business agreed to be carried on by the said company under their original contract, and still carried on in terms and by virtue thereof, are totally distinct and separate from the profits arising on the foresaid insurance account; and that, in so far as the profits realized by the company arise from this latter source, they do not fall within the operation of the contract at all; and the provisions and conditions of the contract, in regard to the setting aside of a sinking fund, and in regard to the distribution of the profits realized on the business carried on under the contract, have no application; and, on the contrary, that the rule as to the disposal of this branch of the company's profits is, that the whole shall be annually distributed among the partners without reserve, and without setting aside any portion whatever thereof, either in name of sinking fund or otherwise."

The company, besides their pleas relative to the true meaning of the term 'free profits,' and the proper use of the sinking fund, further maintained, 1. That the capital had been regularly increased to its present amount according to the regulations of the contract; and, 2. That the profits of the company, so far as derived from savings in consequence of non-insurance, fell under the same rules of distribution with the rest of their profits, and were not to be differently dealt with, merely because an insurance account had been opened in their books, in order to ascertain whether it was, on the whole, a beneficial system to run their sea-risks themselves.

The Lord Ordinary advocated, and conjoined the processes,—"repelled the reasons of advocation, sustained the defences, and assoilzied the defenders from the conclusions of declarator," &c. with expenses in both Courts.*

Flowerdew reclaimed; but the Court unanimously adhered, without calling on the defenders' counsel to support the interlocutor.

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* "NOTE.—The Lord Ordinary sees no objection to the first declaratory conclusion, which indeed is not disputed by the defenders; but a finding to that effect would serve no purpose, as it is only introduced as a foundation for the next conclusion, which does not seem admissible, and besides, could have no application to the present situation of the company whose capital has been increased. It appears to him that the principle on which the balance-sheets of the company in process have been made up, is quite correct. There are brought to account, on the one side, the whole existing funds of the company, consisting of their shipping and stores, heritable property, cash, bills, and debts due to them, the shipping being taken at the present estimated value, while on the other side is placed the original input stock of £34,200; the sinking fund in so far as realized, and the debts owing by the company; and the difference, or excess of the funds, is added under the head of profits to balance the account. Now, as in the balance-sheet of May 1829 the sinking fund is only £3200, the company was entitled, in terms of the contract, to retain 25 per cent. of the profits towards increasing it, seeing that, after such addition, it would not exceed the maximum of

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LORD BALGRAY.—I think the principle on which the dividend was struck by the company is extremely correct, and should be sorry to see their business otherwise conducted. And I would observe in general, that it is a very delicate matter for a Court to interfere and control the directors of a company, who are only blamed by a single partner for the excess of prudence which they display in conducting affairs which they probably understand much better than himself. Still, if they were infringing the contract, we should be obliged to restrain them; but, in place of this, they calculate the free profits in perfect consistency with it. After striking their gross profits, they are obliged from year to year to set aside a certain sum to meet the deterioration which their shipping has suffered, over and above the repairs that have been required; for no repairs can keep their shipping stock from gradual decay. Here is a sum of £34,200 invested in that stock, which is necessarily wasting away yearly; and, in striking each annual balance, it is therefore necessary to estimate the deterioration of the shipping, and set aside a sum from the profits to meet it, before the free profits are fairly ascertained which can be made the subject of a dividend, according to the provisions of the contract. Look to any other stock besides shipping. Take bank stock: If an annual estimate of a quantity of that stock is to be taken, it must not be rated as at the price it first cost, but at its fair market value on the day when the balance is struck. I think the Lord Ordinary's interlocutor perfectly right; and the advocator will find that the more this company guards against the division of profits upon delusive principles, the more improved will be the value of his stock in the market.

The other Judges assented.

RITCHIE and MILLER, S. S. C.—BROWN and MILLER, W. S.—Agents.

£5000. It is obvious also that on these principles the company's stock could never be increased beyond the amount of the original input stock and the full sinking fund; because, in so far as the existing funds came to exceed this amount, they must fall, as free profits, to be wholly divisible among the partners. The result might no doubt be unfair, were the shipping or other property estimated below its true value; but there is no averment to this effect in the record, the pursuer's objections being solely to the principle of accounting. As to the insurance account, the Lord Ordinary cannot see how the saving the company may have made by not insuring at all, can be said to be a profit arising from a separate trade. The keeping of an account, on the hypothetical footing that insurance had been effected at the ordinary premiums, was just a mode of showing whether, or to what extent, the system of not insuring was a profitable one. The Lord Ordinary has been the more disposed to give expenses, that almost the whole incurred in this Court have arisen since the resolutions of the meeting of 11th March 1830, increasing the capital to £50,000. By this resolution, it appears to him that the object of the present litigation, and particularly of the action of declarator, was done away, and that the pursuer had, with the exception of the expenses for which he was found liable in his action in the Inferior Court, no longer any substantial interest in continuing the proceedings."

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Feb. 2. 1831.
Murray v. Smith &c.

ANTHONY MURRAY, Pursuer.—*Skene—Smythe.*
A. SMITH and J. GIBSON, Defenders.—*Greenshields—Keay.*

Clause—Heirs and Disponees—Revocation.—A party having executed a general settlement of his estates in favour of certain substitutes, whom failing, his own nearest heirs and assignees whomsoever; and having afterwards executed a new disposition of part of his estates, for the special purpose of conferring a liferent, and making certain debts real, destining the same to his 'heirs and disponees' in fee, but not specially mentioning the substitutes called in the prior deed—Held that this did not import a revocation of these deeds, but that the substitutes therein called were still entitled to succeed.

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2D DIVISION.
Ld. Fullerton.
T.

THE late Alexander Watson of Turin, by deed of settlement dated 13th October 1797, disponed certain parts of the lands belonging to him "to and in favour of myself and the heirs whomsoever of my own body; whom failing, to Alexander Watson, Esq. of Turin, my father, in liferent, for his liferent use allenarly, and to Miss Mary Carnegie, eldest daughter of the deceased Sir James Carnegie of Southesk, Baronet, in fee, and the heirs whomsoever of her body; whom failing, to Patrick Carnegie, Esq., of Lower, and the heirs whomsoever of his body; whom failing, to my own nearest and lawful heirs and assignees." Of date 22d January 1798, Mr. Watson (his father being at that time dead) executed a general disposition of the whole heritable and moveable property belonging to him, or which should belong to him at the time of his death, in favour of himself and the series of heirs called in the former deed.

Upon the 8th of March 1828, (Mary Carnegie, the first substitute in these deeds, having died in February,) he executed another deed of settlement, proceeding on the narrative of his love and favour for Miss Elizabeth Carnegie, (sister of Mary Carnegie),—of his wish to provide for the payment of his debts by making them real burdens affecting his lands, and of his intention "to settle and dispose of his moveable means and effects." By this deed he disponed, inter alia, certain parts of his lands, being those contained in the first settlement of October 1797, "to and in favour of the said Miss Elizabeth Carnegie in liferent, during all the days of her lifetime, in case she shall survive me, for her liferent use allenarly, and with power and faculty to burden my lands and estate for payment of my debts as after mentioned, and to my heirs and disponees in fee." This last-mentioned deed contained no express revocation of the former settlements, and the whole of these deeds were found uncancelled in Mr. Watson's repositories at his death.

Patrick Carnegie of Lower, the second substitute named in the first two deeds above referred to, died in the month of November 1799, and was succeeded by his eldest son, who again was succeeded by his eldest son Patrick Carnegie, now of Lower. On Mr. Watson's death, Mr. Carnegie served himself heir general of provision to that gentleman under the three several settlements above mentioned. Thereafter, on the 10th of October 1828, he executed a trust-disposition in favour of the pur-

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Feb. 2. 1831. Murray v. Smith &c.

suer Mr. Murray, who thereupon brought an action against the defenders Smith and Gibson, heirs-portioners of line of Mr. Watson, concluding that it should be found and declared that the general disposition and deed of settlement of January 1798 comprehended by general description, inter alia, the lands conveyed by the disposition and settlement of March 1828, and that Mr. Carnegie had right to the same; and further concluding that the defenders should be ordained to make up titles in their persons to these lands, and then to convey them to the pursuer, as in right of Mr. Carnegie, in implement of the general disposition of January 1798.

The defenders pleaded in defence, that so far as regarded the lands conveyed by the deed of 1828, they were under it entitled to succeed, on the ground that Watson had not therein repeated the destination in favour of Patrick Carnegie contained in the first deeds, but had disponed the lands directly to his own heirs and disponees; and that this omission was a virtual revocation of the former deeds, in so far as they contained a destination in favour of Patrick Carnegie to the lands disponed in the deed of 1828.

The Lord Ordinary pronounced a special interlocutor, which, after narrating the deeds &c., proceeded thus:—"Finds that in these circumstances, and according to the legal construction of the said settlements, the deed of 8th March 1828 cannot be held to imply a revocation or alteration of the former settlement, in so far as regards the fee of any parts of the lands of the disponer; and therefore repels the defences, and decerns in terms of the libel."

His Lordship added the subjoined note.*

The Court adhered.

Pursuer's Authorities.—Weir v. Steele, Feb. 7. 1745, (11359); Robson v. Robson, Feb. 18. 1794, (14958); Anderson v. Anderson, June 11. 1829, (ante, VII. 743.)

A. Murray, W. S.—Macmillan and Grant, W. S.—Agents.

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* "Note.—It is perfectly understood that the term 'heirs and assignees' does not necessarily and technically denote the particular series of heirs of line. It admits of construction, and may be construed as referring to persons on whom the character of heir and disponee has been conferred by the granter's former settlements. No doubt, such a reference is often completely excluded, as in the case supposed in argument on the part of the defenders. When a party dispones his lands in favour of one series of persons, and afterwards dispones the same lands in favour of another series of persons, whom failing, his heirs and assignees, this last expression could not well be held to apply to the parties called in the first deed, for the very obvious reason that their character, whether as heirs or disponees, would in that case be extinguished by the force of the revocation or alteration of the disposition in their favour necessarily implied in the appointment of the new disponees in the second deed. This seems to have presented a great difficulty in the case of Weir v. Steele, and Pattens v. Hamilton, in which the terms of the marriage-contracts in favour of the children of the marriage admitted, upon very plausible grounds, of being considered as in themselves revoking the former dispositions, and consequently as necessarily excluding the application of

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Feb. 2. 1831. Auchincloss &c.

WILLIAM AUCHINCLOSS and Others, Petitioners.—*Houston.*

Tutor and Curator.—In making up tutorial inventories to children whose father had been illegitimate, the Court authorized them to be made at the sight of the nearest of kin on the mother's side only.

Feb. 2. 1831.

2D DIVISION. T.

THE late Alexander Muirhead, by his deed of settlement, conveyed all his property to the petitioners as trustees for behoof, in part, of the children of a sister deceased, to whom he also appointed them to be tutors and curators. The father of these children (also now deceased) had been illegitimate, and so had no relations recognised in law; in consequence of which the petitioners, in making up inventories, were unable to comply with the provisions of the act 1672, c. 2, requiring two of the nearest of kin of minors, both by the father and the mother, to be cited, to see them given up. They therefore presented this application to the Court, praying that the Judge Ordinary might be authorized to make up inventories at the sight of the two nearest of kin on the mother's side only, which the Court granted accordingly.

ROBERT BURN, W. S. Agent.

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the term 'heirs and assignees' to these former disponees. But, even in those cases, the difficulty was got over, on the ground, as the Lord Ordinary understands, that the effect of the marriage-contracts, in relation to the previous dispositions, was qualified by reference to the particular object of those contracts; and that consequently, except in regard to that object, viz. the interest of the children, the rights of the former disponees remained in force.

"In the present case, no such difficulty occurs. The late Mr. Watson, by his first deeds of 1797 and 1798 in favour of himself and the heirs whomsoever of his body, whom failing, the series of persons there named, truly constituted those persons his 'heirs,' if regard be had to the form of their succession,—and his 'disponees,' if regard be had to the nature of the deed by which that succession was appointed. But the deed 1828 contains no disposition of the fee of the estate in favour of any individuals preferred to the parties called by the former settlement; but proceeding on the narrative of his regard for Miss Carnegie, and of his intention to settle his moveable estate, it conveys the whole moveable estate to her as executrix, and certain of his lands to her in liferent, and his 'heirs and disponees' in fee,—a form of expression which, it may be observed, is peculiar, and is very different indeed from the general clause of devolution employed in his former deeds, viz. 'his nearest heirs and disponees whomsoever.' In these circumstances, it appears to the Lord Ordinary, that, according to the true construction of these settlements, the term 'heirs and disponees,' employed in a deed executed, according to its narrative, for the purpose of creating a liferent, cannot be held to denote, and was not intended to denote his heirs of line, but is applicable to the parties clearly entitled to that designation in virtue of the former deeds and not deprived of it by any thing contained in the deed in dispute."

STEWART, Pursuer.—*Skene—H. J. Robertson.*
FALCONER, Defender.—*Ld. Adv. Jeffrey—Forsyth.*

No. 194.

Feb. 2. 1831.
Stewart v. Falconer.

Agent and Client.—A motion to set aside a verdict, finding that certain calumnious accusations contained in pleadings in a submission had been made by an agent with the sanction and authority of the client, refused.

Feb. 2. 1831.

2D DIVISION. Jury Court.

THE pursuer Falconer, writer in Edinburgh, was employed by the trustees of the late Macqueen of Corrybrough, of whom the pursuer Stewart was the acting trustee, to conduct a submission between them and Hugh Macqueen, W. S., one of their number, and son of the deceased. In the pleadings in this submission, very injurious accusations were made against Macqueen; but, as it appeared, these were all contained in a memorial on which counsel was consulted before any proceedings were taken, and which had been made up under the superintendence of Stewart, who also, during the whole of the discussion, was in constant communication with Falconer. After the submission had depended for some time before two counsel of eminence, it was allowed to expire, and by this time (it was stated by Stewart) the accusations against Macqueen had been shown to be unfounded. A new submission to the present Dean of Faculty, as sole arbiter, was afterwards agreed to. This, which was signed by Stewart, bore that the case should be laid before the new arbiter on the pleadings in the former submission. The Dean of Faculty having ordered memorials, Falconer prepared one for the trustees, in which some of the former slanders were repeated, but nothing that was not already contained in the pleadings. The Dean thereafter heard parties, and finally decided in Macqueen's favour, and found the trustees liable in expenses, issuing, at the same time, notes in which he strongly reprobated the conduct of the trustees in persisting in the accusations against Macqueen. When Stewart was informed of this judgment, he wrote to Falconer, in answer, a letter expressing, in violent terms, his conviction of the truth of the calumnies referred to, and of the injustice of the decision; but he subsequently raised the present action against Falconer, to be relieved of the expenses of the submission, on the ground that these had been awarded in respect of the calumnies against Macqueen; and that Falconer had no authority for advancing them, and at all events had violated his duty as an agent in persisting in them, after proof had been produced that they were unfounded.

In this action an issue was sent to a Jury, to try whether Falconer had acted without the sanction or authority of Stewart; and a verdict having been returned for Falconer, Stewart moved for a new trial, on the ground that the verdict was contrary to evidence. The Court granted a rule on Falconer to show cause; but, on hearing parties this day, they refused the motion.

No. 195.

Feb. 2. 1831.
Stewart
v. Clyne.

Cullen.

GAVIN STEWART, Pursuer.—*D. F. Hope—Speirs.*
DAVID CLYNE, Defender.—*Sol.-Gen. Cockburn—Boswell.*

Master and Servant—Agent and Clerk.—Found, where a salary of £30 had been offered to a clerk by an agent, in place of full payment for writings, but not accepted by the clerk, and no specific sum agreed upon, that the rate of payment was to be regulated by the principle recognised by the parties in payments already made.

Feb. 2. 1831.

2D DIVISION.
Lord Medwyn.
T.

IN 1823, the pursuer Stewart became clerk to the defender Clyne S. S. C. Clyne had offered £30 per annum; but this had been rejected, and no special agreement entered into. Various settlements for writings were made down to April 1824, in the earlier part of which less than one-half the usual rates was allowed, then one-half, and afterwards somewhat more than a half. Subsequent to April 1824, no settlement was made, and only partial payments received. In 1827 Stewart left Clyne's employment, and thereafter raised this action for payment of a certain sum, as the amount due for his writings at the full rates.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer is not well founded in his claim for full payment for his writings when acting as clerk in the defender's office subsequent to the 4th of April 1824; but, in respect of the mode of dealing previously between the parties, finds that he is entitled to remuneration for his labour according to a rate of payment between what would be full payment, and after a deduction of a little more than one-third; and remits to Mr. Richard Mackenzie, joint deputy keeper of the Signet, to consider at what rate, within the above range, the pursuer ought to be paid during the period from April 1824 to September 1827, on the one hand, taking in consideration the increased value of his services from the additional knowledge of business he may be supposed to have acquired; and, on the other, that that knowledge was acquired in the service of the defender."

Clyne reclaimed; but the Court adhered, with this variation, that instead of Mr. Mackenzie, they remitted to the Preses of the Society of Solicitors to which Clyne belonged.

TOD and WRIGHT, W. S.—D. CLYNE, W. S.—Agents.

Single Bills, &c.

No. 196.

MRS. WARTON OF CULLEN, Petitioner.—*Cuninghame.*

Feb. 3. 1831.

1ST DIVISION.
S.

Judicial Factor—Bastard—Jurisdiction.—Mrs. Warton or Cullen petitioned for the appointment of a factor on the estate of her husband lately deceased.

LORD PRESIDENT.—The deceased is said to have been illegitimate, and to have died without issue. This application should have been made in Exchequer.

Cuninghame having explained that the estate consisted chiefly of house-property, and required to be immediately let, and that such interim management was equally necessary, whoever might be the heir, the Court ordered intimation.

G. J. URE, W. S.—Agent.

JOHN HUNTER and Others, Petitioners.—*D. F. Hope—G. Napier.*
GEORGE GARDNER, Respondent.—*Skene—Anderson.*

No. 197.

Feb. 3. 1831.
Hunter &c. v. Gardner.

Bankrupt—Sequestration.—A party having insured his life with an English insurance company of the nature of a mutual benefit society, which had a subordinate board of agency in Edinburgh,—not liable to sequestration as an insurance-broker in Scotland.

1st DIVISION. D.

MR. GEORGE GARDNER, Comptroller-General of the Customs in Scotland, insured his life for £1000 with the Norwich Union Company. That company is formed on the principle of a mutual benefit society, so that all who insure with it derive a certain share of the profits, according to regulations by which a bonus may be added from time to time to the amount for which a party stands insured. The Norwich Union is an English company, and all the policies of the company are dated and signed in England, although it has a subordinate board of management for transacting business at Edinburgh.

On the 21st of July 1830, the estates of Gardner were sequestrated on an application by him, with concurrence of Sir William Forbes and Company. The concurring creditors made affidavit to their belief that "Gardner is an insurance-broker in Edinburgh, or at least a partner or holder of a share or shares in the undertaking known by the name of the Norwich Union Life Insurance Society for Insurance on Lives and granting Annuities, and is, as such, according to the deponent's belief, within the description of persons whose estates are liable to sequestration," &c.

John Hunter and others, creditors of Gardner, petitioned for recal of the sequestration, contending, 1. That the insurance effected by him on his own life, though it made him a member of a mutual benefit society, did not bring him within the description of persons liable to sequestration; and, 2. That the insurance company was an English company, so that a partner was not entitled to sequestration.

Gardner answered, 1. That as a member of a life insurance company, having an interest in its profits, and as it was a mutual benefit society, he was a partner and shareholder; and, 2. That as the company had a board of management here, though subordinate, it had a domicile of trade in Scotland, sufficient to give its partners the privilege of sequestration.

LORD PRESIDENT.—This is an English company. Its partners cannot apply for sequestration in Scotland.

LORD BALGRAY.—I have no doubt about recalling the sequestration, as improperly awarded.

LORD GILLIES.—If a Scotchman choose to insure his life with a company in France or Holland, will that make him a trader in Scotland within the meaning of the act? I am clear for recalling.

LORD CRAIGIE concurred.

THE COURT then recalled the sequestration, and subjected the bankrupt and concurring creditors in expenses.

DEUCHER and KNOX, S. S. C.—J. BURNESS, S. S. C.—Agents.

No. 198.

Feb. 3. 1831.
Brownlee
v. Millar.

JAMES BROWNLEE, Suspender.—*Cuninghame—A. Dunlop.*
ROBERT MILLAR Jun., Charger.—*Wilson.*

Sequestration — Trustee — Cautioner.—1.—A sequestration having been settled by composition where the trustee had recovered no funds, his commission limited to five per cent. on the amount of composition and expenses.—2.—Competent for a cautioner under a composition in a sequestration to open up a decree in absence against the bankrupt for the expenses of the sequestration, in order to have the amount taxed.—3.—An account for proceedings raised against debtors to the estate, after the date of the acceptance of a composition, not exigible from the cautioner.

1st DIVISION.
Lord Newton.
S.

ON the 10th of December 1814, the estates of Mather and Greig were sequestrated, and Robert Millar jun., writer in Glasgow, was elected trustee. In April thereafter a composition of 6d. per pound was accepted by the creditors, and a bond granted on the 29th June following, for payment of the composition and the expenses of the sequestration,—the suspender Brownlee being cautioner. Subsequently to this, Millar instituted actions against two debtors to the estate, in which he incurred some expense. In April 1816, decree of approval of the composition and exoneration was pronounced. On the 19th of June, Millar got decree in absence against Mather and Greig for the expenses of the sequestration. In September, two parties who had been named commissioners under the sequestration, allowed a commission of £30 to Millar, the trustee. Millar, in 1820, gave Brownlee a charge for certain sums as due under that bond, and recovered a payment of £6 to account. In 1825, he gave a new charge on the bond for £44. 10s. 5d., as the expenses of carrying through the sequestration of Mather and Greig; £2. 3s. 10d. as the expense of the decree in absence against them; £30. 7s. as the expenses of prosecuting the actions above mentioned; and £30 of commission,—alleging that he had recovered none of these sums from the trust-estate, as "he had no intromission with the funds and effects of the bankrupts."

Brownlee suspended, and pleaded—1. The accounts sued for were never incurred; but at all events they must be produced and taxed. 2. The decree for their amount was in absence; it could have been opened up by the defenders themselves to this extent, and equally so by their cautioner, who should have been made a party to the process. 3. The commission of £30 was extravagant, and had been incompetently awarded, long after the sequestration was brought to a close.

Millar answered—1. He had obtained decree for the amount of his accounts in a question with the principal party, and was not bound to instruct his claims anew in discussing the cautioners; and, 2. His commission was reasonable, considering the amount of the trouble he had incurred; it had been fixed by the commissioners, and was covered by the bond of caution.

The Lord Ordinary, before answer, remitted to the Auditor to tax Millar's accounts. The Auditor taxed the account of expenses in the sequestration at £25. 12s. 6d. He stated that the second account of £30. 7s. appeared to be incurred posterior to the decree of Court approv-

ing of the composition, and to be for proceedings not connected with the winding up of the sequestration. He therefore doubted whether it was covered by the bond of caution; but added that it had been impossible to tax the account, as neither the process, nor any of the papers connected with it, were produced. As to the commission, the Auditor submitted, that as the whole amount requisite to pay the composition and expenses did not exceed £100, and as the estate was wound up by a composition-contract, so as to diminish the trustee's trouble, a commission of £5 was sufficient.

No. 198.

Feb. 3. 1831.

Brownlee v. Millar.

Ewing v. Wallace.

Millar objected to the Auditor's report; but the Lord Ordinary "repelled the objections, and, in terms of the report, found the charger entitled to the sum of £25. 12s. 6d. as expenses of the sequestration, with the sum of £5 as commission;" disallowed the charge for expenses incurred after the composition was agreed to, and found him liable in modified expenses.

Millar reclaimed; but the Court adhered.

Lord Balgray.—Millar should have applied to have his commission fixed before the sequestration was brought to an end, as after that period there were no commissioners.

Lord President.—They were previously functi. I have no hesitation in adhering.

Lords Craigie and Gillies assented.

Suspender's Authority.—2. Bell, 489.

Charger's Authorities.—Harkness, March 9. 1822, (ante, 1. 392); Anderson, May 25. 1821, (ante, I. 31); Barbour, May 27. 1828, (ante, VI. 856.)

Tweedie, Graham, and Anderson, W. S.—J. Pattison Jun. W. S.—Agents.

William Ewing, Suspender.—*D. F. Hope—Jameson.*
William Wallace, W. S., Charger.—*Cuninghame.*

No. 199.

Competent and Omitted—Agent and Client.—A party who allowed the agent of his opponent to obtain decree in the Jury Court for expenses in his own name, found barred, by the exception of competent and omitted, from suspending a charge on the allegation that the agent had no license.

Wight raised an action against Ewing, which was remitted to the Jury Court, and he there obtained decree in foro, with expenses. These expenses were taxed in the Jury Court, and decree taken for them in the name of William Wallace, W. S., Wight's agent. Wallace gave a charge for the amount, which Ewing suspended, alleging, inter alia, that Wallace had no attorney license for the period when the expenses were incurred, and therefore could maintain no action for them. Wallace answered, that he had subsequently taken out a license, so as to rehabilitate him to claim the expenses; but, independently of this, Ewing was barred by the exception of competent and omitted, from now stating the objection of the want of license, which he ought to have made before decree was pronounced in the Jury Court.

Feb. 3. 1831.

1st Division. Lord Newton. H.

No. 199.

Feb. 3. 1831. Ewing v. Wallace.

The Lord Ordinary suspended the letters simpliciter, with expenses, "reserving any claim for the expenses charged for which may be competent to Wight."*

Wallace reclaimed.

Cuninghame.—The decree for expenses was pronounced by the Jury, and such a decree is not subject to review, as was expressly held in Megget v. Roy, May 20. 1830.

Dean of Faculty.—That case is not in point; it was substantially a reclaiming petition on the merits against a judgment of the Jury Court; but the case of Robertson v. Strachan is a direct precedent in support of this suspension. The words of the statute are quite express, that the disqualified agent shall be "incapable to maintain or prosecute any action or suit in any Court of Law or Equity, for the recovery of any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit, or proceeding." We are now objecting to the title of Wallace to make a claim in Court for these expenses, and it is an objection to which the Court are bound to give effect.

Lord Gillies.—In Strachan's case, the exception of competent and omitted seems to have been applicable as well as here; yet the Court did not hesitate to suspend. If, therefore, I felt satisfied of that being a good decision, I would suspend here also. But though the charger might have pleaded the exception in Robertson's case, it does not appear that he did so. That exception, however, is pleaded here, and it is a most important plea in the law of this country. I feel a doubt about the implicit adoption of Robertson's case as a precedent, since it appears that this plea was never stirred in it. Though the case is not free from difficulty, since Ewing founds on the statute as cutting down the title of Wallace, yet I am disposed to alter the interlocutor of the Lord Ordinary, because I think Ewing is barred from stating this objection to the title. The exception of competent and omitted covers objections to the title, as well as to the merits of the action to which it applies. Ewing could have urged his objection in the Jury Court, where it must have received effect, if well founded. He did not do so, and he cannot now be allowed to open up the case upon it.

Lord President.—Wallace is not now properly maintaining an 'action or suit' for these expenses. He has already been allowed by Ewing to do this, and to recover a decree for their full amount. After that, it is merely legal diligence which is done to enforce the decree of a Supreme Court recovered in foro contentioso. I think any plea which was open to Ewing to state against

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* "The objection of competent and omitted was ineffectual in the case Robertson v. Strachan, June 29. 1826, where a charge was suspended in circumstances similar to the present; and the Lord Ordinary is not aware of any distinction betwixt the proceedings in the Court of Session, and those in the Jury Court, as to taking out decrees for expenses in the name of the agent, which should render that decision inapplicable as an authority to the present case. He has made a similar reservation to that which was inserted in the Court's interlocutor in the case of Robertson."

Wallace's obtaining decree, falls under the rule of competent and omitted, and he is barred from pleading it against the enforcing of that decree. No. 199.

Feb. 3. 1831. Ewing v. Wallace.

Lords Craigie and Balgray assented.

The Court therefore "altered the interlocutor, found the letters and charge orderly proceeded, and expenses due to the charger," &c.

King's Advocate.

Suspender's Authorities.—25. Geo. III. c. 80. § 1'; 37. Geo. III. c. 90, § 7; Robertson, June 29. 1826, (ante, IV. 772.)

Gordon's Trustees v. Williamson.

Charger's Authority.—Megget v. Roy, May 20. 1830, (ante, VIII. 779.)

Ramsay v. Roberts.

Wotherspoon and Mack, W. S.—W. Wallace, W. S.—Agents.

King's Advocate, Petitioner.—*Cuninghame.* No. 200.

Records.—A registered deed given out on receipt of the Crown Agent, with a view to the investigation of an alleged forgery of one of the names thereon.

A party who was charged on a registered bond of caution, having given information that his name, bearing to be thereto adhibited, was a forgery, the Lord Advocate presented a petition praying for a warrant on the Clerk Register and his deputies to deliver up the bond, on the Crown Agent's receipt, for the purpose of investigation. The Court granted warrant accordingly. Feb. 3. 1831. 2d Division. R.

D. Cleghorn, W. S. Agent.

Gordon's Trustees, Pursuers.—*More.*
Thomas Williamson, Defender.—*Cuninghame.* No. 201.

Landlord and Tenant.—Sequel of the case noticed ante, VIII. 436. The question ultimately turned on whether a certain half year's rent had been paid or not; and the Lord Ordinary and Court, being satisfied by the report of an accountant that it had been paid, assoilzied the defender. Feb. 3. 1831. 2d Division. Ld. Mackenzie. R.

J. Logan, W. S.—Tweedie, Graham, and Anderson,—W. S.—Agents.

James Ramsay, Suspender.—*Jameson—Neaves.*
William Roberts, Charger.—*Skene.* No. 202

Bill of Exchange.—An agent having become bound for the interest on a bill of his client for £400; and the client having transmitted to him a bill for £50 drawn and indorsed by a third party, and accepted by the client to apply the proceeds to the payment of the interest; and the agent, without discounting this bill, having, after a considerable interval, paid the interest—Held entitled to recover to that extent from the drawer.

In November 1817, David Bruce, farmer at Sheilhill, granted to Mr. Lyell of Kinnordy a bill for £400, which Lyell indorsed to Jobson, cashier of the Dundee Banking Company. The bill was allowed to Feb. 3. 1831. 2d Division. Ld. Mackenzie. F.

No. 202.
Feb. 3. 1831.
Ramsay v. Roberts.

lie over for some time; but, in spring 1819, Jobson having executed a poinding of certain effects belonging to Bruce, the latter prevailed on the charger Roberts, writer in Forfar, who was his agent, to become bound to Jobson in payment of the bill, on condition of receiving a transference to an assignment held by Lyell of certain West India property belonging to Bruce, and also subsequently to become bound for the interest and expenses on it. A few days after the date of the letter by which Roberts undertook to pay the interest and expenses on the bill, Bruce transmitted to him a bill for £50, drawn and indorsed by the suspender Ramsay, and accepted by himself. The letter from Bruce enclosing this bill was lost, but the object for which it was sent was explained by Roberts' answer, which was as follows:—"I was favoured by yours of to-day, enclosing Mr. Ramsay's bill on you for £50, the free proceeds of which to be applied in payment of the interest and expenses due on Mr. Lyell's bill of £400, and the balance in part of the sum which I must disburse for stamps on your account." This bill Roberts did not discount, but retained it in his possession till a final settlement was made by him as to Lyell's bill in November 1821, when he took it up from Jobson, receiving the stipulated assignment in return, and further paying, as he alleged, £75 of interest on the bill,—the claim for expenses being waived by Lyell. Having afterwards charged Ramsay for payment of the £50 bill, a suspension was brought, on the ground that it had been transmitted by Bruce to Roberts, as his agent, for the special purpose of being discounted, and applying the proceeds to payment of the interest and expenses on Lyell's bill; and that this not having been done, Roberts could not found on any claims, as a creditor of Bruce, as constituting him an onerous indorsee to the effect of recovering against Ramsay, who averred that he had granted the bill solely for Bruce's accommodation.

To this it was answered—That Roberts having come under an obligation to pay the interest on Bruce's bill to Lyell, that now charged on was intended to relieve him to this extent; and having paid interest to a greater amount than the bill, he was entitled to recover; and that the circumstance of not having discounted it with a banker was not of any consequence.

The Lord Ordinary found that the bill was sent to Roberts, "as an agent, for the special purpose of being discounted, and the contents immediately applied to certain payments; and that as it was not applied to that purpose, the charger is not entitled to state himself generally as an onerous indorsee thereof, and to do diligence thereon for his own behoof;" and his Lordship therefore suspended simpliciter.

On a reclaiming note, however, the Court altered, found Roberts entitled to recover on the bill to the extent he had paid of interest and expenses on the £400 bill, and remitted to the Lord Ordinary to proceed accordingly.

T. Deuchar,—Wotherspoon and Mack, W. S.—Agents.

T. PATON, (FRASER'S TRUSTEE,) Complainer.—*Forsyth—Buchanan.*
C. FERRIER (LYELL'S TRUSTEE,) Respondent.—*D. F. Hope—Cuninghame.*

No. 203.
Feb. 4. 1831.
Paton v. Ferrier.

Bankrupt—Sequestration—Cautioner.—1.—Though the whole claims lodged in a sequestration have been paid, and the creditors have agreed to a discharge, but no judicial discharge has been obtained, a new claim may competently be presented.—2.—The seller of an estate having declared the price a real lien in his disposition, and taken a bond of caution from third parties in further security; and while in the course of operating payment under his real lien, having recovered payment from the trustee for the creditors of a second purchaser, and assigned the bond of caution to the trustee—Held that the trustee could not recover from the cautioners under the bond so assigned.

Feb. 4. 1831.
2D DIVISION.
Ld. Moncreiff.
T.

IN 1809, Douglas of Easter Inch sold a property to James Jordan Wilson, who was infeft, but in a few months thereafter Wilson resold it to Douglas, constituting the price (£11,000) in the re-disposition a real burden on the lands, and at the same time taking from Douglas a bond, with Lyell and Dick as his cautioners, in further security of the three first instalments, with the interest thereon.

In October 1810, Douglas sold the property to Mr. Bristow Fraser for £11,500 sterling. Fraser made immediate payment of the £500; and for the remaining £11,000 he granted a bond over the lands, whereby the price was made payable by instalments in the same way as Douglas had become bound to pay his price to Wilson. Fraser paid the first instalment, being £1000, at Martinmas 1810, together with the interest of the whole price down to Whitsunday 1811, for which payments he obtained a discharge from Douglas, who paid over the money to Wilson, and was in like manner discharged by him. Douglas having assigned Fraser's bond to Wilson, in order, as the assignation bore, "to save the expense and trouble of double discharges, and for the more convenient settlement of the different instalments of the aforesaid sum still remaining unpaid," Fraser paid to Wilson the second instalment which fell due at Martinmas 1811, with the interest of the whole residue of the price from Whitsunday to Martinmas 1811. The third instalment fell due at Martinmas 1813; and Wilson having charged Fraser on his bond to Douglas, Fraser suspended upon a plea of compensation against Douglas. This ground of suspension having been sustained, Wilson took steps for making effectual his real lien over the lands. These proceedings led to a long litigation as to the validity of the lien, which in the end was found effectual, so as to entitle Wilson to bring the lands to sale for the balance of the price due to him. During this discussion, and after the decision, the balance of the price was paid by Fraser to Wilson, who, on the 12th of March 1829, assigned the bond in his favour by Douglas and his cautioners to the complainer Paton, trustee on the sequestrated estate of Fraser.

No. 203.

Feb. 4. 1831.
Paton v.
Ferrier.

In February 1819, the estate of Lyell, one of the cautioners, had been sequestrated, and the respondent Ferrier elected trustee thereon. No claim was given in for Wilson, or any party in his right, between 1819 and March 1829. In that month Lyell, having paid in full the whole claims lodged, made a settlement with his creditors, who agreed to his discharge; but no judicial recal of sequestration or discharge followed. In May 1829, Paton, as trustee on Ferrier's estate, lodged a claim on Lyell's estate under the bond of caution, which Ferrier refused to receive, on the ground that the sequestration was at an end.

Paton thereupon presented a complaint, in which he pleaded that the sequestration against Lyell was still a depending process, and the office of trustee thereon a subsisting office; and that Ferrier was bound to have received the claim. On the merits of the claim he maintained, that Lyell having become liable by his bond in payment to Wilson, his heirs, executors, and assignees whomsoever, and that bond having been duly assigned for value by Wilson to Fraser, he, as Fraser's trustee, was entitled to exact payment.

For Ferrier it was argued, that the claim and petition were incompetent, as the sequestration was substantially at an end by the payment in full of the whole creditors ranked during a period of thirteen years, and by their agreement to discharge the trustee and debtor months prior to the presentment of any claim by Paton. And on the merits, that Wilson himself, the original creditor in the bond, could not have maintained such a claim, as he had long ago drawn full payment from the estate of the principal debtor, in virtue of a real security granted unico contextu with the obligation of Messrs. Lyell and Dick; and that the claim was consequently extinguished.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note*:—"Finds that on the supposition that the complainer

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* "Though Mr. Ferrier might, in the circumstances, be perfectly justified in refusing to recognise the claim at all, the Lord Ordinary does not think that it would be warranted by the statute, or would be a safe construction of it, to hold the complaint to be absolutely incompetent.

"The case, on its merits, though it may assume an appearance of perplexity, is in reality reduced to a very short point. Douglas sold to Wilson. Wilson, being infeft, resold to Douglas for £11,000. This price was declared to be a real burden, in a form which was found to constitute a real security; and Wilson received in addition the bond of caution of Lyell and Dick for the three first instalments and the interest. Then Douglas sold to Fraser for £11,500. Fraser paid the £500, but retained the £11,000 for his relief of the real lien. He received no bond of caution from Lyell. Wilson charged Fraser as if he had been his debtor personally, but failed in this, because Douglas was the proper creditor of Fraser, and he alleged personal claims of compensation against Douglas. Wilson then resorted to his real lien, and was proceeding with a poinding of the ground, when Fraser paid the debt, and obtained the assignation of Lyell's bond of caution. But it is evident that Wilson had no right to assign the bond for Fraser's relief. If Wilson had proceeded on the bond against Lyell, it is clear that Lyell, on paying the debt, could have demanded an assignation

No. 203.

Feb. 4. 1831. Paton v. Ferrier.

had a good claim of debt against Mr. Lyell, the state of the process of sequestration, at the time when the claim was first presented to the respondent, was not such that, under any of the provisions of the statute, the claim and this complaint can be held to be legally incompetent; therefore repels the objection stated on that ground, and finds the complaint competent in point of form for trying the validity of the claim of debt; but, on the merits, that the title of James Bristow Fraser in the lands of Blackburn having been burdened with the real lien of £11,000 effectually constituted in favour of James Jordan Wilson; and the said James Bristow Fraser, or others in his right, having fully paid to the said James J. Wilson the said sum of £11,000, in order to stop the proceedings then in progress for making the said real lien effectual, the cautionary obligation of Mr. George Lyell, which had been constituted in favour of the said J. J. Wilson as a subsidiary security for the three first instalments, and the whole interest of the said price, were, by such payment, legally extinguished; and that it was incompetent for the said J. J. Wilson to grant, or for the said J. B. Fraser to receive, or to use with any legal effect, any assignment of the said bond of caution; that neither the complainer, nor any creditors who may have advanced money in order to enable Mr. J. B. Fraser to pay the debt to Mr. Wilson, and thereby relieve the lands of the real burden affecting them, can be in a better situation, as to this claim, than Mr. Fraser himself; therefore finds that the complainer has no good claim of debt against Mr. Lyell, the party under sequestration; dismisses the complaint, and decerns; finds expenses due, and allows an account to be given in."

The Court adhered.

Lord Justice-Clerk.—I think the view taken by the Lord Ordinary is perfectly sound. Fraser had no right to the assignation of this bond from Wilson.

Lord Meadowbank.—I agree. I never saw a more iniquitous affair from first to last. It seems just to have been a scheme to subject Mr. Lyell to the payment of an extinguished obligation.

The other Judges concurred.

J. Martin,—W. Douglas, W. S.—Agents.

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to the real lien for his relief, and then he could have proceeded on it against Fraser; and if Wilson had surrendered his real lien to Fraser without getting payment, he would have lost his claim against Lyell. But Fraser, holding the lands, could not resist the claim, in so far as the real burden affected them; and his only security consisted in his right to retain the £11,000 stipulated with Douglas. He could have kept that price, and let the lands go; or he could pay the price to Wilson, and keep the lands. He could not do both. He preferred the latter course; and no doubt, when he did so, he took his chance of the value of the lands, and he had no security for his claims against Douglas on the guarantee of the rents &c. He took his chance of this also. But surely Lyell can be under no obligation to him, when the debt has been paid in full to Wilson, the proper creditor, and that solely by the force of his real lien, which was his first security, and to the benefit of which Lyell had a complete right. The case appears to the Lord Ordinary to be extremely clear."

No. 204.

JAMES and JEAN MACDOUGALL, Pursuers.—*Baillie.*

Feb. 5. 1831. Macdougalls v. Gordon &c.

DAVID WILLIAM GORDON and Others, Defenders.—*Sol.-Gen. Cockburn.*

M'Rae v. Mackenzie's Trustees.

Proof—Deathbed—Jury Trial.—Heirs at law having raised a reduction on the head of deathbed; and trustees under the challenged deed having raised a declarator of liege poustie; and the actions having been conjoined—Held that the pursuers of the reduction should stand as pursuers at the trial in the Jury Court.

Feb. 3. 1831.

1ST DIVISION. Ld. Corehouse.

MACDOUGALLS raised a reduction of a deed on the head of deathbed, and the trustees under the deed raised a declarator of liege poustie. The actions were conjoined; and a question arose as to which party was entitled to stand in the Jury Court as pursuer of the conjoined actions, and so possess the right of reply.

The Lord Ordinary found "that the pursuer of the reduction shall stand as pursuer at the trial of the conjoined actions of reduction and declarator.*

The trustees reclaimed; but the Court unanimously adhered.

W. H. SANDS, W. S.—GREIG and MORTON, W. S.—Agents.

No. 205.

REV. WILLIAM M'RAE, Suspender.—*Sir J. Connell.*

MRS. STEWART MACKENZIE'S TRUSTEES, Chargers.—*Rutherfurd.*

Glebe—Contract—Removing.—A clergyman who had obtained decree from his presbytery for a glebe and minister's grass, which the sole heritor of the parish intended to challenge, having entered into an agreement with him for the possession of a farm at a certain rent, to subsist while the 'question regarding the glebe' should be under discussion, and the Court having, in a reduction of the decree, determined the question of the glebe proper, but not that of the minister's grass—Held that the clergyman was not entitled to retain possession of the farm till it also should be decided.

Feb. 5. 1831.

2D DIVISION. Bill-Chamber. Ld. Moncreiff. T.

PRIOR to the raising of the process mentioned ante, VIII. 683, (which see,) for setting aside a decree of the presbytery of Lewis, designating to the suspender M'Rae, minister of Barvas, sixteen soumes of grass in lieu of an arable glebe, and also pasture for two cows and a horse, as

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* "NOTE.—The deed in question, being ex facie regular and probative, must be held effectual until the contrary is proved. The onus probandi therefore lies, in the first instance, on the pursuer of the reduction. If the defender in the reduction had admitted that the testator, at the date of the deed, was labouring under a disease apparently mortal, and had rested his defence solely on the fact of the testator having been subsequently at kirk or market, that admission might have transferred the onus, in the first instance, to the defender. But the record in the conjoined actions is not so shaped; for, in the fifth article of the condescendence for the trustees, it is set forth, that on the day on which Macdougall executed 'the settlement, he was not afflicted with any bodily disease that appeared to be mortal, or to incapacitate him from carrying on his ordinary business.' That statement leaves the onus on the heirs at law."

minister's grass, an agreement was entered into with Mrs. Stewart Mackenzie, his sole heritor, whereby he was to be allowed to remain in possession, at a certain rent, of the farm of Upper Barvas "during the year or years that the question regarding the glebe may remain under agitation." On the judgment of the Court of the 9th of March 1830, which finally decided the questions regarding the glebe, but remitted to hear as to any remaining points of the cause, Mrs. Mackenzie's trustees charged M'Rae to remove from Upper Barvas. Of this charge he presented a bill of suspension, on the ground that, the question as to the minister's grass being still undecided, he was entitled, under the agreement, to retain possession till that was settled.

No. 205.

Feb. 5. 1831.
M'Rae v. Mackenzie's Trustees.

Elder v. Elder.

Gracie v. Earl Stair's Trustees &c.

The Lord Ordinary refused the bill; and the Court, holding that the term 'glebe' in the agreement could not be considered as applying to the minister's grass, adhered.

JOHN MURRAY, W. S.—W. MACKENZIE, W. S.—Agents.

WILLIAM ELDER, Advocator.—*M'Neill—G. G. Bell.*
MRS. MARY M'LEAN or ELDER, Respondent.—*Robertson.*

No. 206.

Husband and Wife— Aliment.—Decree having been pronounced in a declarator of marriage against a man who had an income of £200 a year, but was not shown to possess any capital—Held,—1.—That £50 per annum was a sufficient aliment to his wife, whom he refused to receive into family;—and,—2.—That she was not entitled to any allowance for purchasing furniture.

IN the declarator of marriage mentioned ante, VIII. 56, the Commissaries, having decerned in the declarator, awarded to Mrs. Elder an aliment of £60 per annum, together with a sum of £200 for providing furniture. Their judgment on this point was remitted for further consideration and investigation. It appeared that, as supervisor of Excise, Elder had a salary of £200 per annum; and that, when these proceedings commenced, he had in cash nearly £1000, almost the whole of which, however, had been swallowed up by the law expenses of the process.

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2D DIVISION. Bill-Chamber. Consistorial.

The Commissaries having adhered to their former judgment, Elder again presented a bill of advocation, which being reported, with answers, to the Court, their Lordships recalled the interlocutor of the Commissaries, and decerned for £50 per annum, without any allowance for furniture.

LAMONT and NEWTON, W. S.—SCOTT and RYMER,—Agents.

JOHN BLACK GRACIE, W. S., Pursuer.—*D. F. Hope—Pyper.*
EARL of STAIR'S TRUSTEES and Others, Defenders.—*A. Bell.*
WALLACE'S TRUSTEES and Others, Defenders.—*Marshall.*

No. 207.

Indefinite Payment—Judicial Factor—Bona Fides.—1.—In a reduction, the rights of the defenders to an estate having been set aside; and, pending a question as to their bona fide possession, a judicial factor having of consent been appointed, who collected from the

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tenants rents due both prior to and at and subsequent to Martinmas 1822; and it having been ultimately decided that the pursuer was entitled to the rents due at and after that term; and that, prior to this date, the defenders were bona fide possessors; and the funds collected by the factor being insufficient to satisfy the claims of all parties—Found that the pursuer was entitled to payment primo loco of the rent due at and after Martinmas, leaving the deficiency to fall on the prior rents;—and,—2.—A party, pending the reduction, having purchased the right of a defender, and a pro forma reduction having been brought against him—Found that his bona fides terminated as if he had been a defender in the original action.

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2d Division. Ld. Mackenzie. R.

THIS was a question of accounting arising out of the Sheuchan case, (mentioned ante, IV. 604,) betwixt Mr. Gracie, for behoof of the creditors of the late John Vans Agnew, and the various parties whose purchases of this estate had been reduced by a judgment of the House of Lords of the 31st of July 1822. [1] In the claim subsequently made by Vans Agnew, the pursuer of the reduction, for bygone rents, the Court sustained the defence of bona fides on the part of the purchasers down to the term of Martinmas next after the judgment; but, on an appeal, the House of Lords so far altered, as to find that the purchasers could not be considered in bona fide after the date of the judgment, and that Vans Agnew's representatives (he being now dead) were "entitled to receive the rents which fell due at Martinmas 1822." [2]

Pending these proceedings, the lands had been sequestrated of consent, and Mr. M'Haffie, writer in Wigton, appointed judicial factor by the Court on the 5th of July 1823. [3] At this time there existed a considerable arrear of the rents payable at Martinmas 1822 as to some of the lots purchased by the defenders in the reduction, which arrears were uplifted by the judicial factor. This sequestration was recalled on the 7th of July 1824; [4] and, of the same date, decree of removing was pronounced in favour of the late Mr. Vans Agnew "as at the term of Martinmas then next;" and the judicial factor was subsequently exonered, after some discussion on an objection to his management that he had discharged certain arrears on the interference of Vans Agnew alone, without authority from the purchasers.

Previous to the judgment of the House of Lords on the question of bygone rents, the parties had come to an interim arrangement as to dividing the rents, which had been lodged in a bank by the judicial factor, in consequence of which the purchasers had been allowed to draw the rents which had fallen due at and preceding Martinmas 1822, in terms of the decision of this Court. By the alteration, however, in the House of Lords, the purchasers were deprived of the rents due at Martinmas, for repayment of which, so far as drawn by them, the pursuer Gracie, for behoof of the creditors of Vans Agnew, raised the present action against

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[1] 1. Shaw's Appeals, 333. [2] July 22. 1828, 3. W. and S. 321. [3] Ante, II. 457. [4] Ante, III. 229.

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them. The only points in the discussion, which it is necessary to notice, were these:—

1. Maitland of Freuch had held certain parts of the estate, the rent of which was £575 per annum. When the judicial factor entered into possession, the arrears prior to Martinmas 1822 were £768. Only part of these arrears, however, was recovered by the factor, and Maitland had received only £270 out of the fund deposited in bank, being considerably less than the proportion of arrears due to him. This sum, he argued, must be imputed to the oldest arrears, which were those due to himself, and consequently that he could not be called upon to repay it, as being the half year's rent due at Martinmas 1822. He further averred that a large proportion of these arrears had been improperly abated by the judicial factor at the instigation of Vans Agnew himself, so that his representatives must bear any deficiency.

2. Pending the action of reduction, the late Mr. Wallace purchased part of a lot included in the challenge; but he was not personally made a party till after the judgment of the House of Lords, when a new action was raised against him. In these circumstances, his trustees contended that his bona fides did not cease until the challenge was actually instituted.

Of these and other points the Lord Ordinary disposed by the following interlocutors:—"The Lord Ordinary having considered the remit from the Inner House, dated the 13th day of November 1828, and the Revised Cases for the parties, and whole process, finds, primo, That all the defenders are liable in ordinary legal interest on the rents received by them, and which they are now to repay. Secundo, In respect to the defender Mr. Maitland, finds no circumstances stated from which it can be inferred that the money received from the tenants by the judicial factor was legally applicable to the rent of any one more than another of the whole years or terms for which the judicial factor had power to recover the rents; and therefore finds that the same must be applied equally and proportionally to the arrears to which Mr. Maitland desires to apply it, and to the after rents receivable by the judicial factor: In respect to the defenders, the heirs of Mr. Hannay, finds that Mr. Agnew appears to have adopted the lease of the lands evicted from them, and therefore must have paid or allowed out of the sums stipulated in that lease for improvements, after he became entitled to possession, if the same had not been paid by the said heirs of Mr. Hannay; therefore sustains their counter claim for said payments, in so far as sufficiently vouched, under deduction of £50 for the half year's rent which they drew and retain; sustains also their claim for public burdens, in so far as sufficiently vouched: In respect to the lands which were in grass on the 31st day of July 1822, finds that a proportion of rent ought to be paid for the same, on account of the possession from the said date down to the time when the possession of the defenders ceased; and appoints the cause to be enrolled, that the above findings may be applied."—

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Thereafter, "Having heard parties' procurators, in explanation of the interlocutor of 18th June last, finds that the parties, actual possessors of the lands, are liable in the legal interest on their rents, as well as those who received rents from tenants; further finds that there are no circumstances sufficient to establish a distinction of bona fides in the case of Wallace's trustees."

The following parties reclaimed,—Mr. Gracie for Vans Agnew's creditors, in so far as the Lord Ordinary found Maitland entitled to retain any part of the rents drawn from the original judicial factor, and also in so far as he sustained the counter claim of meliorations for Hannay's representatives,—Maitland, in so far as he had not been completely assoilzied,—and Wallace's trustees, in so far as their defence was repelled.

The question principally discussed at the advising of these notes was Maitland's claim to impute the payments drawn by him to the oldest arrears of rent, so as to escape repetition. With reference to this, it was denied by Gracie that Vans Agnew had interfered in the collection of the rents, or authorized any remission; and he contended that that gentleman being proprietor in 1822, and entitled to the proceeds of the crop of that year to the effect of paying the half year's rent then due, the payments then received from the tenants must be first applied to the extinction of that rent.

Lord Glenlee.—I am not sure that I have this case fully explained to me. There are two distinct and separate questions:—1. Whether, in the collection of arrears, (by which I mean old rent and new rent as due at Martinmas 1822,) the late Mr. Vans Agnew interfered with the judicial factor, so as to entitle Mr. Maitland to say, You are just as if you yourself had collected, and are accountable. Though urged from the Bar, this point is not alluded to by the Lord Ordinary; and in the present state of the information before us, we can say nothing as to that fact. Now this forms a separate question; but the Lord Ordinary has not even touched upon it in his interlocutor. The second question is totally distinct—namely, whether the arrears are divisible, in some rateable proportion, betwixt the possessor and the proprietor. Now I differ from the Lord Ordinary in the principle he has adopted. True, the factor M'Haffie must be held as having collected for both parties, and the sum falls to be divided according to their several rights and interests. But the debts were of a distinct and separate nature. In respect to Mr. Maitland, the liability by the tenants to him was only as to a personal creditor; but Mr. Agnew was proprietor of the soil; he had a preferable right to the rent effeiring to that crop due at Martinmas 1822 against all mortals—he had the landlord's hypothec; therefore I cannot agree with the Lord Ordinary that there was to be a proportionate division of the indefinite payments. The question of ameliorations may be a very nice one, but the facts are not sufficiently before us to decide that point.

Lord Justice-Clerk.—I am clear that we must decide, not upon any general principles of the duties of a judicial factor, or analogy of heir and executor, but on the precise words of the judgment of the House of Lords, which expressly bears that our interlocutors, in so far as they repel "the claims of

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the appellant, as the representative of the said John Vans Agnew to the rents, due by the occupiers of the lands in question under the respondents, which became due at Martinmas 1822, subsequent to the judgment of this House of the 31st of July 1822, be, and the same are hereby reversed," &c. In short, it was fixed that, from and after the 31st of July 1822, Mr. Agnew was complete master, and every arrear subsequent to that date must be paid to him or his representatives. Now we have evidence of money having been received by the judicial factor; and we can only give implicit obedience to the judgment of the House, by imputing it primo loco to the arrears due to Mr. Agnew. If it appear that this gentleman took a separate charge of the matter, and interfered with the judicial factor in collecting arrears, this may form a deduction from his claim in favour of the tenant. But this is a separate question not fully before us, and may be reserved. The question of ameliorations, I agree with Lord Glenlee, may prove a difficult one; but I will give on that head no definite opinion till there is further investigation as to the facts.

Lord Cringletie.—The exposition of facts in this case is very meagre. The question is, whether the sum of £270, collected by Mr. M'Haffie as to Mr. Maitland's lot, really comes under the judgment of the House of Lords. How did the judicial factor get this? Did he use the right of hypothec? If so, he clearly collected for Mr. Agnew. But if he simply took it as an indefinite and partial payment of a long course of arrears, I am doubtful if it does not fall to be applied upon the common principle, and imputed to the oldest arrear. As factor he might certainly have used the right of hypothec. I am, at any rate, for so far altering the Lord Ordinary's interlocutor, seeing I can discover no principle for applying it proportionally, as he has done. As to the meliorations, there must be more inquiry.

Lord Meadowbank concurred.

The Court accordingly pronounced this interlocutor:—"Alter the second finding of the interlocutor complained of, and find that the indifinite payments made by the tenants to the judicial factor, to account of their rents due prior to and at Martinmas 1822, must be held as having been applicable, in the first place, to the payment of the rents that had become due to the proprietor, John Vans Agnew, at the said term of Martinmas 1822; and in the question with the said defender, P. Maitland, remit to the Lord Ordinary to proceed accordingly, and particularly to hear parties further on the said defender's claims of abatement for sums pursued for, founded on his allegation that a discharge of the rents due by the tenants prior to and at Whitsunday 1822 had been granted under the sanction and authority of the said John Vans Agnew, and to proceed therein as to his Lordship shall seem just;—recal the third finding of the interlocutor relative to the counter claims of the trustees and representatives of the deceased Johnstone Hannay, and remit to the Lord Ordinary to hear parties further as to any claims of abatement of the sums pursued for on account of alleged improvements, or any other grounds, and to proceed thereanent as to his Lordship shall seem just;—quoad ultra, adhere to the interlocutor of the Lord Ordinary, and refuse the desires of the reclaiming notes."

J. B. Gracie, W. S.—J. Bell, W. S.—Agents.

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Feb. 8. 1831.
Duncan v. Union Canal Company.

WILLIAM DUNCAN, W. S., Pursuer.—*D. F. Hope—G. G. Bell.*
UNION CANAL COMPANY, Defenders.—*Skene—More.*

Partnership—Recompense—Agent and Client.—Where a committee of a joint stock company was appointed to make an investigation for behoof of the company; and one of their number, a writer to the Signet, acted as their clerk, but did not stipulate for remuneration—Found not entitled to make a charge for his time and trouble, but entitled to reimbursement of his outlay, besides a charge for making copies, in his own chambers, of the proceedings of the committee for their behoof.

Feb. 8. 1831.
1st DIVISION.
Ld. Corehouse.
D.

IN June 1826, a general meeting of proprietors of the Union Canal Company appointed a committee to act along with the directors in drawing up a full statement of the affairs of the company. They empowered the committee to take the assistance of a professional accountant, if necessary, but nothing was said as to a clerk. Mr. William Duncan, W. S., was named one of the committee. In March 1828, a report was presented, stating the necessity of further investigation upon subjects of vital importance, and the committee was re-appointed for that purpose. At all the subsequent meetings to conduct this investigation, being thirty-eight in number, Mr. Duncan acted as clerk. The sederunts of the committee were frequently long, a great deal of evidence was led, many minutes were written out, a report was prepared, which was printed along with the evidence, and other general trouble was undertaken. In regard to all these matters, Mr. Duncan acted as clerk;—took down the evidence;—afterwards made copies of it, and of the minutes &c. at his own chambers, for the use of the committee;—superintended the printing and revising of the report, &c.;—conducted the correspondence, and prepared and laid cases before counsel, and attended them on the part of the committee. The company had a regular law-agent, but he was not required to attend the committee. After the committee was dissolved, Duncan brought an action against the company for payment of £321. 12s. 5d., for his trouble and outlays.

The company resisted this demand, except as to his outlays, and a charge for writing, in his own chambers, copies of the proceedings of committee, alleging that, as a partner, and as member of the committee, whose office was understood to be honorary and gratuitous, he was

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Single Bills, &c.

A. v. B.

Feb. 8. 1831.
1st DIVISION.

Process—Record—Expenses.—The Lord Ordinary having pronounced an interlocutor which refused expenses to the gaining party, the loser reclaimed on the merits, and the gainer by a relative note on the point of expenses. The losing party printed the record, and he now insisted that, as his opponent could not have reclaimed without a printed record being before the Court, the reclaiming note on the point of expenses should not be received, unless on payment of one-half the cost of printing the record. The Court refused to annex any such condition to the receipt of the note on the point of expenses, and ordered it to the roll as usual.

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not entitled to claim any recompense for his services. The committee had been empowered to employ an accountant if necessary, but not to hire a clerk; and the company already had a man of business to act as their agent, if one was required.

Duncan answered, that his services as an ordinary member of committee would have been gratuitous; but having acted as clerk, and performed all the duties of that office, he was entitled to a recompense for his trouble. It was true that he had not expressly stipulated for remuneration; but he was ready to submit his accounts to taxation.

The Lord Ordinary, "in respect the pursuer was himself a member of the aggregate committee, and did not stipulate for any remuneration on account of his services in that committee, and in respect it does not appear that the company authorized the aggregate committee to appoint a clerk, to be paid by the company, for doing any part of the business intrusted to the committee, assoilzied the defenders, except to the extent of the pursuer's claim for advances in money, which he made by the order or for behoof of the committee, with interest at the rate of five per cent. from the date of each advance, and found the pursuer liable in expenses."

Duncan reclaimed; and the Court, after indicating an opinion that his claim could not be sustained as it stood, appointed him, "before answer, to give in a state of the articles of the account of which he now asks payment."

He lodged a state, of which the following were the chief items:—

"Copies of proceedings &c. made in chambers, -	£90	17	6
"Writing proceedings," - - - - - -	17	18	0
"Time occupied in chambers on each day after a sederunt of the committee, being thirty-eight days, revising drafts of minutes &c., two to three hours each day, - -	20	0	0
"Writing ninety-three letters," - - - -	15	16	0
Several items of attendances on counsel, drawing cases for them &c., about - - - - - - -	13	0	0
Time occupied in revising proofs and re-proofs of 469 manuscript sheets of evidence, also of report, and other papers, twenty-five days, at three hours per day, - -	20	0	0
Besides an outlay of about - - - - -	106	0	0
The whole account was now - - - - -	286	0	0

The Canal Company stated that they had offered to pay Duncan his outlay, and £91. 2s. 6d. for making copies of the proceedings, amounting in all to £197. 17s. 11d. But they objected to the charge of £17. 18s. for 'writing proceedings,' as having been done in the committee-room, where Duncan was bound to attend and take notes of evidence as a member. They objected also to the charge of £20 for the time generally alleged to have been consumed, on the day following each sederunt, in revising minutes &c.; to the demand of £15 16s. for let-

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ter-writing, which the committee could have done by any clerk of the company, had they known it to be necessary; to the charge for drawing cases for counsel, alleging that the consulting of counsel had been ultra vires, though they were willing to indemnify Duncan of his outlay in fees; and, besides trifling items, they objected to the last charge of £20 for revising the printed evidence &c., which was a duty incumbent on every member of the committee.

Lord Balgray.—When a man of business is member of a committee, and means to be hired in the service of that committee, he should take care that his brother members are made distinctly aware of the footing on which he tenders his services in the discharge of any business devolved on the committee. There are many items in this account, even as now reduced by the pursuer, which are objectionable. I would strike out his charge for all those duties which belonged to him in the character of a member of committee co-operating with the others in the dispatch of the business intrusted to them by the company, and voluntarily undertaken by them; also his writings in the committee—his correspondence—his drawing cases to counsel, in which, if any agent was to be employed, it should have been the common law-agent of the company—and his charge for revising the proofs of evidence, &c.—The result is somewhere about £205 or £210, which is all that I would allow.

Lord President.—I am of the same opinion. Mr. Duncan was chosen a member of this committee. He might have declined the office, had he thought fit; but he chose to accept of it, and he was bound to discharge all the ordinary duties of a member without any remuneration. The committee were chosen expressly to conduct an investigation implying a considerable sacrifice of time and trouble on the part of the members. Any charge, therefore, for the time or trouble of Mr. Duncan, while attending at meetings of the committee, cannot be allowed; and in general I concur in the remarks made by Lord Balgray. I would allow the sum of £205.

Lord Craigie.—I am strongly inclined to adhere, without reserve, to Lord Corehouse's interlocutor, and would not go so far as your Lordships do in favour of the pursuer. I am unwilling to go into the detail of the items or their amount, but conceive it to be important to adhere strictly to the principles on which that interlocutor is rested. I am averse to alter it in any point whatever.

Lord Gillies was understood to assent to the views expressed by Lords President and Balgray.

The Court "found the pursuer entitled to the sum of £205, with the interest at five per cent. from the dates of advance respectively, and that in full of his claim libelled; quoad ultra, adhered to the interlocutor reclaimed against; of new found the pursuer liable in expenses," &c.

T. Landale, S.S.C.—J. G. Davidson, W.S.—Agents.

JOHN SMYTH, Suspender.—*Anderson.*

MRS. WEBSTER or GUTHRIE and Others, Respondents.—*Cuninghame.*

No. 209.

Feb. 8. 1831.

Smyth v. Guthrie &c.

Commonty—Interdict.—A party interdicted, who, after a commissioner in a division of commonty had approved of a division and allotment of it, began to carry off stones from a lot marked off to another, and to break up the surface.

Feb. 8. 1831.

1st DIVISION. Lord Newton. D.

JOHN SMYTH of Balharry in April 1828, raised an action of division of the commonty of Glencally, adjacent to his estate. A remit was made to a commissioner, who led a proof, and in June 1829 he issued notes of the principles on which he was to direct the land-surveyors to value and divide the common. At the same time he intimated, that if no representation was made to him within three weeks, he would remit to surveyors to divide according to these principles. No representation was lodged; and in August he remitted to surveyors, to divide and lott off the common; and, on the 1st of that month, Mr. Hagart, on the part of Mrs. Webster or Guthrie and others, (who had a right to a small portion of the common,) wrote to Mr. Smyth, saying,—"I have quarried a quantity of stones upon that part of the hill of Glencally which is likely to become your portion of it in the event of the division taking place of the said common. If you would be so good as mention, on receipt of this, whether or not you would allow me, should the hill be divided, to take stones of your portion of Wester Inverharity."

The allotment by the surveyors was finished on the 25th of August, and it was approved of by the commissioner. Mr. Smyth then wrote to Mr. Haggart,—"I regret I cannot comply with your request in the present state of matters. I am," &c. Nevertheless Mrs. Webster and others proceeded to carry off a quantity of the building-stones from the portion allotted to Mr. Smyth, who applied for an interdict, alleging that their operations consisted of a species of quarrying of the ground, which had never been permitted to any commoner, and at any rate that the division of commonty had proceeded so far as to give him a right to check the encroachment. Interim interdict was granted; and, after an explanation from the commissioner, the bill was passed, in respect of the actual allotment by the commissioner having taken place, so far as it was in his power to do so, and the division was approved of by the Court in January 1830.

Under the passed bill the Lord Ordinary "continued the interdict, declared the same perpetual," and subjected the respondents in expenses.

The respondents reclaimed; but the Court unanimously adhered.

LORD PRESIDENT.—The respondents' operations went to the actual consumption of the subject of the commonty.

LORD BALGRAY.—They were not making the ordinary use of the subject.

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The surface-stones carried away might be of the greatest use to the person to whose lot they belonged, as enabling him to make that enclosure of it which it is the policy of the Act of Parliament to promote. The respondents had no right to carry away the subject, or tear it in peices, as they appear to have done here.

Lords Craigie and Gillies assented.

Suspender's Authority.—Robertson, May 22. 1810, (F. C.)

A. Shepherd,—P. Pearson,—Agents.

No 210. Macdonald, Young, and Co., Pursuers.—*Sol.-Gen. Hope—More.*

James Hamilton, Defender.—*Keay—A. Dunlop.*

Landlord and Tenant—Warrandice.—Where the proprietor in part of a loch let his share to a tenant, who held a lease of the other part, and who erected on the stream issuing therefrom an embankment and sluice for the collection and regulation of the water to supply works; and the proprietor thereafter let a portion of his lands, past which the stream flowed, for the purposes of bleaching &c., but without mention of any right to the loch, or of the stream, (the use of which, however, was necessarily enjoyed when the tenant of the loch opened the sluice); and, at the expiry of this lease, again let the bleachfield, 'as possessed' by the former tenant; and, on the termination of the lease of the loch, ejected the tenant, in consequence of which the sluice was removed, and the water allowed to run in its natural course—Held, in an action at the instance of the tenant in the bleachfield, that the lease did not imply a warrandice of the artificial supply.

Feb. 8. 1831. 2d Division. Ld. Mackenzie. R.

The defender Hamilton is proprietor, in part of the Cochney loch, situated among the Kilpatrick hills in the county of Dumbarton. The other part is included in the entail of the estate of Edinbarnet, belonging to Mr. Stirling of Law, and formed the subject of the litigation mentioned ante, 276. and VI. 272. From this loch a stream issues, which, after a run of a few miles, falls into the Clyde, affording, in its descent, several situations for the erection of mills and machinery. In 1787, the Duntocher Woollen Company, proprietors of certain works on this stream, obtained from Hamilton, and his father (now deceased) a lease of their interest in the loch for 38 years, with power to erect embankments, and collect the water. They also obtained from Mr. Stirling a lease of his share of the loch for 300 years, with similar powers. Under these leases they erected embankments, and placed a sluice at the mouth of the loch, by which the issue of the water was regulated at the pleasure of the company. In this state of matters, Hamilton let to one Colquhoun a field for nineteen years, at a rent of £60, for the purposes of a bleachfield, past which the stream flowed, and lying between the mouth of the loch and the works of the company. A small dam had been formed on the field let to Colquhoun, who, though having no control over the sluice, necessarily enjoyed the benefit of the water collected in the loch,

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as it flowed past his field. Colquhoun's lease expired in 1822, and Hamilton then let the field to one Arthur at the same rent of £60. In the lease to Arthur, the subjects let were described as "all and whole that bleachfield, with the buildings thereon, lying &c., and as presently possessed by Alexander Colquhoun." No special mention was made of the stream of water, nor of the loch, nor was any right thereto expressly granted or warranted; but it was declared that the subjects let were to be "used for the purpose of bleaching, dyeing, and printing, and any other operations connected with bleaching, dyeing, or printing, or for agriculture;" and that the tenant should be allowed, at the end of the lease, "to remove the water-wheel, and any other machinery which may not be legally considered fixtures." The lease contained the usual general clause of warrandice. Arthur entered into possession, and continued to possess in the same way as Colquhoun, till August 1826, when, having become insolvent, he and his trustees subset the premises, for the remainder of the lease, to the pursuers, M'Donald, Young, and Co., at a rent of £120, being double that payable to Hamilton. On the 21st of September 1826, and immediately on their entry, they made a proposal to Hamilton for an extension of the lease for a second term of 19 years, offering to pay to him a rent of £120, and bearing, inter alia, "This field being let for the purposes of bleaching and printing, it is expressly understood that you preserve to us a regular supply of water, and in its natural purity, in so far as you have the command of the loch." This offer was refused.

In the mean while, the lease granted by Hamilton of his share of the loch to the Duntocher Woollen Company, together with their works on the stream, and the lease by Mr. Stirling, had come into the person of Mr. Dunn, merchant in Glasgow. Previous also to the sublease of the bleachfield in favour of the pursuers, the lease granted by Hamilton of his part of the loch had expired, and decree of removing, as at Martinmas 1826, obtained against Dunn. He, however, resisted an application for ejection till March 1828, when decree was finally pronounced against him. He thereupon opened the sluice, and allowed the water to issue from the loch in its natural course; and shortly afterwards Hamilton removed the door of the sluice.

Pending the process of ejection against Dunn, the pursuers served Hamilton with a protest, requiring him to desist from any steps which would deprive them of the benefit of the artificial supply of water secured by its collection in the loch, and setting forth that they would hold him liable for the consequences of any deficiency thereby occasioned; and on decree of ejection being pronounced against Dunn, and the sluice being opened, they again represented to Hamilton that they were likely to suffer damage, if the water were allowed to run out. He thereupon wrote them a letter, stating his willingness to let the sluice be shut, and regulated to suit their convenience, until a decision

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should be pronounced by the House of Lords in an action of reduction, at Mr. Stirling's instance, of the lease of his share of the loch, then depending on appeal in that House.* Dunn, however, (to whom, as tenant of Mr. Stirling, the pursuers applied,) not having given his consent to this, the sluice remained open, and the water consequently ran out, thus restoring the stream to its natural state. The pursuers, alleging that the natural supply of water was totally inadequate for their works, raised an action against Hamilton, (in which they also called their cedent Arthur,) founding on the warrandice in the lease, and concluding that Hamilton should be ordained to replace the sluice, and cause the same to be regulated, so that they might enjoy an artificial supply of water to the same extent as they had formerly done; or failing thereof, for damages at the rate of £2000 per annum for all the years which the lease had still to run.

Parties differed greatly in their averments as to how far the natural supply of water was or was not sufficient for the purposes of the bleachfield; but in defence, as arising from the admitted facts, Hamilton pleaded—This action is not for rescission of the contract, on the ground of the subject having become unfit for the purposes for which it was let, from causes beyond the control of the landlord, nor for damages for having been led into a lease on false representations; but it is laid solely on the warrandice in the tack, as importing an obligation on the landlord to preserve, during the lease, an artificial supply of water from the loch. But there is no right to the loch, nor to an artificial supply of water from it, given expressly in the tack, nor any warrandice of such a right. Such a warrandice can only be inferred by implication from the circumstance that the premises were let for the purposes of a bleachfield &c., and that they are described "as possessed" by Colquhoun, the previous tenant. But it is clear that Hamilton never could have intended to warrant absolutely an artificial supply from the loch, because it belonged to him only in part, so that he never could collect water in it without the consent of the other proprietor or his tenant; and besides, he had already let his own interest to other parties, whose regulation of the sluice he could not control. Neither could the pursuers suppose that they had acquired right to an artificial supply, because they saw other parties in possession of the loch; and indeed their letter of September 1826 proves that they were perfectly aware of the state of the rights to the loch—that the defender had not warranted any right to them, and had not himself an absolute control over the loch. Their enjoyment of this supply was quite precarious, dependent on the will of the tenants of the loch, who might have kept the sluice entirely shut, or let the whole water out at their pleasure. During the subsistence of

* This case was decided in June 1829. See 3. Wilson and Shaw, 462.

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the lease of the loch, the pursuers could not have brought an action to have the defender ordained to compel his tenants in the loch to regulate the sluice, so as to suit the convenience of the pursuers; and the lease having come to an end, cannot alter the rights of parties. Nor is the defender responsible, because he had recourse to an action of ejection against his tenant in the loch, any more than if the tenant had removed voluntarily at the issue of his lease.

On the other hand, the pursuers pleaded, that they saw Colquhoun, the previous tenant, and their cedent Arthur, in the actual enjoyment of an artificial supply of water, on the continuance of which they were entitled to rely; that the field being let for bleaching and printing, implied a warranty that the artificial supply of water (which they alleged was essential to carrying on their works) should be preserved to them; and that whatever might have been the case, had the failure arisen from a damnum fatale, or cause over which the defender had no control, it was very different here, where the loss of the artificial supply arose from the defender's own act and deed in ejecting the tenant from the loch, and causing the sluice to be removed.

The Lord Ordinary assoilzied the defenders, adding the subjoined note.*

The Court adhered.

W., A. G., and R. Ellis, W. S.—W. Patrick, W. S.—Agents.

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* "Note.—This is an action founded, not on an alleged fraudulent inducement, or with conclusions for rescission of the pursuers' lease, and damages for being drawn into that lease, but entirely upon an alleged warrandice of an artificial modification of the supply of water from the Cochney loch. Now the Lord Ordinary does not think the terms of the lease to Arthur, or the circumstances condescended on by the pursuers, are sufficient to constitute such warrandice, when taken along with those that are stated by the defender Mr. Hamilton, and not denied. He thinks that if Arthur, in taking his lease, had any idea of obtaining such warrandice, it was his duty to speak out and ask it expressly, in which case it must of course have been refused. The pursuer can be in no better situation, as against the first defender; and supposing there was no warrandice in the lease, the Lord Ordinary does not see the conduct of the defender Hamilton afterwards was fraudulent, or such as to found the conclusions of this action. As against Arthur, the Lord Ordinary sees no circumstances which at all appear to found any action of this sort."

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Feb. 8. 1831. Booths v. Black &c.

JOHN and LIVINGSTONE BOOTH, Pursuers.—*Moir.*
MRS. RACHEL BOOTH or BLACK and HUSBAND, Defenders.—*Monro.*

Testament — Conditio si sine Liberis. — Circumstances which were held not sufficient to exclude a grandchild under the condition si sine liberis, from the provisions of her grandfather's settlement in favour of his children.

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2D DIVISION. Lord Medwyn. T.

BY antenuptial contract, dated the 24th of February 1770, betwixt Patrick Booth, merchant in Aberdeen, and Ann Hogg, he bound and obliged himself, "his heirs, executors, and successors," inter alia, "to make payment to the children, one or more, to be procreated of the marriage, of the sum of £400 sterling,—£200 sterling whereof is declared payable at their attaining the respective ages of twenty-one years complete, and the remaining £200 is payable at the first term of Whitsunday or Martinmas immediately following the said Patrick Booth his decease, with interest and penalty thereafter during the not-payment; and also the said Patrick Booth binds and obliges him and his foresaids to provide the just and equal half of both heritable and moveable subjects, that shall be conquest or acquired during this marriage, to the children of the marriage; and in the mean time he binds and obliges him to educate and sustain the said children, according to their quality, in all necessaries for their maintenance and education, till their respective ages of twenty-one years complete." Of this marriage there were three sons —John, Alexander, and Livingstone.

In 1783, during the subsistence of the marriage, Mr. Booth executed a trust-settlement, mortis causâ, of all his property, heritable and moveable, in favour of his wife and two brothers, as trustees, for payment, in the first place, of all his debts and funeral expenses. Then followed a clause, that "after complete payment of all my just and lawful debts, it is my intention that the whole rest and remainder of my estate, whether heritable or moveable, be considered as a residue for behoof of my said spouse and children who shall then be alive." Certain powers and directions are then given to the trustees, particularly to secure a provision to Mrs. Booth; "and the said capital sum being so secured and set apart, it is my will and appointment that all my children, who shall then be alive, shall be entitled to the full free residue of my whole heritable and moveable estates, equally, share and share alike, without any preference to the one before the other; and in case they be all arrived at majority, or be married, at the time of my death, then I appoint my said trustees to pay their said shares to them how soon my estates can be realized and converted into cash; but in case it shall happen that some of my children shall then be major, or married, while others of them are still in minority, then and in that event I ordain and appoint the shares or portions of the children so major, and the expense of whose education I will have paid, to suffer a defalcation in favour of

the younger children, so as to educate them in the same manner, of which my said trustees shall be judges,—my intention being to do strict and impartial justice to all my children without distinction; and however soon any of my children arrive at majority, or be married, his or her share of the free unliferented residue of my said estates shall then become payable to him or her, subject always to the defalcation above mentioned, in case the cause thereof still subsist; and providing also, that in case any of my said children shall incline, even before arriving at majority, to set up in any lawful business or occupation &c., then and in that event my said trustees are hereby authorized and empowered to advance to such child any part of his or her share of the free unliferented residue they shall think proper; but such advances shall not interfere with or prejudice the shares of my other children."

Mrs. Booth died in 1787. In 1801, Mr. Booth, on the occasion of his son Alexander's marriage, made an allotment of property among his three sons as follows:—To Alexander, £1650—to John, the like sum;—to Livingstone, £1030, but with a declaration that the difference in his share, and that of his brothers, was afterwards to be made up to him. The particulars of these portions, which received some further additions, Mr. Booth entered with his own hand in a book, to which he prefixed the following note and title:—"A Clatt-book of John, Alexander, and Livingstone Booth's portions, as put by to them in July 1801, on Alexander being married, who receives all the profits himself that arise from his portion from this time; but J. and L.'s profits that arise from their share, P. Booth keeps, and must account to them for it when any settlement takes place that they may want it up. J. and A.'s portions, it's to be observed, is about equal to each of them; but L.'s is far short, which must be afterwards made up, as will appear in each of their accounts as stated in this book."

Alexander Booth died in 1805, leaving a widow and three children, of whom the defender Mrs. Black was the only survivor. Old Mr. Booth took charge of Alexander's family and funds, and survived till the year 1825. At his death, the deed of settlement already mentioned was found in his repositories. The trustees therein named were all dead, and the pursuers John and Livingstone Booth, confirmed as executors of their father; and in that character, as well as joint heirs under his settlement, they took the management of his estate. Mrs. Black having, as representing her father, Alexander, claimed an equal share of the property along with the pursuers, and this being resisted, she raised an action of exhibition and count and reckoning against them before the Sheriff of Aberdeenshire. The proceedings before him, however, were shortly afterwards superseded by the present summons of declarator raised in this Court at the instance of the Messrs. Booth, concluding to have it found that their niece had no claim.

In defence, Mrs. Black, besides a plea of homologation founded on

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certain proceedings with reference to an extrajudicial settlement, contended that, in virtue of the conditio si sine liberis, she was entitled to draw the share to which her father would have had right, had he survived old Mr. Booth.

The Lord Ordinary reported the cause on Cases to the Court.

Pleaded for Booths—

1. It is admitted that if matters had remained upon the footing of the marriage-contract of 1770 alone, Mrs. Black would have been entitled to her father's share; but, in 1801, Mr. Booth made certain allocations of property among his children, exceeding the provisions of the marriage-contract. This took place on occasion of the marriage of his son Alexander, who received immediate possession of his own share, of which, and the nature of these provisions, there is complete evidence, under Mr. Booth's own hand, in "the Clatt-book." This provision must be presumed to have been in full satisfaction of all claims under the marriage-contract, as it exceeded the latter, and was paid over to Alexander upon the occasion of his marriage and forisfamiliation.[1]

2. It is equally clear that Mrs. Black has no claim under the deed of settlement of 1783, more especially when taken in connexion with the circumstances of the case, and the situation of parties. Her pretensions rest entirely upon the implied condition, si sine liberis decesserit —a condition excluded in her case by the terms of the settlement— by the liberal and distinct footing upon which Mr. Booth had placed the provision of his son Alexander—by the length of time he survived that son and the birth of his grandchildren, who were living constantly under his superintendence, while he made no alteration in the terms of that deed. All these circumstances amount to a clear expression of his intention not to leave any thing to the family of Alexander beyond the portion already allotted. The rule si sine liberis decesserit is a mere equitable construction of a parent's will in favour of his own children, and in preference to more distant relations. It has been extended, though with difficulty, to the case of a grandchild whose parent's share would, without the application of the condition si sine liberis, have accresced to the surviving children of the granter. But this application of the rule is not in consequence of any extension of the ordinary meaning of the word *children* in such a settlement; but simply, that the law presumes that had the granter recollected the contingency of the existence of grandchildren, he would have provided for it by an additional substitution in their favour. If, however, there be sufficient evidence that the granter had this contingency in view, and yet made no provision to meet it, there is no room for the application of the rule si

[1] Mathieson v. Mathieson, Nov. 20. 1766, (Mor. 11,453.)

sine liberis. Now, although the settlement of 1783 remained the regulating disposition of Mr. Booth's property at the time of his death in 1825, and although he had for many years taken charge, not only of Alexander's separate estate, but also of his grandchildren, yet no alteration or substitution in that settlement was made in their favour. This, and all the circumstances of Alexander's provision, truly indicated the will of Mr. Booth to be, that his grand-daughter Mrs. Black should have no share with her uncles under the settlement in question.

Pleaded for Mrs. Black—

1. The provisions in the marriage-contract to the children of the marriage, in which, if not superseded by other settlements, Mrs. Black has an admitted right to represent her father, were not by any means discharged by the allocations in the clatt-book. At that time the deed of settlement, as well as the contract, was in existence, and no discharge was taken by Mr. Booth from his sons of the other provisions, when he, ex pietate naturali, made this allocation of funds amongst them. At all events, therefore, Mrs. Black is entitled to claim under the marriage-contract.

2. But the condition si sine liberis is implied in family-settlements, unless excluded per expressum. Now, under the whole circumstances of Mr. Booth's settlements, not only is there no express exclusion of his grandchildren, but, upon every fair construction, there is evidence of his intention to include them. By the marriage-contract they would clearly have succeeded. Then the trust-deed of 1783 was an universal disposition, obviously not intended to disappoint the claims under his partial settlement by the marriage-contract, but a general deed including the former. This was the simple view of the deeds, and the only rational mode by which Mr. Booth's various provisions for his family could be reconciled. In this view, the provision of the clatt-book was just an anticipation to that extent of the provisions in the previous trust-settlement, which included the partial settlement of the marriage-contract, and no special extinction of the provisions in that contract, considered as a separate deed. The avowed object of Mr. Booth was to do 'impartial justice' to his whole family; and the terms of his general disposition of 1783 in favour of his three sons, at that time boys, are precisely of the nature which admitted the conditio si sine liberis in the leading cases of Wallace v. Wallace, and Christie v. Paterson. Independently of any such fixed legal rule of construction, the terms of that deed, and the whole circumstances, evince the intention of Mr. Booth not to isolate his son Alexander in the family arrangements, or definitively to pay him off. On the contrary, his sons were all placed, as nearly as circumstances would permit, on a footing, and the common rules of law, as to their representation by children nascituris, left to operate. That Mr. Booth had the existence of his grandchildren fully under his observation, and yet made no additional provision to embrace their interest, can never be held to redargue the implied condi-

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tion in favour of Mrs. Black, as her grandfather might have considered her secured by that very rule of law; and besides, all the authorities and decisions upon the point, in particular the case of Baillies v. Neilson, prove that the presumption of law si sine liberis cannot be got the better of by such circumstances; for that condition is not here pleaded, as the pursuers maintain, as a presumed revocation of the trust-settlement, but on the ground of a presumed intention in the granter coeval and in harmony with that deed.

The Court found Mrs. Black entitled to a third as in place of her father, and remitted to the Lord Ordinary to proceed accordingly.

Lord Justice-Clerk.—I am quite clear that there was nothing in the original attempt to settle these claims, of the nature of homologation on the part of this lady's uncle; or that there is any thing like a rei interventus, which precludes us from going into the question of law. Again, when I consider the contract of marriage and the subsequent provisions, I am clear that the claims of Mrs. Black, in virtue of that contract, are in no way discharged or superseded by any steps taken either by her father or grandfather. But the real question is as to her legal right under the general settlement of 1783. Now I think it a material feature in the case what was done in 1801, in terms of what is called "The Clatt-book." It is obvious that in this allocation an equal division was contemplated. True, there is a difference as to the share of John, the third son, which was less; but that deficiency is expressly made a debt. In short, the three sons were intended to be placed precisely on a footing. Then, with regard to the deed of 1783, it is also clear that an equal division among the whole children alive at the granter's death was intended. But here comes the point of law: Can the child of one of these children claim the share of its parent? Now I am of opinion, independently altogether of the indications of Mr. Booth's actual intention, that the general principle of law, as fixed particularly by the cases of Wallace, and of Christie against Paterson, applies here. I am clear that this lady must just be put on an equality with her uncles. How much her share may be, is a question of accounting.

Lord Glenlee.—I am of the same opinion. By the very nature of this settlement, the lady must come in place of her father; for whatever doubts and difficulties may have once occurred in establishing such construction, it is now fixed by repeated decisions,—more particularly in a case like this, of direct, and not collateral succession.

Lord Cringletie.—I completely concur, and think the preliminary objections refuted. Under the contract of marriage there were certain specific provisions. Now, if we sustain the condition si sine liberis, it just places this lady beyond her claim there, and on a footing with her uncles in the general settlement. This condition has been settled over and over again, as inherent in all such settlements. To be sure, this is a strong case. I was a little moved by seeing that the granter had actually the charge of Alexander's child; and it may be said that this redarguses the presumption of his meaning to include her, not having done so. But this specialty has occurred in other cases.

Lord Meadowbank.—My opinion is the same. I think the general settlement and other provisions effected no revocation of the marriage-contract, and it is quite clear that Alexander's family could take under that.

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Low v. Farquharson.

Pursuers' Authorities.—Conditio si sine Liberis.—Papinian, l. 102, de Cond. et Demon.; Cod. l. 6. t. 42, de Fidei Com. 30; Bank. l. 9. 6; Ersk. 3. 8. 46; Yule, Dec. 20. 1758, (F. C. Mor. 6400); Watt, July 30. 1760, (Mor. 6401); Jarvey, Jan. 7. 1762, (Mor. 8170); Oliphant, June 19. 1793, (F. C.); Colquhoun, June 5. 1829, (ante, VII. 709.)

Defenders' Authorities.—Conditio si sine.—D. l. 35. t. 1. 102; Cod. l. 6. t. 42. 130; Magistrates of Montrose, Nov. 21. 1738, (6398); M'Kenzie, Feb. 2. 1781, (6602); Cuthbertson, March 1. 1781, (4279); Wallace, Jan. 28. 1807; Neilson v. Baillie, June 4. 1822, and authorities there referred to, (ante, I. 458); Christie v. Paterson, July 5. 1822, (ante, I. 543); Colquhoun v. Campbell, ut supra.

INGLIS and DONALD, W. S.—P. IRVINE, W. S.—Agents.

No 212.

JOHN LOW, Advocator.—*Keay—Moir.*
ARCHIBALD FARQUHARSON, Respondent.—*Skene—Innes.*

Cautioner—Relief.—Competent for a cautioner threatened with diligence, and who has paid only his share of the debt, to call upon his co-cautioner to pay his proportion.

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2D DIVISION.
Lord Medwyn.
R

JOHN LOW, writer in Stonehaven, and Farquharson of Finzean, as co-cautioners, had joined in a bond with James Innes of Durris-house for a cash-credit in the British Linen Company's Bank for £500. Innes having drawn to the full extent of the credit, and left the country, the agent of the bank became very pressing in his demands upon Low, and threatened diligence. Low paid his own share of the obligation, and raised this action against his co-cautioner Farquharson, before the Sheriff of Kincardineshire, concluding to have him ordained to pay up his share of the bond. The Sheriff assoilzied Farquharson, upon the ground, that Low not having paid the whole of the debt to the bank, his action of relief was incompetent. Low advocated; and the Lord Ordinary, "in respect the advocator and respondent stand in the relation of co-cautioners to each other, and that the advocator does not aver that he has paid any part of the sum of which he claims to be relieved by the respondent, repels the reasons of advocation, remits simpliciter to the Sheriff, and decerns; but finds no expenses due."

The Court, however, altered this interlocutor, remitted to the Lord Ordinary to advocate the cause, to recal the interlocutor of the Sheriff, and decern in terms of the libel.

LORD GLENLEE.—I am of opinion that matters had come to that state which entitled Mr. Low to say to his co-cautioner, Pay your proportion, and I'll pay mine. I never understood that there was no claim for relief until the whole debt had been paid, or until legal diligence had commenced. I think there was here sufficient distress.

The other Judges concurred.

C. F. DAVIDSON, W. S.—DALLAS and INNES, W. S.—Agents.

No. 213.

Feb. 9. 1831.
Halkett v.
E. of Elgin.

SIR CHARLES HALKETT, Bart., Pursuer.—*Keay—Cuninghame.*
EARL of ELGIN, Defender.—*Bell—Robertson.*

Proof—Judicial Remit.—An offer of proof, to contradict a report by a person of skill upon a judicial remit of consent, held incompetent.

Feb. 9. 1831.

2D DIVISION.
Ld. Mackenzie.
R.

IN the case mentioned ante, V. 154, (which see,) the Court, with the concurrence of the parties, had directed the Lord Ordinary to remit to Messrs. Bald and Beaumont, engineers, "to ascertain and report the true worth and value of the communication of the Pitfirrane and Urquhart level to any coal-fields belonging to or leased by the defender, not contained in his tack with the pursuer." The remit was made, and afterwards renewed to Mr. Bald and Mr. John Williamson in place of Mr. Beaumont—a substitution also made with the consent of parties. Messrs. Bald and Williamson differed in their report,—the material subject of difference being, whether in estimating the value, the fortuitous or necessary drainage arising from the nature of the strata was, or was not, to be taken into consideration. The Lord Ordinary (Mackenzie) found that this was too conjectural to be estimated; but the Court, on the 29th of May 1829, recalled his Lordship's interlocutor, and directed a new remit to Messrs. Bald and Williamson as to the value of the communication of the levels, taking into view not only the facilities which the existence of the Urquhart level afforded, but also the effect of the natural drainage; "and in the event of any difference of opinion between the two reporters, to remit to any third person of skill to be mutually chosen by the said Messrs. Bald and Williamson, to report on the points of difference that may have arisen in their opinion." In a second report these gentlemen still differed in opinion, and Mr. George Taylor of the Ayr Colliery was accordingly nominated by them as umpire.

Mr. Taylor gave in a long report, which was objected to, on various grounds not necessary to be mentioned, by Sir Charles Halkett, who craved a remit to the Jury Court. This the Lord Ordinary refused, but remitted to Mr. Taylor to reconsider his report, with reference to Sir Charles Halkett's objections.

Sir Charles reclaimed; but the Court adhered.

Pursuer's Authorities.—Rowat v. Whitehead, Nov. 17. 1826, (ante, V. 19); D. of Buccleuch v. Mrs. M'Murdoch, May 17. 1827, (ante, V. 677.)

Defender's Authorities.—Rowat v. Whitehead, ut supra; Fraser v. Maitland, March 9. 1824, (2. Shaw's Appeals, 37.)

W. H. SANDS, W. S.—A. ROLLAND jun., W. S.—Agents.

No. 214.

EARL of STIRLING, Pursuer.—*Robertson—Anderson.*
OFFICERS of STATE, Defenders.—*Ld. Adv. Jeffrey—Sol. Gen. Cockburn.*

Feb. 9. 1831.
E. of Stirling v. Officers of State.

Reddie v. Syme.

Peerage—Process.—A summons being raised by a party claiming a peerage, but whose right thereto had never been recognised by any competent tribunal under the style and title of a peer, allowed to proceed contrary to the previous judgment, ante, VIII. 404.

Feb. 9. 1831.

2D DIVISION. T.

AFTER the judgment pronounced in the proving of the tenor at the pursuer's instance mentioned ante, VIII. 634,[1] (which see,) he raised a new summons, framed with a view to obviate the objections sustained by the Court, but designing himself, as he had originally done in the first summons, "Earl of Stirling," &c. The Officers of State, who were called as defenders, repeated the objection to the designation, which had been sustained by the Court to the first summons, after consulting the other Judges, as mentioned ante, VIII. 404,[2] (which see.) Their Lordships, however, now took a different view of the matter; and, after again consulting the other Judges, repelled the objection, and allowed the action to proceed in name of the Earl of Stirling.

E. LOCKHART, W. S.—F. WILSON, W. S.—Agents.

No. 215.

JOHN REDDIE, Pursuer.—*D. F. Hope—Deas.*
DAVID SYME, Defender.—*Sol.-Gen. Cockburn—Ivory.*

Reparation—Sale.—Circumstances in which a party who sold a farm was assoilzied from an action of damages at the instance of the purchaser, who alleged that his avowed object in making the purchase was to plant trees on the farm, and that he was obstructed in carrying this into effect by a tenant, who founded on a missive of lease by the seller, said to have been concealed by the seller's agent at the date of the sale.

Feb. 10. 1831.

1ST DIVISION. Ld. Corehouse. D.

MR. SYME of Cartmore was proprietor of the farm of Southfield of Cuthill, which had been held by Daniel Campbell, on a verbal lease, for some years prior to 1828. In February of that year, a servant of Mr. Syme made out a note in these terms:—"Conditions—Daniel Campbell's Lease. The lease to be for 19 years; money rent to be annually, for the first five years, £25, &c. There was to be a suitable tofting put upon the lands, &c. The tenant to drive the carriages for the sum of £14., &c. &c. The above and foregoing are the conditions of Daniel Campbell's lease, to the best of my recollection. John Birrell." To this the following note was subjoined:—"The above are the conditions on which I am bound to grant a tack of Cuthill farm to Daniel Campbell. He is not answerable for the expense of erecting the tofting. David Syme. Feb. 27. 1828." Nothing was said about cropping, or about any power being reserved to the landlord to plant part of the farm during the lease. In preparing to extend a regular lease,

[1] Alexander v. King's Advocate, March 4. 1830. [2] Alexander v. King's Advocate, Jan. 26. 1830.

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two drafts were made out,—one by Mr. Syme, and the other holograph of the tenant, and subscribed by him,—in both of which, power was expressly "reserved to the said David Syme to take off ground for planting trees within the farm, at such places as he or they may judge proper," &c. There were other reservations in favour of Mr. Syme, and stipulations were inserted, binding the tenant to cultivate according to the rules of good husbandry, &c.; but the drafts differed from each other in regard to some of the details of cropping, especially for the last four years of the lease.

In July 1828, Mr. Reddie of Cutbill offered to purchase the farm from Mr. Syme's agent for £1000, which was accepted. Mr. Reddie had mentioned, previous to his offer, that one of his chief objects in purchasing was to plant part of the farm as a shelter to his contiguous estate, and he was then informed "that the lands had been agreed to be let;" and a scroll of a lease was shown him, in which power was reserved to the landlord to plant in the terms already quoted. When Mr. Syme's agent accepted the offer, it was made a condition that "the lease to Mr. Campbell be confirmed in the terms specified in the scroll which was shown to you when here some time ago." On the 1st of August Mr. Reddie's agent wrote, proposing a deduction from the price, and requesting the title-deeds and a scroll of the lease; and also asking whether, with consent of the tenant, he might not commence planting before his term of entry, On the 2d of August the deduction was agreed to, and Mr. Syme wrote, "he had not the least objection to Mr. Reddie arranging as to his plantation whenever he pleases, and will be glad to give him all the facilities in his power." On the 6th, Mr. Syme sent to Mr. Reddie the above two drafts of lease, both of which contained a reserved power to plant; and at the same time wrote, "You will observe, that as to the term of endurance, the rent to be paid, and other material conditions, they do not differ, and that the principal disagreements are as to the management of the lands, more particularly during the last four years of his possession, &c. As I have always found the tenant perfectly reasonable and well disposed, I am sure that you will find no difficulty in getting him to agree to any conditions which are in themselves equitable. Those in which both scrolls agree, may be considered as the only ones finally settled."

Pursuant to this, Mr. Reddie attempted to come to a final arrangement with the tenant, and he stated that they agreed as to the extent to which he should plant, and as to the mode of cropping; but the tenant afterwards refused to subscribe the agreement, unless Mr. Reddie made certain enclosures, which he declined. Mr. Reddie intimated this to Mr. Syme in October 1828, but did not notify any intention to resile from the bargain. On the contrary, at the term of Martinmas, he paid the price, and obtained a disposition from Mr. Syme of the lands, "as now possessed by Daniel Campbell," &c. It contained no reference to any lease or missive

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to Campbell, but had the usual warrandice of the titles against all mortals, and of the rents against the granter's facts and deeds.

Mr. Reddie having purchased a large number of young trees, was proceeding to plant them in December 1828, when the tenant intimated that he would apply for an interdict, unless Mr. Reddie desisted, as he held a missive of lease from Mr. Syme, anterior to the scrolls, in which no mention was made of a reserved power to plant trees at all. Mr. Reddie then wrote to Mr. Syme to be informed of the terms of this missive, intimating that he could have agreed to a lease in terms of either of the two scrolls, but would not recognise, as binding, any lease which deprived him of the power of planting trees. An offer was then made to him on the part of Mr. Syme to restore the price and interest, if he gave back the lands. This Mr. Reddie rejected, and raised an action of damages against Mr. Syme, stating that he had been deceived and misled by the concealment of the original missive of lease; that he had been induced to purchase on the express understanding of his having full power to plant the farm, which, he relied, was only let upon the terms specified in the scroll of lease shown to him prior to his making offer to buy it; that it now appeared that the tenant held a prior valid missive of lease which deprived the landlord of all right to plant, and did not regulate any plan of cropping, &c.; that thus the sole object of his purchase was frustrated, the farm of little value to him, and useless as a shelter to his adjoining estate, which he had intended it to be when planted; that Mr. Syme was therefore liable to him in damages for his expense in purchasing trees, and for failure to implement the bargain, and thereby occasioning the derangement of his intended improvements of the property.

In defence, Mr. Syme contended that no relevant ground of damage was stated. He had implemented every obligation incumbent on him. He had given a good disposition to the lands, and made Mr. Reddie fully aware of the unfinished state of the transaction with the tenant, by showing the two scrolls of lease. The tenant could be compelled to subscribe a lease in terms of the holograph scroll, in which a power was reserved to the landlord to plant, and the pursuer should have raised action to that effect against the tenant; but even if the tenant could not be so compelled, still, as Mr. Reddie, after his dispute with him, and being made aware of the unfinished state of the two scrolls of lease, had paid the full price of the lands, and accepted a disposition, without any reference to the lease or its terms, he could not now go back on prior communings. Besides, the defender had offered a restitution hinc inde, and the pursuer therefore could not insist for damages.

Mr. Reddie answered, that he was not bound to try the question of the validity of the missive with the tenant, or whether he was bound to subscribe a lease in terms of the scroll, but could at once recur on Mr. Syme; that the words of the disposition were immaterial, as fraud was alleged, and the missive of sale stipulated that the lease should be in terms

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of the scroll shown to him when he offered for the land, and that scroll contained a reserved power to plant, besides other provisions in favour of the landlord; that as the tenant now insisted on his right to possess the lands without allowing the landlord's right to plant, or the other provisions in his favour, he was entitled to damages for non-implement of the bargain; and he was not bound to accept of repetition of the price with interest, which did not replace the expense to which he had already been put.

The Lord Ordinary having reported the cause on Cases, the Court unanimously assoilzied the defender, with expenses.

Lord Balgray.—This has been a very loose transaction. If one scroll of a lease had been shown to the pursuer before the sale, and another one popped out upon him after it, this would have been a deception. But it does not appear which of the two scrolls was shown to him before the missives of sale; and when his attention is fully called to them afterwards, he makes no proposal to throw up his bargain on account of their partial discrepancy. On the contrary, his favourite object is to plant, and the tenant does not oppose this. Both scrolls of the lease reserve power to him to do this; but he and the tenant quarrel about some other matter altogether; and even then, instead of giving up his bargain, or intimating a claim for damages, he proceeds to take a disposition, and pays the price without objection. Looking at this transaction, and the terms of the disposition, in which not a word is said about the nature of the lease, I think the pursuer took on himself the burden of completing the arrangement with the tenant, and cannot say that the defender has not implemented his contract of sale.

Lord Craigie.—The pursuer quarrels with his tenant about the enclosures to be made—a thing with which the defender has nothing to do; and the result is a groundless action of damages against him.

Lords President and Gillies assented.

Pursuer's Authorities.—M'Lean, June 23. 1757, (14164); Ferrier, March 9. 1823, (1. Shaw's Appeal Cases, 455); Gordon, June 15. 1815, (F. C.); Hughes, March 25. 1819, (1. Bligh, 287); 3 Ersk. 1. 16.

Defender's Authorities.—Hannay, Jan. 26. 1785, (13334); Inglis, June 27. 1788, (13335); Gray, June 28. 1801, (Sale, App. 2.)

Brown and Miller, W. S.—Gibson-Craigs, Wardlaw, and Dalziell, W. S.—Agents.

No. 216.

William Jaffray, Suspender.—*D. F. Hope—Wilson.*

William Gordon and John Waddell, Chargers.—*Jameson.*

Bankrupt—Trustee.—Circumstances under which a decree under the Small Debt Act, against a trustee on a sequestrated estate, was held to be against him personally, although he had no funds.

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Gordon and Waddell, servants and chaise-drivers of one Mackay, an innkeeper, raised an action before the Sheriff of Lanarkshire, acting under the Small Debt Act, for their wages, against "William Jaffray junior, trustee on the sequestrated estate of John Mackay." Each of them obtained a decree, finding "the within-designed William Jaffray,

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defender liable in the sum of £8," &c. Having charged him on the decrees, he presented two bills of suspension, which the First Division of the Court, on the 22d and 30th of November 1827, refused, with expenses, as incompetent.[1]

Jaffray thereafter, alleging that Gordon and Waddell were about to do personal diligence against him, that the First Division had stated that the decrees could only apply to him qua trustee, and that he had no funds, presented new bills of suspension, which came before the Second Division.

Gordon and Waddell denied the allegations of Jaffray, both as to the grounds on which his former bills had been refused, and as to having no trust-funds; and stated that the actions had been raised against him as individually liable to them; and indeed they would otherwise have been incompetent and unmeaning, as claims might have been made in the sequestration in common form.

The bills having been passed, the Lord Ordinary found that Jaffray had not trust-funds in his hands at the date of the charge; "and as the Lord Ordinary is not satisfied that the Court intended that the decerniture in favour of the chargers should be a personal decerniture against the suspender, suspended the letters simpliciter; but, under all the circumstances of the case, found no expenses due."

Gordon and Waddell reclaimed on the merits, and Jaffray on the point of expenses. Their Lordships of the Second Division remitted the case to the First Division, in respect of the former bills of suspension having been there disposed of.

Lord Balgray.—The chargers obtained decrees against Jaffray, the trustee, before the Sheriff Small Debt Court. The Sheriff never meant them to be decrees against the trust-estate. The thing is impossible sua naturâ. He must have meant them against Jaffray personally. I interpret them as decrees against him personally; and as we have previously refused bills of suspension, we cannot now stay diligence.

The Lord President and Lord Gillies concurred,—Lord Gillies at the same time observing, that if he had formerly expressed an opinion that the decrees were only available against Jaffray as trustee, he was now satisfied that they were against him personally.

Lord Craigie.—The decrees being in the Sheriff Small Debt Court, it is quite clear that a personal decerniture against Jaffray must have been meant. He must indeed have so viewed it himself, and have known that it meant this, and could mean nothing else. I am for altering the judgment.

The Court then altered, found the letters orderly proceeded, allowed the chargers their expenses, and refused the reclaiming note of Jaffray.

W. Mercer, W. S.—Wotherspoon and Mack, W. S.—Agents.

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[1] Ante, VI. 99.

No. 217.

WILLIAM LOCH, Pursuer.—*Robertson—W. Bell.*
LOCH'S TRUSTEES.—*More—Brownlee.*

Feb. 10. 1831.
2D DIVISION.
Ld. Mackenzie.
T.
Loch v. Loch's Trustees.
Fraser v. Lang.

Donation.—In an accounting at the instance of the pursuer Loch against his deceased father's trustees, they, inter alia, claimed credit in discharge for a payment in purchase of a lease, in name of the pursuer and his father, for behoof of Mrs. Gardner, daughter of the deceased, and sister of the pursuer. This payment had been made, with the pursuer's concurrence, out of a fund liferented by his father, but of which the fee belonged to the pursuer; and the trustees alleged that the pursuer's consent amounted to a donation in favour of his sister. The Lord Ordinary, however, being satisfied from the correspondence that the pursuer had merely consented to the money being so employed in the mean time as an accommodation to his father, found that the trustees were not entitled to take credit for this payment; and the Court adhered.

W. DICKSON, W. S.—P. COUPER, W. S.—Agents.

No. 218.

ARCHIBALD FRASER, Pursuer.—*Macdonald.*
JAMES LANG, Defender.—*Cuninghame—J. W. Dickson.*

Master and Servant—Agent and Clerk.—General allegations by a writer of incapacity and negligence on the part of his clerk, not complained of while the clerk was in his service, held not to be a relevant defence against the clerk's claim for salary, in terms of an admitted agreement entered into after the clerk had been six months in his employment.

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2D DIVISION.
Lord Medwyn.
H.

FRASER, who, for more than a year, was in the employment of Lang, W. S., as his clerk, pursued him for the balance of a salary of £50 per annum. Lang admitted that an agreement to pay the £50 had been entered into six months after Fraser's service with him commenced; but he alleged that Fraser had failed to implement his part of the contract, having been negligent and irregular. There was, however, no averment that he had ever complained of negligence or irregularity while Fraser continued in his service.

The Lord Ordinary, "in respect the agreement with the pursuer was entered into by the defender after he had experience of the qualifications of the pursuer, and that it is not averred that the defender ever complained to him while in the defender's employment of his alleged incapacity or negligence, or irregularity of attendance," repelled the defences, and decerned. Lang reclaimed; but the Court refused his note, without hearing the pursuer in reply.

COLL MACDONALD, W. S.—J. LANG, W. S.—Agents.

C. MACKINTOSH, Pursuer.—*Sol.-Gen. Cockburn—Keay—Marshall.*
H. MACQUEEN, W. S., Defender.—*D. F. Hope—Buchanan.*
MRS. ELIZABETH MACQUEEN and Others, Defenders.—*Skene.*

No. 219.
Feb. 10. 1831.
Mackintosh v. Macqueen &c.

Process.—The Lord Ordinary, having sisted process as to representatives pleading defences in law, till the result of an accounting with a trustee, which might render a decision of these defences unnecessary, the Court altered, so as to allow the representatives to go into the accounting, if they saw fit; but superseded the discussion of the pleas in law.

MACKINTOSH, as factor employed by the trustees of the late Mr. Macqueen of Corrybrough, raised an action for payment of certain advances against Macqueen, W. S., as sole surviving trustee, and also against him personally, and the widow and younger children, who disputed their liability on grounds of law not necessary to be here specially mentioned.

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2D DIVISION.
Lord Medwyn.
T.

The Lord Ordinary, before closing the record, sisted process as to all the defenders, (except Macqueen qua trustee, and as to him remitted Mackintosh's accounts to an accountant,) on the ground that the result of the investigation might supersede any discussion of the legal pleas upon which the other parties founded their defence. These parties reclaimed, and contended that their pleas should now be discussed and disposed of, without regard to the investigation before the accountant. The Court adhered, but varied so far as to supersede the discussion of these defences, instead of sisting process, so as to entitle them to attend before the accountant, if they saw cause.

J. FORMAN, W. S.—J. MACDONELL, W. S.—H. MACQUEEN, W. S.—Agents.

CHARLES FERRIER, Pursuer.—*D. F. Hope—Forsyth.*
W. C. C. GRAHAM and Others, Defenders.—*Rutherfurd—Speirs.*

No. 220.
Feb. 10. 1831.
Ferrier v. Graham &c.

Bankrupt—Reference to Oath.—In a question with creditors, a reference by a debtor, after verdict, to the oath of a discharged bankrupt held incompetent,—the discharge having deprived the bankrupt of all interest as a party;—and Observed, that he might have been adduced as a witness at the trial.

MANY years ago, the late Sir John Lowther Johnstone lost a large sum of money to Mr. Graham of Gartmore at play, for which he accepted to Graham two bonds for £2000 each, dated in May 1810, payable the one in three, and the other in four years. In 1811, these bonds were purchased from Graham by White, a jeweller in Edinburgh, who paid for the one £1500, and for the other £1225. In 1815, White raised an action against the trustees of Sir John Johnstone for payment of these bonds, or alternatively against Graham for repetition of the prices paid him. Sir John's trustees thereupon raised a counter action, concluding for reduction of the bonds, as granted for game debts. In that action they obtained decree, and were accordingly assoilzied from the action

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raised by White.[1] In the mean time, White's estates were sequestrated and the pursuer Ferrier appointed trustee. After the action against Graham had been asleep for several years Ferrier wakened it, to have the alternative conclusion disposed of. Thereafter a defence, that the statute of Queen Anne, annulling the debt, was also a bar to repetition of the purchase-money was repelled,[2] and a remit was made to the Jury Court to try the following issue:—"Whether, at the time the said bonds, or either of them, were assigned as aforesaid, the said John White knew that the said bonds, or either of them, were granted by the said Sir John Lowther Johnstone to the said William Cunninghame Cunninghame Graham, for money lost at play as aforesaid." A verdict having been returned, on the 18th July 1829, in favour of Ferrier, and a motion for a new trial having been refused, a minute was given in for Graham's trustees, (he having left the country insolvent,) proposing to refer to White's oath "the facts admitted to the defender's probation, as contained in the issue sent to the jury." Previous to the trial, White had obtained a discharge in the sequestration, and Ferrier, in respect of it, objected to this reference as incompetent. The Lord Ordinary ordered Cases.

Pleaded by Ferrier.—The primary question is, whether White, the bankrupt, has such an interest in the case as to render the reference to his oath competent? By the law of Scotland, there are two characters under one or other of which the testimony of an individual upon oath may be received to establish facts,—either, 1. As a witness; or, 2. As a party. But the universal rule is, that if in any case it be competent to examine an individual as a witness, it is not competent to obtain a decision by reference to his oath as a party. This is the regulating principle on the subject, and the converse of the proposition is equally true. The reason is, a witness must have no interest in the result of the action in which he is examined. On the other hand, a reference to oath is a transaction or contract by which the one party perils his case upon the statement of his antagonist; consequently the competency of a reference to oath of party depends upon the question whether the person to whom the reference is made is truly a party interested, and having power to enter into a transaction with regard to that interest. In the present case it was perfectly competent to have examined White as a witness on the Jury trial, as he had been previously discharged, and was free from all interest in the result. For the same reason, it is incompetent to refer to his oath as a party after the issue of that trial. Erskine, 3. 5. 9, followed by Tait, p. 273, supports this doctrine to the fullest extent; and the principle is also very clearly laid down by Lord Pitmilly in the case of Towers;[3] while, in all the cases referred to by the defenders, and in which

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[1] See ante, V. 40. note. [2] Ante, VI. 818. [3] Ante, VII. 902.

reference to oath was admitted, there was an obvious and positive interest in the party.

Pleaded by Graham's Trustees.—Although White has obtained a discharge, the defenders cannot admit that he is thereby free from all interest in the result of the litigation, or that his affairs are so desperate as to afford no hope of a reversion to himself after payment of his debts, which indeed might materially depend upon the fate of this action. The pursuer's argument resolves into this, that the pursuer of an action may, by his own voluntary act, such as an act of bankruptcy, deprive his adversary of one of the modes of proof, and perhaps the only one on which he can rely for disproving the claim that has been brought against him. There can be no doubt that, generally speaking, the right of either party in an action to enter into a judicial contract of reference to the oath of his adversary, as decisive of the cause, is a mode of proof competent by the law of Scotland to all litigants; nor does the bankruptcy of the party interfere with the rule; for although bankruptcy was formerly held to disqualify the bankrupt from being a witness in questions with his creditors, that state of the law has since been changed; and it is now established by a long train of decisions, that, in the ordinary case, the evidence of the bankrupt is admissible against his creditors. When adduced as an ordinary witness, a bankrupt is, no doubt, subject to the objection of interest, which applies to all witnesses; and it has in consequence been doubted whether a sequestrated bankrupt is a competent witness in questions which go to enlarge the fund by means of which he may hope either to obtain more favourable terms with his creditors, or a reversion for himself. White, therefore, would not have been a competent witness against the defender. But, with respect to the competency of a reference to the oath of the bankrupt in questions between his creditors, there is now no doubt. Bankruptcy, it has been decided, does not per se bar such reference, although the Court, in the exercise of a discretionary power, have refused a reference where the character or relationship of the bankrupt would have interfered with his admissibility as an ordinary witness. Under these restrictions, however, the principle of which is perfectly obvious, the oath of reference has always been sustained. Further, the trustee can be considered in no better situation than that of an onerous assignee, in a question with whom it would be competent to refer to the oath of his cedent.

The Lord Ordinary pronounced the following interlocutor, upon the supposition that the fact of White's discharge was not admitted by the defenders, adding the subjoined note:*—"Finds that if it shall turn out that John White is a discharged bankrupt, having no interest in this

* "Note.—When a bankrupt has obtained his discharge, his interest in the recovery of his estate is at an end; and if there be no improper agreement or understanding

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case, which has been wakened and insisted in by the trustee for his creditors, and that it is carried on solely for their behoof, it will not be competent to make a reference of the same to his oath of verity, as proposed by the defender; but as it is not admitted that the bankrupt has been discharged, appoints the pursuer to produce in process the bankrupt's discharge."

LORD GLENLEE.—I am inclined to adhere. The reference could not be allowed, unless you were to hold the bankrupt's oath conclusive in all cases, both against himself and his creditors. This is not settled. The oath will only be an ingredient in evidence, and it might be met by a letter under his own hand. In the case of Mein v. Towers, Lord Pitmilly held that it would not be per se decisive, and so did others of the Court; and also in the case of Mackay v. Ritchie, where infamia was held a bar to it.[1] Bell and Tait do not support Mr. Graham's plea. It is perfectly plain, that unless the oath is to be wholly conclusive against the creditors, the reference cannot be sustained.

LORD CRINGLETIE.—There is a great difference betwixt the case of a common assignation, and that of a discharged bankrupt. As to the plea of being deprived of the benefit of the oath, that is the fault of the party, who might have made a witness of the bankrupt.

LORD JUSTICE-CLERK.—We cannot alter this interlocutor. I hold that a reference to oath, such as is proposed here, must be bottomed on substantial interest in the party referred to. They might have had Mr. White as a witness. He was discharged from all interest. But having failed to obtain Mr. White's evidence in the competent way, they are not entitled to have the benefit of his evidence now.

THE COURT accordingly adhered.

Pursuer's Authorities.—Ersk. 3. 5. 9; Tait on Evidence, p. 273 and 363; Towers v. Mein, July 11. 1829, (ante, VII. 902.)

Defenders' Authorities.—2. Bell, 484, and 1. ditto, 334, (5th edit.); Tait, 276; Halkerston v. Lindsay, Feb. 26. 1783, (12476); Blair v. Balfour, July 9. 1745, (12473); Moodie, Dec. 3. 1736, (12471); Sinclair, Nov. 7. 1749, (12475); Grant, (12476); Pringle, (12473); Nairne, (12468); Ritchie v. Mackay, March 7. 1826, (ante, IV. 534.)

LOCKHART and SWAN, W. S.—DEUCHAR and KNOX, S. S. C.—Agents.

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between the bankrupt and his creditors, as the cause of granting the discharge, he will become an unobjectionable witness in any cause relating to that estate; and if so, it must be incompetent to refer a cause, which is pursued for the benefit of others, to his oath of verity, for which interest is the qualification. If the defender in the present case really wished to have the benefit of Mr. White's evidence, he should have brought him forward as a witness on the trial."

[1] But see judgment of House of Lords, June 24. 1829, (3. W. and S. 484.)

GEORGE JEFFREY, Pursuer.—*Skene—Coventry.*
GEORGE AITKEN, Claimant.—*Skene—Coventry.*
JOHN GRAY and Others, Claimants.—*D. F. Hope—More.*

No. 221.
Feb. 11. 1831.
Jeffrey v. Aitken &c.

Presumption—Testament—Provision to Children.—1.—Circumstances in which a bequest by a father to a daughter, in name of legitim, held not to be revoked by subsequent provisions in testamentary writings.—2.—Where a bank receipt was taken by a father in name of his daughter, kept by him during his life, and bequeathed by him to her in liferent, and to another in fee; and the daughter, after his death, acted on the footing that it was not her property—Found that her next of kin could not take it as her property.

Feb. 11. 1831.
1ST DIVISION.
Ld. Corehouse.
D.

ON the 1st of September 1802, the late James Aitken of Dalkeith executed a deed of settlement. At this time he had one son, George, two unmarried daughters, Margaret and Susan, and a daughter Anne, married to John Gray. He left his heritable property to George, under burden of paying £200 to each of Margaret and Susan, and £120 to Mrs. Gray, at the first term after his decease. He provided, that if any of them died without issue, the survivor or survivors, and the heirs of such of them as might predecease, should succeed to the share of the child dying without issue. He afterwards, in 1804, wrote a declaration on the back of the settlement, that "the provisions above specified in favour of my daughters are in full of legitim, bairns' part of gear, and of every thing they can claim through my death." In 1803, he lodged £400 in the hands of Mansfield, Ramsay, and Company, bankers, on a deposit receipt in his own name; and, in February 1807, he provided, by a holograph writing, "that what money and household furniture is in my possession at my decease, is to belong to my daughters Margaret and Susan, and to be their property as long as they live, and to be divided betwixt my son George and Anne Aitken at their death, or the heirs of their bodies, agreeably to the disposition in their favour; reserving my power to make any alteration," &c. Susan predeceased her father without issue. In 1808 he deposited the further sum of £100 in the same banking-house, taking a receipt in name of his daughter Margaret, but he retained it in his own custody till his death.

By another holograph document, dated 17th October 1810, addressed to Margaret, he provided, "that as my daughter Margaret stands in need of all the interest of £500 to support her in a comfortable way of living; so I give her full power to uplift interest of the whole sum of £500 in Mansfield and Ramsay's hand; and that neither my son George, nor my daughter Anne Aitken, shall presume to uplift any part of the same till my daughter's death."

He died in 1812; and besides the two bank receipts already mentioned, a separate deposit receipt of Sir William Forbes and Company for £120

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was found in his repositories. Thereafter George, Margaret, and Anne (Mrs. Gray,) signed an agreement to abide by the holograph writings of their father, as equally binding on them with his settlement; and on the same day Mrs. Gray acknowledged herself "to have received the sum of £120, contained in a bill, bequeathed to me agreeably to my deceased father's deed of settlement, dated 1st September 1802."

George and his sisters concurred in placing the two receipts of Mansfield, Ramsay, and Co., for £400 and £100, in the hands of David Reid, taking a receipt from him in these terms:—"I acknowledge to have received in trust, for the children of the deceased James Aitken, in bills, the sum of £500 sterling; and hereby bind myself to see the interest of the whole sum, as above, regularly paid to Margaret Aitken, the deceased's eldest daughter, agreeably to a holograph letter in her possession."

Reid held these receipts, and paid the interest to Margaret till the period of his death. They were then changed by John Gray junior (a son of Mrs. Gray) for two receipts of £250 each,—one payable to Mrs. Gray, the other to George Aitken,—and were deposited with one Jeffrey, who granted a receipt that he had got them from George, and held them in trust on the same terms as Reid. Mrs. Gray died in 1824, and Margaret Aitken in 1827. On the latter event, the husband and children of Mrs. Gray, claimed from Jeffrey the deposit receipt for £250 taken payable to Mrs. Gray; and having raised an action against him for delivery, he brought a multiplepoinding. In these processes (which were conjoined) George Aitken lodged a claim, contending, 1. That as the two deposit receipts of £250 each originally composed the receipt of £400 belonging to his father, and the other of £100 to his sister Margaret; and they had, without his or her consent, been put into their present form; and as the £100 receipt was Margaret's exclusive property, and Mrs. Gray had predeceased her, he, as Margaret's next of kin, was entitled to it; and, 2. That as the codicils or testamentary writings of 1807 and 1810 imported a revocation of all prior provisions in favour of Mrs. Gray, the interest on the sum of £120 paid to her should have been drawn by Margaret during her life; and therefore he, as Margaret's next of kin, was entitled to it, and also to one half of the principal.

The husband and children of Mrs. Gray lodged a claim, and pleaded that the holograph writings of the testator showed that he considered the £100 receipt in Margaret's name to be his own; that the conduct of all the family, and especially of Margaret and George, after his death, confirmed this; that the sum of £120 had been kept by the testator in a separate bank receipt till his death, for the express purpose of paying what was bequeathed to his daughter Mrs. Gray; that the subsequent provisions did not import a revocation, but were merely intended, after giving George the heritage, and Mrs. Gray the £120, and Margaret the liferent of the other funds, to produce a division,

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on Margaret's death, of these last funds between George and Mrs. Gray, (or their heirs,);—that this was evident from the comparative value of the bequests in 1802 and 1807—the different terms of payment—the state of the testator's family—and the conduct of all parties on the testator's death; and therefore they were entitled to one-half of the £500, and consequently to have the receipt for £250 delivered up to them.

The Lord Ordinary "found the said George Jeffrey entitled to the expenses of bringing the process of multiplepoinding into Court out of the fund in medio, &c.;—decerned in the ordinary action against the said George Jeffrey for delivery of the £250 bank receipt; quoad ultra, assoilzied him from that action;—and in the multiplepoinding preferred the said John Gray and others, claimants, in virtue of their claim and writings produced, to the fund in medio, as claimed by them; and decerned in the preference against the raiser of the multiplepoinding for delivery accordingly, under deduction of said expenses found due to him;—found the other claimant, George Aitken, liable to the said John Gray and others in expenses of process," &c.*

Aitken reclaimed on the merits, and Jeffrey to be allowed his expenses in the ordinary action; but the Court unanimously adhered.

Lord Balgray.—When we look at the terms of the settlement—the tenor of the codicils viewed in connexion—the agreement which was entered into by the parties, and the conduct of the confidential trustees with whom the receipts were deposited,—the whole together makes a case which is extremely clear. The Lord Ordinary's judgment is well founded, and I have no hesitation in adhering.

The other Judges assented.

George Aitken's Authorities.—Belches, Dec. 22. 1752, (11361, and Supp. 5803); Gallie, Dec. 18. 1782, (11374); Monteath, Dec. 11. 1776, (App. v. Presumption, No. 2.); Stenhouse, June 15. 1737, (11444); and Supp. (5198); Houston, Nov. 16. 1708, (11465, and Supp.

* "It cannot be held that the legacy of £120 left to Anne Gray by the settlement in 1802, which was payable at her father's death, and in full of her legitim and every other claim, was meant to be revoked by the testamentary writings or codicils, as they are called, dated in 1807 and 1810. Every presumption arising from the comparative value of the bequests to her in 1802 and 1807—from the different terms of payment of these bequests—from the state of the testator's family in 1802, 1807, and 1810—and from the conduct of the family after the testator's death—is opposed to the construction for which the claimant George Aitken contends. Nor does any difficulty arise from the codicil of 1807; for by the money in the testator's possession there mentioned, must be understood either his moveable funds, deducting the sum set apart for Anne, or the money in his natural possession, contradistinguished from that which was in the hands of his banker. With regard to £100 lodged with Mansfield and Ramsay in the name of Margaret, on which James Aitken tests as his own property, there is abundant evidence in the conduct of all parties, and particularly of Margaret herself, to show that it really belonged to him."

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5912); Burnet, Feb. 24. 1709, (11467, and Supp. 4737); Paip, Nov. 19. 1681, (12999); Matheson, Nov. 20. 1766, (11453, and Hailes, 155); Forbes, 1650, (Supp. 1449.)

R. Wilson,—W., A. G., and R. Ellis, W. S.—Agents.

Lindsay &c. v. Orr.

No. 222.

Robert M. Lindsay and Others, Advocators.—*Sol. Gen. Cockburn—More.*

Charles Orr, Respondent.—*J. Anderson.*

Jurisdiction—Friendly Societies—33. Geo. III. c. 54.—*49. Geo. III. c.* 125.—1.—Circumstances under which an action by a member of a Friendly Society against other members held to be competent before the Justices under these statutes;—and,—2.—No power in the Court of Session to review their judgment.

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2d Division. Ld. Mackenzie. T.

By the 15th section of the 33d of Geo. III., for the regulation of Friendly Societies, it is provided, that "if any person, having been a member of any such society established by virtue of this act, shall think himself aggrieved by any act, matter, or thing done, or omitted to be done, by any such society, or any person or persons acting under them, it shall and may be lawful for any two or more of the Justices of the Peace of the county," &c., on complaint upon oath or affirmation, to issue their summons to the presidents, wardens, stewards, or other principal officers of such society, "in case such complaint shall be made against such society collectively; and in case such complaint shall be made against any person or persons appointed to such office," to summon them individually to appear before such Justices, "who shall proceed peremptorily to hear and determine, in a summary way, the matter of such complaint, according to the true purport and meaning of the rules," &c. And it is further declared that the Justices "shall make such order therein as to them shall seem just; and every such order of such Justices shall be complied with, and shall be final to all intents and purposes, and shall not be subject to appeal, or to be removed or removable into any of his Majesty's Courts of Record at Westminster."

By the first section of the 49th Geo. III. it is enacted, "If any person having been admitted a member of any society established under the authority of the 33d of Geo. III. c. 54, shall offend against any of the rules" &c., the Justices are, "upon complaint made by any member," to summon the person complained of, to determine the complaint, and enforce their judgment by distress and sale. The same act (section 5) provides, "that every order, adjudication, or award of any Justice or Justices under this act, shall be *final* and conclusive to all intents and purposes, and shall not be removed or removable into any Court of Law, or restrained or restrainable by the injunction of any Court of Equity."

A Friendly Society established in Glasgow, under these statutes, for Indigent Teachers, having been involved in a litigation with some of its

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members, Mr. Renny, writing-master in Glasgow, one of the society, was very active in assisting the legal proceedings, which finally terminated by a judgment in favour of that society. In consideration of his exertions, besides a vote of thanks, the society awarded him a compensation of £15. 15s., which was thereafter paid to him by the treasurer. Some days afterwards, the respondent Orr, and several other members, (who had not been present at the meeting which voted the fifteen guineas,) objected to this application of the society funds, and commenced legal proceedings before the Justices, which were ultimately quashed by this Court, in respect of irregularities in form. Thereafter Orr alone made another application to the Justices, calling Lindsay, and other members and office-bearers, to answer for this disposal of the society funds; and a full bench found the application of the £15. 15s. illegal and improper, decerned for repetition, and granted warrant for recovery, "in terms of the Friendly Society Acts."

Of this judgment Lindsay brought an advocation, to the competency of which it was objected, that the decree of the Justices was final under the Friendly Society Acts, and not subject to review. The Lord Ordinary having sustained this objection, and dismissed the advocation, Lindsay &c. presented a reclaiming note, on advising which, the Court ordered short Cases.

Pleaded for Lindsay, &c.—

1. The action raised by Orr was incompetent before the Justices. They have confessedly no common law jurisdiction in such matters; and the terms of the statutes do not sanction the proceedings that took place. These enactments contemplate no personal action or proceeding at the instance of one individual member of a Friendly Society against other individual members. The only actions competent under the statutes are complaints against the society in its collective character, or against its office-bearers in their official capacity; and they even appear to be confined to claims or demands in which the member has a personal or peculiar interest, distinct from that which he holds in common with the other members.

2. At any rate, there is nothing in either of the statutes which prevents review in this case. The clauses of the 33d of Geo. III. referred to, apply entirely to English jurisdictions. It is a general rule that the appellant jurisdiction of this Court is never excluded by implication; and it has been decided that review was not excluded by a provision "that no judgment or conviction should be removable by certiorari into any Court whatsoever."[1] On the other hand, the clause of finality in the 49th Geo. III. refers exclusively to orders, adjudications, or awards under that particular statute, and cannot affect proceedings under the 33d Geo. III.

[1] Guthrie v. Cowan, Dec. 10. 1807, (F. C.)

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Pleaded for Orr—

1. In the proceedings before the Justices, the form of process pointed out by the statute was carefully observed. The complaint laid before the Justices was clearly comprehended under the act, which is not confined to personal or peculiar interests, but is in the most general and comprehensive terms—"If any member shall think himself aggrieved by any act, matter, or thing done, or omitted to be done, by any such society, or any person acting under them," &c. The respondent complained of a violation of the rules of the society, and the Justices were bound, by the express terms of the statute, to entertain the complaint.

2. Before the 33d Geo. III., Friendly Societies, or their office-bearers, could not sue or be sued; still less could any member, who thought himself aggrieved by any act done by the society, call the offenders even before the Supreme Court. The act then did not derogate from any jurisdiction previously enjoyed by this Court. It was not necessary, therefore, to exclude, per expressum, such jurisdiction. The question is not so much whether the statutes exclude, as whether they confer, the power of review in this Court. There are general expressions of finality throughout both statutes, which hang together; and the excluding clause is not confined, as in the case of Guthrie, to appeal to an English Court.

The Court adhered to the Lord Ordinary's interlocutor.

Lord Justice-Clerk.—I am disposed to adhere, after careful perusal of these cases and the statutes. The Legislature committed this matter to a particular jurisdiction. This was done for the purpose of affording a convenient and economical tribunal. The terms of the statutes are express and unequivocal. I do not enter into the merits. We have no intention of precluding Mr. Renny from establishing any debt or claim he may have against the society; but I am clearly of opinion that the application to the Justices in this case was competent. The only question which remains is, whether their judgment be final; and when I look at the statutes, I can have no doubt. The broad provision in the 33d Geo. III. is the rule of my opinion.

Lord Cringletie.—I am entirely of the same opinion. I think the application was in terms of the Act of Parliament. We are not so desirous of jurisdiction as to entertain a review in the face of that act, merely because it does not exclude us per expressum.

Lord Glenlee.—I confess I am not so clear about it as your Lordships.

Advocators' Authorities.—(2.)—Magistrates of Perth, July 15. 1756, (5. Brown's Supp. 318); Buchanan, March 10. 1754, (7347); Countess of Loudon, May 28. 1793, (7395); Guthrie, Dec. 10. 1807.

Respondent's Authorities.—(1.)—Rex v. Gash, Dec. 10. 1816, (1. Starkie, 441); Jaffray, Nov. 22. 1827, (ante, VI. 99); Simpson, June 25. 1830, (ante, VIII. 977).—(2.)—Statutes quoted, per Lord Chief Justice in King v. Hall, Nov. 28. 1822, (B. and A.); Erskine, I. 1. 51; Magistrates of Perth, ut supra; Countess of Loudon, ut supra, (Lord Hermand's MS. in Adv.

Lib.); Mill, June 7. 1822, (ante, I. 473); Campbell, June 28. 1823, (ante, II. 440); Bremner, Dec. 1817, (F. C.)

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CAMPBELL and MACDOWALL, S. S. C.—JOHN M'GILL,—Agents.

J. COOK, Pursuer.—*A. M'Neill.*
P. FORBES and Others, Defenders.—*W. Bell.*

No. 223.

Process—Reclaiming Note.—A reclaiming note, on a point of expenses, having no copy of the summons appended, refused as incompetent, although the record (revised condescendence and answers) was appended.

Feb. 12. 1831.

1ST DIVISION.
Ld. Corehouse.
H.

Cook v. Forbes &c.

COOK, S. S. C., raised an action against the defenders, executors of Mrs. Barclay, for payment of a law account. No defences were lodged, and the account was remitted to the Auditor, and taxed. The defenders admitted their liability, but stated that they had offered to settle previous to the action being raised; and, in regard to this, a record was made up and closed, the question between the parties being confined to the expenses of process. The Lord Ordinary found Cook entitled to expenses, and against this judgment the defenders reclaimed. They did not append a copy of the summons to the reclaiming note, but only of the revised condescendence and answers.

The Court refused the note as incompetent.

J. COOK, S. S. C. —J. DAVIDSON, S. S. C.—Agents.

WILLIAM MACDONALD &c., Advocators.—*D. F. Hope—More.*
JOHN MACKINTOSH &c., Respondents.—*Rutherfurd—Ivory.*

No. 224.

Feb. 12. 1831.
Macdonald &c. v. Mackintosh &c.

College of Justice—Jurisdiction—Advocate.—The privilege of an advocate sustained against the jurisdiction of the Sheriff in a summary petition for interdict and damages.

Single Bills, &c.

BLACK.—*R. Bell.*

MALCOLM.—*Christison.*

Expenses—Auditor.—In taxing an account of expenses allowed to a defender, the Auditor struck off a fee to counsel, which had been given by the defender when the pursuer's demand was first extrajudicially made against him, and he took advice whether he ought to defend. The defender objected to the report of the Auditor disallowing this fee, and the Court sustained the objection.

Feb. 12. 1831.

1ST DIVISION.

Black v. Malcolm.

LORD PRESIDENT.—I wish that all parties would take such advice before they enter a Court. The fee is a disbursement fairly chargeable against the other party, whose unwarrantable demand occasioned it.

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Feb. 12. 1831.
1st Division.
Ld. Corehouse.
H.

Macdonald &c.
v. Mackintosh
&c.

Mr. Mackintosh of Dalmunzie, and his tenant, presented a summary petition to the Sheriff of Perthshire against Mr. Macdonald of St. Martin's, advocate, and his tenant Robertson, alleging that they had wrongously interrupted the pursuer's servants in winning and leading the peats of certain lands, and praying the Sheriff to find that they did wrong in making this interruption, and to interdict them from repeating it, and also to find them liable in £20 of damages. Mr. Macdonald pleaded his privilege as an advocate, and declined the jurisdiction of the Sheriff. The declinature was repelled. He then brought an advocation, praying either that a remit should be made to the Sheriff to sustain the declinature, or that the cause should be advocated. Lord Meadowbank, without adverting to this plea, pronounced judgment on the merits; but the Court recalled it, and remitted to Lord Corehouse, in place of his Lordship, "to determine on the preliminary point of the complainer's privilege as a member of the College of Justice."[1] The Lord Ordinary "found that the advocator Mr. Macdonald, as a member of the College of Justice, was entitled to decline the jurisdiction of the Sheriff; therefore advocated the cause, found Mr. Macdonald entitled to the expenses incurred by him in the Inferior Court," &c.

Mackintosh reclaimed, contending that the privilege could not apply to a case of this nature; but the Court adhered.

Lord President.—The origin of the privilege was the supposed necessity under which members of the College of Justice were laid to give constant attendance in this Court. But eventually the plea of privilege has not been limited by reference to this consideration, and I conceive the Sheriff had no power to disregard it here.

Lord Craigie.—I am of a different opinion. The action before the Sheriff involved an application for interdict. If the Judge Ordinary cannot instantly take up questions of this summary nature against members of the College of Justice, such persons may go on annoying and injuring their neighbours with comparative impunity. These summary actions are different from ordinary processes for recovery of debt.

Lord President.—An interdict may be competently granted by the Judge Ordinary; but the merits of the case must be tried in the Supreme Court.

Lord Gillies concurred.

Respondents' Authority.—4. Stair, 27. 5.

D. Watson, S. S. C.—Gibson-Craigs, Wardlaw, and Dalziel, W. S.—Agents.

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[1] Ante, p. 104.

MRS. M'TAVISH, Petitioner.—*Jameson—A. Wood.*
W. A. TURNER, (MACKENZIE'S Trustee,) Respondent.—*Rutherfurd.*

No. 225.

Feb. 12. 1831.
M'Tavish v. Turner.

Process—Appeal—Expenses.—The Court of Session having assoilzied defenders, but found no expenses due, and afterwards altered, and decerned with expenses; and the defenders having appealed against the first judgment so far as it found no expenses due, and from the subsequent judgments on the merits; and the House of Lords having reversed the first judgment, so far as appealed from, and also the subsequent interlocutors—Held that, in applying the judgment of reversal, this Court could not award the expenses of process to the defenders.

Feb. 12. 1831.
1ST DIVISION.

THE late Mackenzie of Dundonnell raised an action, founding on a cautionary obligation, against John M'Tavish, for payment of certain sums of money. The Lord Ordinary assoilzied, but said nothing as to expenses. Against this judgment the pursuer reclaimed; and the Court, on the 26th of May 1825, adhered, but "found no expenses due to either party."

The pursuer again reclaimed; and, after certain intermediate procedure, the Court altered, repelled the defences, found the defenders liable in the expenses hitherto incurred, and remitted to the Lord Ordinary to adjust the state of accounting, &c. These expenses were afterwards paid; and while proceedings quoad ultra were going on before his Lordship, M'Tavish died, and his widow was sisted in his place; and Mackenzie having conveyed his estate in trust to Turner, he appeared as pursuer. Mrs. M'Tavish then entered an appeal, which was directed against the judgment of the 26th of May 1825, in so far as it had found no expenses due, and against the subsequent judgments of the Court.

The House of Lords, "after hearing counsel upon the petition and appeal &c., complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 26th of May 1825, in so far as expenses are refused by it to the petitioner,—also of an interlocutor of the said Lords of Session, of the First Division, of the 12th of May 1827, &c., and praying that the same might be reversed, varied, or altered, so far as complained of;—Ordered and adjudged that the interlocutors complained of in the said appeal be, and the same are hereby reversed."

Mrs. M'Tavish then petitioned this Court to apply the judgment, and prayed them to assoilzie, and find her entitled to the expenses of process. The pursuer admitted that she was entitled to be assoilzied, but maintained that as the House of Lords had merely reversed, without specially finding her entitled to expenses, or making a remit to that effect, it was incompetent to give the expenses of process; and this had been so decided in the case of Reid.[1]

To this it was answered, that she had appealed against the judgment

[1] Nov. 18. 1825, (ante, IV. 198.)

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finding her not entitled to expenses; and the House of Lords had reversed that finding, which was just, in other words, finding her entitled to expenses.

The Court, on advising minutes, applied the judgment; but holding that the case must be ruled by that of Reid, and "in respect the Court have no power to award expenses to the petitioner, found no expenses due."[1]

J. Macdonell, W. S.—R. Roy, W. S.—Agents.

No. 226.

William Pollock, Charger.—*Sol.-Gen. Cockburn.*
Alex. Scot, Suspender.—*D. F. Hope—Wilson.*

Compensation—Expenses.—Question raised as to whether an agent, disburser of expenses in a submission, having an assignation to a decree for them in favour of his client, could be met by a plea of compensation founded on a claim of expenses against his client in another process with the same party.

Feb. 12. 1831.

2d Division. Bill-Chamber. Ld. Moncreiff. R.

Pollock charged Scot for payment of £25 of expenses contained in a decree-arbitral in favour of Cairns, who had assigned it to Pollock as his agent, disburser of the amount. Scot presented a bill of suspension, pleading compensation against Cairns for the expenses of another process, and maintaining that Pollock was in the situation of an ordinary assignee. In the latter process, the decree had been kept open by a reference to Scot's oath, but was on the eve of being finally decided in his favour.[2]

The Lord Ordinary, in respect that an agent-disburser was different from an ordinary assignee, and that Scot had not yet obtained decree in the other process, refused the bill.

On a reclaiming note, it being stated from the bar that the suspender had just obtained decerniture in the other process, their Lordships, considering that the Lord Ordinary's chief difficulty was thereby removed, and that the question of Pollock's claim qua agent-disburser might be tried after passing the bill, remitted to pass accordingly.

J. Pattison Jun. W. S.—W. Pollock,—Agents.

No. 227.

Stein's Assignees, Pursuers.—*D. F. Hope—Sandford.*
M'Clumpha's Trustees, Defenders.—*Marshall.*

Bankrupt—Partnership—Circumstances where a debt due to a person as a member of one firm was found not to fall under the assignment in the commission of bankrupt of that person's estate, as one of the partners of a separate firm.

Feb. 12. 1831.

2d Division. Ld. Mackenzie. R.

John, Robert, and James Stein carried on business as distillers at Canonmills, under the firm of *John Stein*. John Stein, Thomas Smith, Robert Stein, James Stein, and Robert Smith, carried on business as

[1] See Stirling v. Dunn, (ante, 276.)

[2] Ante, 246.

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bankers &c. in London, under the firm of *Stein, Smith, and Company*; and in Edinburgh, under the firm of *Scott, Smith, Stein, and Company*. All the companies became insolvent. Mr. Gibson-Craig and Mr. Brown were appointed trustees for the creditors of the distillery company of *John Stein*; and a commission of bankrupt, dated the 11th of August 1812, was awarded in England against *Stein, Smith, and Company*. The trustees wrote to Mr. John Paterson in Stranraer, on the 5th of that month (August 1812) authorizing him to settle with all persons who had got spirits, by receiving payment of the sums due, or by taking bills for the amount. Paterson was at the same time desired by Mr. Gibson-Craig to remit to him any money received, and to send him the bills granted for the spirits. M'Clumpha, who was indebted to the company of John Stein £55. 2s. 6d. as the price of spirits, granted a bill, on the 26th of September 1812, for the amount to Paterson, as agent for John Stein. This bill was not paid when it became due. M'Clumpha became insolvent, and granted a trust-deed in February 1813, in which Paterson was nominated one of the trustees. The debt was ranked on M'Clumpha's estate, as due to John Paterson for John Stein's creditors; and a dividend of £41. 5s. 9d. was paid to Paterson, who subscribed the discharge, 'John Paterson for John Stein.'

The assignees under the commission of bankrupt of the estates of *Stein and Company, bankers*, subsequently raised an action against M'Clumpha's trustees, on the ground that Paterson, having no authority from them, but only from John Stein's trustees, was not entitled to discharge it.

In defence it was pleaded, 1. The payment was made bonâ fide; 2. That the debt was due to the company of John Stein, and could not fall under the assignation in favour of the pursuers, because the commission of bankrupt on which their assignation proceeded was against Stein, Smith, and Company, and not against John Stein.

The Lord Ordinary assoilzied, and the Court adhered.

Lord Justice-Clerk.—In a question like this, which is just one of double payment, and a case of hardship, I am clear that we must look strictly and critically to the terms of the commission of bankruptcy. Now that commission is in name of *Stein, Smith, and Company*, not of *John Stein*; but the debt was due to John Stein.

The other Judges concurred.

D. Fisher, S. S. C.—J. R. Skinner, W. S.—Agents.

No. 228.

Feb. 12. 1831.
Stalker v. Railton.

JAMES STALKER, Pursuer.—*Sol.-Gen. Cockburn.*
EDWARD RAILTON, Defender.—*Maitland.*

Process—Mandatory.—Possession of an heritable property in Scotland is not sufficient to relieve an absent party from the necessity of sisting a mandatory.

Feb. 12. 1831.

2D DIVISION.
Ld. Moncreiff.
F.

THE Lord Ordinary having assoilzied Railton from an action at the instance of Stalker for setting aside an indorsation of a bill of exchange in his favour, the latter reclaimed. When the cause was put out for advising, it was objected by Railton that Stalker had left the country, and that he must therefore sist a mandatory.

To this it was answered, that he was possessed of heritable property in Scotland, which was sufficient security for expenses, to entitle him to proceed without a mandatory.

The Court, however, appointed a mandatory to be sisted; and, on failure, refused the reclaiming note.

J. DAVIDSON, S. S. C.—J. CULLEN, W. S.—Agents.

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Feb. 15. 1831.
Dalzell &c. v. Menzies &c.

SIR JAMES DALZELL and Others, Pursuers.—*D. F. Hope—G. Napier.*
ROBERT MENZIES and Others, Defenders.—*Keay—Pyper.*

Cautioner.—1.—Where Commissioners of Supply, on electing a Collector of Cess, minuted a resolution that he should produce a discharge from the Receiver-General annually; and cautioners bound themselves for his intromissions for that year, and each year of his re-election; and the collector was re-elected thrice without being required to produce the Receiver-General's discharge, and incurred arrears before the first re-election, and also afterwards; and no notice was given to the cautioners till nearly a twelvemonth after his resignation—Held that they were liberated, although special reference was not made to the minute in their bond.—2.—Circumstances in which a cautioner having subscribed a letter written by another, obliging himself to pay certain arrears of "assessed taxes and land-tax," was not held bound as to the land-tax.

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1ST DIVISION.
Ld. Corehouse.
S.

AT a general meeting of the Commissioners of Supply of the county of Linlithgow on the 23d of May 1823, William Cunynghame, writer, was chosen Collector of the Cess and Assessed Taxes for a year. The meeting, at the same time, minuted a resolution "that in future the collector shall produce the Receiver-General's discharge annually, on the 30th of April, for the cess and taxes which shall have become due in March in the year preceding, or assign his reasons for failing to do so;" and they also declared "their resolution that this order shall be peremptorily complied with in all future years." He offered, as cautioners, his father George Cunynghame, James Black, Andrew Simson, and Robert Menzies, and the offer was accepted. Two bonds were afterwards signed by Cunynghame and the cautioners. The one relative to the cess and assessed taxes, bridge and rogue money, &c., was granted to the county,

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and the other, relating exclusively to the assessed taxes, was granted to the King. The first bond was in these terms:—"Considering that the Commissioners of Supply of the county of Linlithgow, by their minutes of date the 23d day of May 1823, made choice of me, the said William Cunynghame, to be collector of the cess and of assessed taxes of the county of Linlithgow for the year ending the 25th March 1824, and may probably re-elect me annually to the said office for succeeding years; and it being an express condition of such appointment, present or future, that I shall grant bond, with cautioners, in manner underwritten: Therefore I, the said William Cunynghame, and we, &c., do hereby bind and oblige ourselves, &c., jointly and severally, that I, the said William Cunynghame, so soon as I shall receive the sum of £200 of the cess or land-tax and assessed taxes of the said county, shall pay or cause to be paid to the Receiver-General at Edinburgh, or his deputy or deputies, the said sum of £200 so received by me, and shall from time to time, so often as I shall have received the like sum of £200, pay in the same to the Receiver-General, or his deputy or deputies aforesaid, and shall at no time or times have more money arising from the said cess or land-tax, or assessed taxes, in my hands, keeping, and possession, than £200; and that I, the said William Cunynghame, as collector aforesaid, shall, within forty days at the furthest after the 29th day of September and 25th day of March in each and every year, so long as I shall execute the office of collector foresaid, pay over to the said Receiver-General all the rest and remainder of the monies arising from the said cess or land-tax, or assessed taxes, and that ought to have been collected and rendered effectual by me, as collector aforesaid: As also, that I shall duly levy and collect all bridge-money, rogue-money, and other impositions which may be assessed upon the said county, and render a just and true account of the same, and pay over such sums so collected to such person or persons as the said county of Linlithgow shall direct; and that I shall duly and faithfully perform in every respect all the duties of collector aforesaid, and that under the penalty of £200 sterling, over and above performance: Declaring always, as it is hereby expressly provided and declared, that notwithstanding that the said office is an annual appointment, yet nevertheless this bond shall be binding and obligatory upon us the parties and our foresaids, conjunctly and severally, for each and every year, and so long as I the said William Cunynghame shall be appointed or re-elected to the said office. And we consent to the registration hereof," &c.

Cunynghame was afterwards thrice re-elected. On his first re-election in 1824, he was in arrear of the previous year's collection £455. 5s. 4d. On the second, in 1825, the arrears had increased to £605. 5s. 8d. On the third they were £838. 11s. 1d.; and on his resigning office in July 1827, the balance against him was £1293. 16s. 5d. During all this time he was not required by the Commissioners to produce any discharge from the Receiver-General, nor to assign any

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reason for failing to do so, as was provided for in their resolution at his election. On the 5th of June 1828, the clerk to the Commissioners wrote to the cautioners, intimating that they were held liable for the whole arrears.

The bond to the King for assessed taxes was annually renewed by Mr. Cunynghame and his cautioners, and arrears under it were also incurred. Mr. Francis Wilson, W. S., as Solicitor of Taxes, wrote, in February 1829, to the cautioner Mr. Menzies—"With reference to my former correspondence with you relative to the accounts of Mr. William Cunynghame, as collector of assessed taxes for the county of Linlithgow, for whom you stand bound to the King, I consider it my duty to annex, for your information, a state of the balances due on these accounts, &c. I trust that, through your interference, a settlement will be effected, &c.," so as to prevent diligence.

Mr. Wilson again wrote, on the 30th of May 1829, to Mr. Menzies, that he had been endeavouring "to bring the accounts of Mr. William Cunynghame, as collector of assessed taxes, to a settlement;"—and he annexed a copy of a letter, addressed by him to Cunynghame, stating, that "if his accounts of assessed taxes are not closed by the 17th of next month, I shall not hesitate to proceed personally against all bound on his surety bonds."

Two days previously, an ordinary action had been raised by the Commissioners of Supply against Cunynghame and his cautioners, libelling on the bond granted to the county, and concluding for £229. 6s. 10d. as arrears of cess, together with £1000 as the balance of arrears of local assessments for rogue-money, militia depots, jail repairs, &c., which had been directed to be collected along with the cess.

Mr. Menzies, on the 16th of June, (being the last day before Mr. Wilson's letter intimated that diligence would proceed, if the assessed taxes were not settled,) called, with his agent, on Mr. Wilson, and the latter then dictated the following letter to Mr. Menzies' agent, which the agent wrote, and Mr. Menzies signed:—"To F. Wilson, Esq.—Dear Sir—With reference to the correspondence had with you in regard to the arrears of assessed taxes and *land-tax* due by William Cunynghame, writer in Linlithgow, and formerly collector of these duties for the county of Linlithgow, and for which I and others stand bound, I hereby bind and oblige myself, that if the same is not otherwise settled within twelve days from this date, to pay over the amount of these arrears to the Receiver-General, and take my own relief against my co-obligants. I am," &c.

Thereafter the arrears of assessed taxes were paid to the Exchequer by Cunynghame's cautioners, and thus the bond to the King was discharged. In regard, however, to the bond to the county, they denied their liability. Before defences were lodged in the action founded on it, the pursuers put in a minute, stating that, from vouchers produced, and payments made by Cunynghame subsequent to the summons being raised, they

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now concluded only for the arrears of cess, and for £49. 10s. 9d. as the arrears of assessment for rogue-money, jail repairs, &c.

Cunynghame and his father allowed decree to go against them; but the cautioners pleaded that the pursuers, as Commissioners of Supply, had failed in their duty of superintending the collector with any regard to common prudence or propriety, and had betrayed the interest of the cautioners;—that at electing the collector, and causing him to find caution, they had resolved and notified that he should be peremptorily required each year to produce a discharge from the Receiver-General; and on the faith of this being done, and that no arrears from a previous year could be standing against the collector at his beginning a new one, the cautioners had allowed the prospective obligation to be inserted in their bond;—that, instead of this being the case, the Commissioners re-elected him for the second year, while the whole land-tax of the first year was unpaid, and they re-elected him under an increased arrear at each successive year;—that they never required him to produce the Receiver-General's discharge, nor communicated his situation to the cautioners; and that, even after his resignation in July 1827, eleven months were allowed to elapse before any intimation was made to them.

The pursuers having founded separately on Mr. Menzies' letter to Mr. Wilson, he pleaded, 1. That, not being holograph nor tested, it was not binding on him; and, 2. That he never meant it to refer to any but the assessed taxes; that his bond to the King did not embrace land-tax, which was only included in that to the county; that the letter accordingly narrated that it had been granted; "with reference to the correspondence had with you in regard to the arrears of assessed taxes and land-tax;" whereas the previous correspondence related to the assessed taxes only, and he had not observed that the words land-tax were introduced at all; that besides, the letter bore in gremio to be granted under the erroneous belief that the bond to the county was binding on him and on his co-cautioners; whereas it was not binding on them, and the irregularities of the pursuers had deprived him of relief against his co-cautioners, on the faith of which alone he had subscribed the letter, so that there was essential error both in fact and in law.

The pursuers answered, that the bond by the cautioners was framed to apply to each re-election. Their resolution to call annually for the Receiver-General's discharge was a mere matter of private arrangement for themselves; while the obligation by the cautioners to them was contained in a regular bond, which bore no reference whatever to this resolution, and no such reference would have been allowed in it, if it had been proposed. It was equally the duty of Cunynghame to have got the Receiver-General's discharge, whether it was called for by the Commissioners or not, and for his failure, and getting into arrears, his cautioners were necessarily liable. The bond covered the whole arrears as originally concluded for; but those now claimed under the restricted

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libel were only such as arose during the last year of the collector's holding office, so that the fact of his having once owed a larger arrear was irrelevant.

Separately, as against Mr. Menzies, they pleaded, that his letter to Mr. Wilson specially bound him for the arrears of the land-tax. Whether he expected a relief to any extent when he undertook that obligation, was of no moment to the Commissioners. He must fulfil it according to its express tenor, whether he had relief or not. Besides, a rei interventus had occurred, as delay was granted for a time to Mr. Menzies and the other cautioners on the faith of it.

The Lord Ordinary, "in respect of the negligence of the Commissioners of Supply of the county of Linlithgow, in suffering their collector, William Cunynghame, to fall into arrear in paying over the money which he collected, or ought to have collected, contrary to their official duty, and in violation of their express resolution of the 23d of May 1823; and in respect of their improper conduct in re-electing him, year after year, when he had large balances unaccounted for in his hands, without giving notice to his cautioners of their claims against him; assoilzied all the defenders who have made appearance as cautioners in this action from the conclusions of the libel, with the exception of Robert Menzies; and with regard to the said Robert Menzies, in respect of his letter to Mr. Wilson, solicitor of taxes, of date the 16th June 1829, which was communicated to the pursuers and their agents, found him liable for the arrears of cess and land-tax still remaining unpaid, amounting to £185. 16s. 1½d. sterling, with interest on the same as libelled on; assoilzied him quoad ultra, and decerned;—found all the defenders who had appeared, except Robert Menzies, entitled to expenses; and remitted the account, when given in, to the Auditor, to be taxed; and as to Robert Menzies, found no expenses due to either party."

The pursuers and Mr. Menzies respectively reclaimed.

In relation to the pursuers' note—

Lord Balgray.—This is a case of some nicety. I should have liked better, had the words 'official duty' been omitted in the interlocutor; but I am for refusing this note. The Crown might levy the cess directly; but, instead of this, commissioners are chosen for the purpose, and they again name a collector, who is simply their factor, though he is usually taken bound to pay directly to the Receiver-General. They have required their factor to find caution; and now recurring on the cautioner for his arrears, the question is, Whether they themselves have failed in their duty towards the cautioners? Have they acted towards their factor with ordinary prudence? or have they not, by their own gross irregularity, exposed the cautioners to a greater hazard, and to a liability of a more dangerous kind, than was fairly contemplated in their bond? The Commissioners did not enforce the obligation in the bond that their factor should never have more than £200 in his hands at a time; they violated their own resolution, most properly entered into at his election, to call on him annually to produce his receipt from the Receiver-General at the annual meeting, one

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object, and one important duty of which was, to examine their officer's accounts before a new appointment. They re-elected their collector without inquiry, and without any notice to the cautioners, although in his first year he had paid up nothing of the land-tax to the Receiver-General, and was above £500 in arrear, and they continued to re-elect him, though labouring under increasing arrears, till these amounted, at his resignation, to above £1200; and all these were incurred in about four years. After all this, it is in vain to say that so many vouchers have been lately produced, or payments made, and imputed to prior arrears, as to bring down the arrears now claimed to those arising on the last year of his collection. All this only tends to show that probably no arrear would have arisen but for the negligence of the Commissioners; and, at all events, these subsequent arrangements do not touch the fact that there were existing irregularities at the date of the last re-election of Cunynghame, such as to make his cautioners no longer liable under their bond. It is admitted that all prior arrears are paid up, and for subsequent arrears the bond was not binding. That being the fact, and the cautioners being once liberated, the subsequent recovery of sums, or any other subsequent procedure to which they were no parties, could not redintegrate their cautionary obligation. I am satisfied that there are sufficient grounds at common law for our refusing this note.

Lord President concurred.

Lord Gillies.—I am of the same opinion with Lord Balgray, except that I approve of the words 'official duty' in the interlocutor. I conceive that the Commissioners were, from their office, called upon to see that the cess was paid.

Lord Craigie assented, and the Court adhered.

In considering the reclaiming note of Menzies—

Lords Craigie and Balgray intimated an opinion, that as the bond of caution was now held to have been of no force at the date of that letter, it was not sufficient, under the circumstances, to subject Menzies separately from his co-cautioners.

Lord Gillies.—Two separate cautionary obligations were here undertaken. One of these was exclusively for the assessed taxes, in which the cautioners were taken bound to the King, and this bond might have been enforced by a writ of extent. The other was that in which the cess was included, and in which the cautioners were taken bound to the county, and in that bond their obligation was to be enforced by decree of the Court of Session. Incidentally it happens that the same man was collector both of the cess and assessed taxes, and consequently granted both bonds. It also happens that the same parties are cautioners in both; but the obligations arising under each are not the less distinct on that account. In these circumstances, the collector falls into arrear. The Crown agent, Mr. Wilson, immediately applies to his cautioners for the arrears of assessed taxes, and threatens diligence against them in case of delay. A correspondence ensues between Menzies and Wilson, referring exclusively to the arrears of assessed taxes, and embracing the accounts of these arrears. At length, when the delay allowed for their adjustment is about to expire, a letter is obtained from Menzies, under the threat of using the diligence before referred to, in which he no doubt binds himself to pay the arrears "of assessed taxes

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and land-tax." But I think there is evidence on the face of the letter, and real evidence in the circumstances, that these last words were assented to by Menzies from mistake or oversight. His letter begins, "With reference to the correspondence had with you in regard to the arrears of assessed taxes and land-tax," &c. This is the only part of the letter where the words 'land-tax' are introduced, and here they are brought in only by means of a mistatement in point of fact, as the previous correspondence had no reference whatever to the land-tax, but only to the assessed taxes. In addition to this it appears, that if the letter of Menzies really refers intentionally to the cess, it must have been granted by him under the mistake of considering that he was at the same time bound by his cautionary obligation, whereas the Court have now held that he was free; and he also relied on having co-cautioners bound with him, on whom he could recur for relief; whereas the Court have held that the irregular conduct of the pursuers had altogether freed these co-cautioners as of that date, and cut him out of any such claim of relief. On these grounds, I am inclined to alter the judgment of the Lord Ordinary, so far as to assoilzie Menzies; but I would not, under all the circumstances, find him entitled to his expenses.

Lord President.—I am for adhering to the Lord Ordinary's judgment on all points. I do not conceive that the introductory narrative of reference to a previous correspondence can cut down the express terms of an obligation undertaken in the body of the writ.

The Court then altered, and assoilzied Menzies, but found no expenses due to him.

Defender's Authorities.—3. Ersk. 3. 66; 1. Bell, 359. 364; Dick, Nov. 30. 1697, (2090); Fell on Guarantee, 178-185, (2d edit.); Dicta in Smith, June 11. 1824, (2. W. and S. 316); Duncan, Dec. 13. 1826, (ante, V. 111); Smith, June 24. 1829, (ante, VII. 789); Mein, Jan. 19. 1830, (ante, VIII. 346); Leith Banking Company, May 12. 1830, (ante, VIII. 722).

G. and W. Napier, W. S.—H. Bremner, W. S.—Agents.

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George Easton, Charger.—*Buchanan.*

Robert Johnston and Others, Suspenders.—*Maitland—Shaw.*

Oath on Reference—Proof—Partnership.—The liability of a dissolved company for a bill apparently signed by the firm, being referred to oath of the two co-partners; and one having deponed negative, while the other made various admissions, the first held entitled to absolvitor, independently of the issue of the action as against the last.

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1st Division.
Ld. Corehouse.

In June 1829, George Easton gave a charge to Alexander Sudden, Robert Johnston, and Thomas Hogg, upon an alleged decree in July 1809. They presented a bill of suspension, stating that the decree was in absence; that they had never received any citation, and that the sums were not due. The bill was passed, and a record made up, in which the charger alleged that the sums concluded for were the contents of certain bills obtained by him from a man named Tweddale, and bearing the name of Sudden, and the firm of Johnston and Hogg, who had once been partners. The suspenders alleged that the bills were forged, and the charger made a reference of the whole cause to their oath. They all deponed that

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they had never been cited in the action in 1809, under which the decree had been recovered. Sudden and Johnston deponed that the debts claimed were not due; that the signature of Sudden was a forgery; that Johnston usually signed the company firm, but had signed none of the bills; and that the signature of the firm was a forgery, unless one, contrary to Johnston's belief, had been signed by his partner Hogg. Johnston added, that Tweddale could sign very like him (Johnston), and he had seen Tweddale trying to copy his signature. Hogg deponed that the signatures of the firm were not adhibited by him, but he believed them to be the genuine subscriptions of Johnston. His deposition varied materially from that of Johnston, and made several admissions.

The Lord Ordinary, "with regard to Robert Johnston and Alexander Sudden, suspended the letters; found the suspenders entitled to their expenses, &c.; and with regard to the suspender Thomas Hogg, appointed parties to be further heard."

The charger reclaimed, and contended that, at least as to Johnston, decree should be delayed in this process till the case of Hogg was disposed of. They were partners; their liability involved a question as to the same signatures of the firm; and if Hogg were to be ultimately found liable, Johnston could not be free. Johnston answered, that the whole cause had been referred to his oath. He had deponed that the sum claimed was not due; that the summons founded on was never served on him, and that the signatures were certainly forged, except one which he believed also to be forged, and knew had not been signed by himself. Hogg had deponed that it was not signed by him; and though he erroneously believed the signature to be Johnston's, yet that was of no avail in the face of the oath of reference. Hogg's oath might make many admissions inconsistent with Johnston's deposition, and thus Hogg might subject himself; but he could not deprive Johnston of the benefit of his own oath on reference.

The Court adhered.

J. Livingston, W. S.—C. Fisher,—Agents.

No. 231.

A. B., Pursuer.—*Smythe.*

His Creditors, Defenders.—*Whigham.*

Cessio Bonorum.—Circumstances in which the pursuer of a cessio was allowed to retain £122 per annum out of the free rental of an entailed estate amounting to £322 a year.

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2d Division.

This was a process of cessio at the instance of the proprietor of an entailed estate of considerable extent, the whole rental of which, with the exception of about £322, was swallowed up by interest on bonds of annuities. The personal debt was about £5000, and the pursuer had eight

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children to support, and was himself 68 years of age; while, if he survived a few years till certain copsewood on the estate was fit for cutting, (till when his superintendence would be of advantage to the creditors,) it would yield more than was required to pay off the debts. In these circumstances, he craved to be allowed £200 a year of aliment out of the free rents. This, however, being opposed by certain creditors, the Court limited the allowance to £122; and, on his assigning the rest, they granted the benefit of cessio.

No. 232.

JAMES FULTON, Suspender.—*Monteith.*

ARCHIBALD M'ALLISTER, Charger.—*Pyper.*

Sasine — Trust. — 1.—Precept of sasine not exhausted by an infeftment not duly recorded. — 2. — A trust-deed having named one of the trustees as factor on the trust-estate, the other trustees not entitled to supersede him, and appoint a new factor.

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2D DIVISION.
Ld. Mackenzie.

WILLIAM WALKER executed, in 1822, a trust-disposition of his property for behoof of his creditors, in which, among others, the suspender Fulton and the charger M'Allister were named trustees, and accepted. The trust-deed contained a clause by which M'Allister was nominated "factor, under control and superintendence of my other trustees above named, or quorum foresaid, to uplift and discharge the rents &c. till a sale thereof takes place." M'Allister was also an heritable creditor, in virtue of two bonds, over Walker's property,—the one for £100, and the other for £298. On the latter he had taken an infeftment, but which he had failed to record within sixty days, and he thereafter took and duly recorded a second infeftment on the same precept. He entered upon the management of the estate, and con-

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Single Bills, &c.

MALCOLM v. SMITH.

Process—Consistorial Causes.—The Court cannot remit to any commissioner, other than the Commissaries of the Court recently abolished, to take proof in consistorial causes; and the Commissaries cannot delegate their powers.

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2D DIVISION.

LORD MACKENZIE reported that in this case, (which was an action of divorce,) in consequence of the pursuer being so poor, that if the proof were not allowed to be taken in the country, it must be abandoned, a remit had been made to the Commissaries, with a view to their granting a commission to take the proof. The Commissaries, however, holding that they had no existence as a Court to the effect of granting such commission, but were merely commissioners to take proofs, without the power of delegating their authority, refused to do so. An application was thereafter made to the Lord Ordinary, who now consulted the Court. Their Lordships were agreed that the Commissaries could not delegate their powers, and instructed the Lord Ordinary to remit to them simpliciter, appointing their deliverance to be laid before the Crown counsel, with a view to the consideration of some legislative remedy for the inconvenience arising from the present state of the law relative to this matter.

tinued to exercise his duties as factor for some years, when the other trustees having discovered the fact of the double infeftment taken upon his security, and conceiving that this was incompetent, and consequently afforded no preference over the creditors under the trust-deed, they, upon the allegation that the fact had been improperly concealed from them, and also of mismanagement, appointed one Carmichael to supersede him as factor. The suspender Fulton was appointed sub-factor, and took the active management for some time. M'Allister, however, in virtue of his two heritable securities, raised an action of maills and duties before the Sheriff of Renfrewshire against the tenants, in which he called the suspender Fulton to account for his intromissions with the rents, and the other trustees for their interest. In this action it was pleaded as to the £298 security, that it was invalid, in respect that the first infeftment was not recorded; and that the second was inept, because the precept had been exhausted. The Sheriff repelled this objection, preferred M'Allister to the rents, and decerned against Fulton (whom he held to have had no title to uplift the rents) to make payment to M'Allister of the sum of £103. 4s. 1d., under a trifling deduction, as the rents intromitted with.

Fulton suspended; but the Lord Ordinary found the letters orderly proceeded, adding the subjoined note;* and the Court adhered.

JAMES PATTISON, W. S.—MACMILLAN and GRANT, W. S.—Agents.

No. 233.

ALEXANDER C. MAITLAND and Others, Pursuers.—*Skene—Wood.*
DAME HELEN MAITLAND GIBSON &c., Defenders.—*Sol.-Gen. Cockburn—Rutherfurd—Whyte.*

Entail—Statute.—An Act of Parliament having empowered a canal company to purchase entailed lands in the line of their operations, with special directions as to the disposal and security of the price paid; and an heir of entail in possession having received, in terms of a private agreement without a jury, a sum of money as the price of the ground taken, and a separate sum to indemnify for a deviation of the line of canal nearer to the mansion-house—Found that the possessor was not entitled to appropriate, as the premium for his individual consent to the deviation, the sum paid in consequence; but that it must be secured in terms of the act, along with the rest of the price, for the benefit of future heirs, under deduction to the possessor of temporary damage.

* "NOTE.—The charger's real security seems to the Lord Ordinary valid by the second infeftment, and that it gave a preferable right to the rents, unless he consented to their being drawn by somebody else. It is averred too, specially, and not specially denied, still less disproved, that the trust-deed named the charger as factor, in which case the other trustees could not appoint the suspender to supersede him. At any rate, as he does not pretend to have had any authority from the charger, he was not entitled to lay out the rents, to which the charger had a preferable and immediate right, in improving the subject, without the consent of the charger. After all, if there be any truth in the suspender's averments, the matter in dispute here is of little consequence, since the subject must be more than sufficient to pay the charger, and repay any improvements that are useful, and warranted by the other creditors."

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2d Division.
Ld. Medwyn.

Maitland &c. v. Gibson &c.

By an act of the 57th Geo. III., powers are given to the Edinburgh and Glasgow Union Canal Company to enable them to construct a canal to join the Forth and Clyde Navigation near Falkirk. After the provisions enabling the company to transact with entailed proprietors, as well as all others, for the lands required by them, the act goes on to provide that parties so conveying their property may and shall accept and receive satisfaction for the value of the same, "and for the damages to be sustained in making and completing the said works herein before directed, in such manner as shall be agreed upon by and between the said parties interested respectively, or any of them, and the said company or committee of management, or some person or persons authorized by them for that purpose." But if the parties cannot agree, then the same is to be ascertained and settled by the verdict of a jury, to be summoned and chosen in the manner therein prescribed; and such juries are specially directed to "distinguish the value set upon the lands &c., and the money assessed or adjudged for such damages as aforesaid, separately and apart from each other." The act further provides, "that if any money shall be agreed or awarded to be paid for any lands &c. taken or used by virtue of the powers of this act for the purposes thereof, which are held under entail, or are subject to liferents, annuities, or other encumbrances, or shall belong to any incorporation, married woman, &c., or persons under any disability or incapacity,—such money shall, in case the same shall amount to the sum of £200 or upwards, under direction and by the authority of the Court of Session, be, with all convenient speed, paid into the Bank of Scotland, Royal Bank of Scotland, or British Linen Company, to the intent that such money shall be applied, under the direction and with the approbation of the said Court;" &c.—"or where such money shall not be so applied, then the same shall be laid out and invested, under the like direction and approbation of the said Court, in the purchase of other lands &c., which shall be conveyed and settled to, for, and upon such and the like uses &c., and in the same manner, as the lands &c. "so purchased," &c.

The line of canal laid out by this act passed through the tailzied estate of Cliftonhall, at a considerable distance from the mansion-house and grounds. But the company having ascertained a better line nearer the house, their committee of management were authorized to transact with the proprietor. Accordingly, after some communings, a deed of agreement dated 6th October 1818, was entered into betwixt the defender, Dame Helen Maitland Gibson, the heir of entail in possession, with the advice and consent of her husband, and also with consent of their eldest son, as next in succession, on the one part, and the Union Canal Company on the other. In respect of the proposed deviation, and interference with the amenity of the place, it was, inter alia, stipulated that the said company shall "pay to the said Mrs. Helen Maitland Gibson the sum of £7000 sterling for her consent to the said deviation, and that by five equal annual instalments of £1400 sterling each," &c.; "and the said

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company are further hereby bound and obliged to pay value for the ground which may be required," &c., "at the rate of £120 sterling for each Scotch acre that the same shall measure, and that before they shall commence operations on the said estate." These sums were to be taken as full indemnity, not only for the deviation, but for fences, embellishments, and all reasonable temporary damages by the loss of crops &c. during the execution of the work. But the company were still further taken bound to preserve the communications by private roads, to construct bridges at the various avenues, restore springs, &c.; and, in short, to preserve the place from deterioration as much as possible. In terms of this agreement, a new Act of Parliament was obtained, and the deviation carried into effect.

The price paid for the ground amounted, at the stipulated rate, to £1181. 10s. 5d.; and it was admitted by Lady Maitland Gibson and her husband that this sum must be laid out and invested for the benefit of the heirs of tailzie, in terms of the original Act of Parliament. But it was maintained that the further sum of £7000, however much beyond a fair compensation for temporary damage, belonged entirely to her, as the premium for her voluntary consent to the operations. Alexander Maitland Gibson, the defender's eldest son, (who had been a party to the agreement with the Canal Company, and received payment from them of part of the first instalment of £7000,) having died, an action was raised in the name of his children, and their tutors, as heirs of entail, concluding that, besides the price of the ground, "the said other sum of £7000 sterling, under deduction of such part thereof as the said Dame Helen Maitland Gibson and her said spouse may be able to instruct to have been a fair compensation to them for the temporary damage" &c., should be in like manner invested for their behoof, as heirs of entail, in terms of the original act.

In this action the Lord Ordinary pronounced this interlocutor, adding the subjoined note:*—"Finds, that besides the sum of £1181. 10s. 5d., the agreed-on price of the land occupied by the Union Canal in passing through the estate of Cliftonhall, the defender must lay out

* "NOTE.—It appears to the Lord Ordinary, that whatever sum is obtained by a proprietor possessing under a strict entail, from commissioners under a canal act, for liberty to pass through the said estate, must be secured for the benefit of the heirs of entail, except in so far as to cover temporary damage by loss of crops, destruction of fences, injury to embellishments, &c. But here it is said that the value of the land has been fixed at £120 per acre; and that, over and above this, the sum of £7000 was paid for the consent of the heir in possession to a deviation in the original line of the canal, and that this consent might have been refused, or it might have been given gratuitously; and therefore that is jus tertii to the pursuers that what might have been given has been sold. It is true the consent might have been withheld, and it might have been given gratuitously. These would have been reckoned within the powers of the heir, and in the bona fide exercise of his administration of the estate. But since he has not done so, can he acquire a pecuniary benefit, in virtue of the character

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and invest, for the benefit of the heirs of tailzie of the said estate, so much of the further sum of £7000 paid by the Union Canal Company to the defenders, as shall remain after making a fair compensation for the temporary loss or damage sustained by them during the progress of making and completing the works therewith connected; and appoints the cause to be called, in order to determine in what manner the amount of said compensation is to be ascertained."

The defenders reclaimed, and contended that the consent of the heirs in possession, for which this £7000 was a premium over and above the price of the ground, might have been withheld altogether, or bestowed gratuitously, and was jus tertii in regard to the pursuers.

The Court adhered.

Lord Justice-Clerk. — This case must be decided on a fair construction of the Acts of Parliament, by which, independently of the written contract, the proprietor of Cliftonhall is bound. The act provides for passing through entailed estates, and estates belonging to corporations &c.; and, inter alia, contains express instructions for the disposal of the value obtained in such cases under the sanction of the Court of Session. I am satisfied, by the words of the act, that the fair value of the lands must be looked to. But who can doubt that the local situation of lands regulates their value? This, and not the mere intrinsic value, is the consideration. In this case, the agreement was in consequence of an alteration of the line proposed originally at a greater distance from the mansion-house. The agreement stipulates for payment, not merely of intrinsic value, but for injury to the estate; and that agreement, as the act expressly permits, just comes in place of the alternative mode of going before a jury. Whether a jury would have given £7000, or not, for coming so near to the mansion-house, we cannot tell; but certainly, if they had, in this case it must have been secured to the heirs of entail; and the only question is, whether, in the case of a private agreement, a different rule is to be followed? Now I have no hesitation in saying, that, on the plainest principles of law, the heirs are entitled to have this indemnity for a permanent injury to the estate invested as the value of lands used. Something has been said about this being a mere consideration for the consent of the heir in possession. There is no sanction to such idea in the Act of Parliament, which we only follow out by adhering to the Lord Ordinary's interlocutor. The analogy of the corporations is decisive. Suppose they had gone through Heriot's Hospital: Could the mana-

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of proprietor of the estate, without communicating it to the heirs of entail? The consent which he has given was as an heir of entail, and as being one of a series of heirs equally, though successively, interested in the estate; and in consenting to the alienation of part of it, he cannot stipulate for himself any advantage over the succeeding heirs. Any other rule would give too much room for improper bartering of the rights of future heirs. Besides, the contract in the present case distinctly states in the narrative that the new line "would injure in a considerable degree the privacy of the said manor-place and pleasure-ground thereto adjoining;" and yet the heir in possession claims right to put into his own pocket the sum which has been paid for permanently injuring the privacy, and of course the comfort of this, as a residence for all the subsequent heirs."

gers pocket a sum for their consent, distinct from the value of the ground? The whole amount must have been secured to the corporation; and, on every consideration, I am satisfied that the Lord Ordinary is right. No. 283. Feb. 15. 1831. Maitland &c. v. Gibson &c. Cadell v. Cassells.

Lord Glenlee.—The material consideration is the Act of Parliament; and the first thing we see there is, that the jury are to ascertain the permanent and the temporary damage separately. The temporary damage goes into the pocket of the heir in possession; but every thing else is value to be invested for behoof of the future heirs. Had the matter come before a jury, they must have given the value of the lands in money to be invested; and, in settling that value, there is no such rule laid down in the act, as merely to consider what so many years purchase of the rental of the land taken would amount to; but there is to be indemnity for value taken; and the diminishing of the marketable value of the estate is most material. The jury, therefore, would have been bound to consider how far the estate and mansion were affected. A jury possibly might not have given so much; but the Canal Company were benefited by the new line; and their being enabled to pay in proportion does not alter the application of the money so paid, in a question with the heir in possession, and other heirs. The agreement does not limit the £7000 to the consent not to oppose the act, but to the consent to the deviation, and consequent damage to the estate. On account of this £7000, she consents that £120 shall be the price of the land per acre; and the agreement concludes expressly that the sums stipulated shall be accepted as full indemnification for the deviation and damage, and says nothing as to being for consent to the act for a new line. I think it quite clear that the £7000 was given as part of the value of the estate taken, just as much as the £120 per acre.

Lord Cringletie.—I have nothing to add. The value of land is what it will bring, and the heirs of entail must be secured in that.

Lord Meadowbank.—At first I felt some embarrassment from the decision in the case of Lord Elgin as to a grassum. But the difference between that case and the present is, that there the heir was exercising a power under the deed of entail, and he was of course entitled to take every thing out of the estate which he was not prohibited by the entail from taking. But this act confers no power on heirs to appropriate any thing out of the estate to themselves. It only gives power to treat, such as is given to tutors and trustees. Nothing but an express clause to that effect in the act would enable them so to appropriate; and had it done this, a door would have been opened for attempts to injure future heirs.

J. G. Davidson, W. S.—Augustus Maitland, W. S.—Agents.

William Cadell, Pursuer.—*Skene—Walker.* No. 284.
David and Robert Cassells, Defenders.—*D. F. Hope—Forsyth.*

Cautioner.—Cautioners under a letter of guarantee for payment of bills discounted prior or posterior to its date, held liable, although they alleged (but did not prove) that it had been got from them on an agreement that cash should be given to the principal party, whereas the bills were put to the credit of others lying over dishonoured.

Mr. Cadell, as treasurer to the Bank of Scotland, raised an action against David and Robert Cassells, sons of John Cassells, formerly distiller at Kepp, founding on two letters by them respectively to the agent Feb. 16. 1831. 1st Division. Lord Newton. H.

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of the bank at Stirling, in these terms:—"Kepp, 19th May 1826.—John M'Millan, Esq., Stirling. Dear Sir—I hereby guarantee to you the regular payment of all bills or drafts already discounted by you, or which may be discounted hereafter by you, with my father Mr. John Cassells' name on them either as drawer, acceptor, or indorser; and this letter to be binding on me in the same manner as if I had indorsed the bills themselves. I am," &c. On the faith of this letter, the pursuer alleged that bills to a large amount had been discounted, and he concluded for a balance of about £3400. The bills libelled were all dated prior to the above letter; but the pursuer alleged that many of them were not discounted till subsequent to its delivery. The defenders, on the other hand, alleged that their father had, previous to the date of the letter, carried the bills to the bank for discount; that the agent retained them in security of bills lying over unpaid, and refused to give the cash for them unless the above letter were granted; that, to enable their father to get the money, they came under the above obligation, but that in place of giving it to him, the agent, while he kept the letter, put the amount to the credit of the outstanding bills; and they therefore maintained that they could not be liable under the letter. The pursuer denied these allegations, and no evidence in support of them was adduced.

The Lord Ordinary repelled the defences with expenses, and the Court adhered.

H. Davidson, W. S.—D. Fisher, S. S. C.—Agents.

No. 235.

Cloup and Pellissie, Advocators.—*Skene—Christison.*
John Henry Alexander, Respondent.—*D. F. Hope—Monteith.*

Pactum Illicitum—Theatre—Locus Pœnitentiæ—Presumption.—1.—The managers of a French company of comedians having hired a minor theatre "for their performances" at a rent of £120, not entitled to resile on an allegation that they had afterwards discovered it was illegal for them to represent their pieces in that theatre,—the theatre being a lawful place of exhibition for various performances, and the contract not specifying any of an illegal sort for which it was let.—2.—A foreigner contracting in this country is presumed to know the laws in the same manner as one of the lieges, and cannot resile on alleged ignorance.

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1st Division. Lord Newton. D.

The Theatre Royal is the only one in Edinburgh in which the regular drama can be lawfully performed. It possesses this privilege in virtue of letters patent from the King, as empowered by 7. Geo. III. c. 27, which in so far repealed the previous act of 10. Geo. II. c. 28, under which the representation of "any interlude, tragedy, comedy, play, farce, or other entertainment of the stage," is prohibited, except on certain conditions. Since the date of that act various species of scenic and dramatic representation have been introduced, which were not known at its date. There is a minor theatre in Edinburgh, which has been known, at different times, under the name of the Pantheon, Circus, or Caledonian Theatre.

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It possesses no privilege from letters patent; and, in 1825, the patentee of the Theatre Royal obtained an interdict against the performance there, either of licensed pieces or the regular drama. But there is a certain range of scenic representation which the words of that interdict do not reach; and the minor theatre has since been held in lease by different managers, who, with a company of performers, have for several seasons exhibited a succession of melo-dramas, &c.

In 1828, Messrs. Cloup and Pelissie, the managers of a company of French comedians who had previously been performing in London under a license from the Lord Chamberlain, came to Edinburgh. They first acted on the stage of the Theatre Royal by agreement with the manager, and afterwards entered into the following contract with John Henry Alexander, manager of the Caledonian Theatre:—"It is hereby agreed between the under-mentioned parties, John Henry Alexander on the one part, and Messrs. Cloup and Pelissie, managers of the French company, on the other—That is to say, the said J. H. Alexander agrees to let them the Caledonian Theatre of Edinburgh for their performances, from the 10th of November next up to the 16th day of December following, for the sum of £120 sterling, to be paid by weekly instalments of £25 for the first four weeks, and £20 on the last, making in all £120."

Subsequently to this agreement, Messrs. Cloup and Pelissie, without giving any notice to Mr. Alexander, entered into an agreement with Mr. Murray, manager of the Theatre Royal, for performing there during part of the time to which their bargain with Mr. Alexander related. In this agreement they made provision for payment of the £120, as the rent due to Mr. Alexander, which they then intended (as they afterwards stated) to pay. In the mean time Mr. Alexander took a new lease of the Caledonian Theatre, at a rent of £300, for the year during part of which the French comedians had agreed to become his subtenants. He also put it in order for their accommodation, and kept it vacant for the period of their sublease.

During the currency of the sublease, Mr. Alexander, having heard of their declining to occupy his theatre, and of their new engagement at the Theatre Royal, arrested them as in meditatione fugæ, without making any previous application to them for explanation; and they stated that it was then, for the first time, they resolved to use every legal plea competent to them for resisting his demand for the rent. Having intimated this, he thereupon raised an action before the Sheriff against them, as "managers of the French company of comedians," and libelled on the above agreement.

They pleaded in defence, 1. That as it was apparent on the face of the agreement and summons that he had let the theatre for the general performances of comedians, and as it was only for such a purpose that it was taken, this was an illicit compact, struck at by 10th Geo. II. c. 28, and therefore he could neither give nor enforce implement; and, 2. That at the time of taking the theatre, they were not aware that any statute disqua-

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lified it as a place for representing regular performances. They were foreigners, not acquainted with the exclusive privileges of the Theatre Royal. Mr. Alexander knew them, but had not mentioned them, and so they were led to form an agreement, in ignorance, which otherwise they would not have entered into. There was thus an essential error in the contract.

The pursuer answered, 1. That the Caledonian Theatre was in constant use as a place for scenic representations of various sorts, and might be lawfully used for many branches of such exhibitions. So far from the agreement being an illegal one, because it referred generally to the performances of a company of comedians, the contrary was the legitimate construction, and these general terms must be held to refer to such classes of performances only as were lawful upon that stage. It was not to be presumed that he intended to let, or the company to hire, the theatre for any illegal exhibitions, and the agreement could not therefore receive such an interpretation. He had renewed his lease of the theatre, and had kept it vacant for them. His lease was undoubtedly binding on him to his landlord, and so was their sublease on them; and, 2. That foreigners, equally with natives, in their transactions in this country, were presumed to know the laws, and were as completely bound by them. In particular, the defenders knew of the privileges of patent or licensed theatres, from having themselves had a license in London from the Lord Chamberlain.

The Sheriff "found it admitted by the defenders that the parties, on the 8th of September 1828, entered into an agreement by which the Caledonian Theatre was let by the pursuer to the defenders, from the 10th of November to the 16th of December 1828, for £120;—found it was incumbent on the defenders, before entering into said agreement, to have made the necessary inquiries as to the said theatre answering the object of the defenders;—found it is not averred by the defenders that they were induced to enter into the said agreement by any misrepresentation on the part of the pursuer;—repelled the defenders' objections to the legality and validity of the agreement;—found it instructed that, after entering into the said agreement, the pursuer did, at Martinmas 1828, obtain a renewal of his lease of the said theatre for eighteen months from that term, and took the necessary steps for having the theatre in proper order for the defenders entering into possession in terms of the agreement, and that the theatre was ready for the reception of the defenders on the 10th of November 1828;—further found it admitted by the defenders that they did not notify to the pursuer their intention of not taking possession of the theatre in terms of their agreement;—found that the pursuer was thus prevented from using the theatre himself, or endeavouring to let it to others, during the five weeks for which it was let to the defenders;—found it proved that the theatre was not used by the pursuer himself, or let to any other person, during the said five weeks;—decerned against the defenders for the sum of £120 sterling, with in-

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terest since 16th December 1828, and found the defenders liable in expenses."

The defenders advocated, and the Lord Ordinary "found that the contract on which the present action is founded, whereby the respondent let the Caledonian Theatre to the advocators, as managers of the French company, for their performances, was not binding on them, in respect the performances of a company of comedians could not take place in an unlicensed theatre without infringing the law, and subjecting the advocators to the penalties of the act of 10th Geo. II. c. 28;—therefore advocated the cause, sustained the defences, assoilzied the defenders, and decerned; but, in the particular circumstances of the case, found no expenses due."*

The pursuers having reclaimed, the Court "altered, repelled the reasons of advocation, remitted the cause simpliciter to the Sheriff, and found no expenses due in this Court."

Lord Balgray.—The only question before us is, whether these French gentlemen can refuse implement of their contract with Mr. Alexander? Upon examining that contract, I see no illegality on the face of it; and I therefore cannot allow myself to presume that an illegal use of the theatre was intended by either of the parties to the contract. I am for altering the interlocutor, and holding the defenders bound by their contract.

Lord Craigie.—The defenders certainly ought to have given notice of their alleged discovery of the illegality of performing in the Caledonian Theatre as soon as it was made, and of their consequent purpose of resiling from their agreement. But I conceive that they are free from the contract, unless Mr. Alexander can show that performances like theirs were legal within his theatre. He cannot do so, and I am for adhering.

Lord Gillies.—All parties to this contract are presumed to know the

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* "Note.—The Lord Ordinary does not dispute, that, as contended for by the pursuer, a contract containing ex facie nothing illegal, and which admits of being executed without infringing the law, may not be rendered void by the intention of one of the parties to apply the subject to an illegal purpose, nor even by the knowledge of the other party that such is the intention. But he apprehends, that where the illegal purpose appears from the terms of the contract, action cannot be supported. Now, by that in question, the theatre is let for the performances of the French company, and the pursuer is not entitled to avail himself of any thing ambiguous or indefinite in the term French company, as he sets forth in his summons that the contract was entered into in consequence of an offer made on behalf of the advocators, as managers of the French company of comedians, presently performing at the Theatre Royal. But the performances of a company of comedians are plainly such as fall under the operation of the act of the 10th George II., and the theatre was therefore let for a purpose to which it could not legally be applied. From the ground on which the Lord Ordinary has put his judgment, he is not disposed to give expenses, and also because, while he does not think mala fides imputable to the pursuer, he conceives the advocators were to blame in not sooner giving notice of their intention to dispute the bargain, and thereby occasioning some unnecessary expense to their opponent."

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law of the country. It is impossible for a foreigner in this country to resile from his contracts by merely pleading that he was ignorant of our laws when he entered into them. Dealing with this question, therefore, as if it were a contract entered into by any of the lieges, I am bound to presume that the legal limits of performance on the stage of the Caledonian Theatre were known to both parties at making the contract, and that it was solely for the performances within these limits that it was let or taken. This presumption may be overcome, if the words of the agreement do not admit of being construed consistently with it; but I see no such repugnantia in its terms. It is not enough to say that illegal performances have been exhibited in this theatre, and formerly interdicted, or that the defenders have often performed elsewhere what would be illegal if represented there. Mr. Alexander avers that he only let the theatre for such performances as were legal. The contract does not contradict this; and it is of no moment that the defenders allege that they had it then in view to exhibit illegal performances, and afterwards desisted. Suppose that a poacher buys a gun from a gunsmith, who perhaps knows him to have committed poaching before; he carries it away for a twelvemonth, could he then pretend to return it to the gunsmith, and refuse to pay the price for it, because he had meant to make it a means of gain by poaching, but, being afterwards better advised, had made no use of it whatever? The defenders are bound by their contract, which, on the face of it, is of a perfectly legal character.

The LORD PRESIDENT concurred.

Advocators' Authorities.—10th Geo. II. c. 28; 7th Geo. III. c. 27; Siddons, Feb. 24. 1825, (ante, III. 576); Alexander, July 9. 1824, (ante, III. 243.)

W. RENNY, W. S.—T. M. MOFFAT,—Agents.

No. 236.

ELIZABETH JOHNSTONE, Pursuer.—*Skene—Napier.*

ADAM DICKSON, Defender.—*Maidment.*

Landlord and Tenant—Removing—Title to Pursue.—Where a party obtained and enforced, as principal tacksman, a decree of removing against a tenant of a house, and it appeared that he was neither tacksman nor proprietor, but factor for another who was not alleged to have authorized the proceedings, the Court reduced the decree.

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1ST DIVISION. Lord Medwyn. H.

ELIZABETH JOHNSTONE for many years inhabited a cottage in Moffat, which belonged to a person named Bell, to whom she was related. Bell lived at a distance, and employed James Dickson to collect his rents. In January 1816 Bell signed a paper, tendered to him by Dickson, (who had made him a proposal to buy the cottage,) bearing to be a receipt for £12 "in part payment of the price of the property situated in the causeway of Moffat, &c.; and I oblige myself to grant a valid disposition &c. by Whitsunday next." On the following day, Johnstone signed, before witnesses, the following paper prepared by Dickson:—"I hereby promise to flitt and remove from the house presently possessed by me, at Whitsunday 1817, without further trouble or warning whatever."

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She remained in the house till 1822, and paid rent to Dickson during part of that period. In that year he obtained a decree in absence against her before the Sheriff in an action of removing, in which he designed himself principal tacksman. He then ejected her; and in 1823 she raised a reduction of the decree, as having been obtained in absence, and by a party having "no good right to the subjects, or title to possess the same, and they belong to the pursuer, as having possessed them, by herself and her authors, for sixty years past."

Dickson pleaded in defence—

1. That she was bound to produce a title to set aside the decree, which she had not done; and,

2. That the purchase from Bell, (to whom he was ready, if necessary, to make up a formal title,) and the obligation to remove granted by Johnstone, and the payment of rent to him till 1822, conferred on him a good title to remove her, and at all events to support the decree.

Johnstone answered—

1. That she had an interest to pursue the reduction, to found her in a claim of damages; and she was entitled to set aside any decree against her, if obtained by a party who had no right to it.

2. That Dickson had never acquired a valid title from Bell, or any right of property in the house; that the paper obliging herself to remove as at Whitsunday 1817 was signed in ignorance; there was no attempt to act on it till 1822; and the payments of rent had been made to Dickson as Bell's factor, and not as recognising the pursuer's right of property.

Dickson having died, his brother Adam was sisted in his place.

The Lord Ordinary, in 1826, repelled the reasons of reduction, "in respect that the pursuer possessed for one or two years under the defender, and paid rent to him for the subject in question, and that she does not pretend to have any real right in the subject, nor has shown any title upon which she can maintain a right to a possessory judgment," but found no expenses due.

Johnstone reclaimed, contending that this interlocutor assumed the principal facts which were in dispute, and Dickson having averred that he was able to complete a feudal title to the subjects, the Court, in July 1827, superseded advising till he "made up a title to the property in question." He then raised an adjudication in implement against Bell; but Bell having been assoilzied, the Court, in respect that Dickson had no right or title to the subjects, and that Johnstone had not derived her right of possession from him, altered, reduced, and found expenses due.

Lords Craigie and Gillies observed, that a party deriving his possession from another, would not be permitted to challenge the title of that other, being his own author; but no such case occurred here.

J. Logan, W. S.—J. J. Fraser, W. S.—Agents.

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MRS. ANN ALLAN OF AITCHISON, Pursuer.—*Keay—Paterson.*
WILLIAM ALLAN, Defender.—*Forsyth—Jameson.*

Testament—Clause—Conditional Institution.—A clause in a disposition and settlement declaring that in the event of the death of any daughter of the granter, her provision therein contained was to be equally divided among the surviving children—Found that the clause imported a conditional institution in favour of the survivors, and that the daughter's provision did not lapse in consequence of her predeceasing the granter.

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2D DIVISION.
Ld. Mackenzie.
F.

THE late Alexander Allan, father of the pursuer and of the defender, executed a deed of settlement upon the 4th of January 1823, by which he disponed his heritable property "to and in favour of the said William Allan, my eldest son, and the heirs of his body, whom failing before majority or marriage," to each of his other sons, and the heirs of their bodies, successively, under the same conditions of substitution. In an after part of the deed, he conveyed his whole moveable estate to his eldest son, whom failing, to his other sons, in the same terms and order of succession as that to his heritable estate; and he appointed "the said William Allan, my eldest son, whom failing, my other disponees in the order foresaid, and their foresaids, to be my sole executors." This conveyance was burdened with payment of debts and other obligations, an annuity to the widow, and provisions to the younger children. To each of his younger sons (all of whom were beyond majority at the date of this settlement) he provided a sum of money, which, with the addition of what they had already received from him, made their portions amount to £20,000 sterling each, and this without condition or substitution. To his five unmarried daughters (the pursuer, his second daughter, being, at the date of the settlement, married to Mr. Aitchison of Drummore) he provided £5000 sterling each. All these provisions to the younger children were made payable at the first term of Whitsunday two years after his death, with interest from the first term after that event; and it was declared, "that in the event of the death of any of my said five daughters above named before marriage or majority, then and in that case the provisions hereby made to such daughter or daughters shall be equally divided amongst all my surviving children, share and share alike, whether male or female, including in that division Mrs. Ann Allan or Aitchison, spouse of William Aitchison, Esq., younger of Drummore."

Mr. Allan died upon the 11th of December 1825. Miss Mary Allan, his fourth daughter, had predeceased him without having attained majority. The question then occurred, whether the provision in her favour had lapsed; or whether the clause above quoted formed a conditional institution in favour of the surviving children. This question was tried in an action at the instance of Mrs. Aitchison and her husband against William Allan, the eldest son, for payment of her share of the provision of £5000 to Mary. The plea in defence was, that according to the legal construction of the settlement, and the obvious intention of the

granter, the clause founded on imported merely, that if any of the laughters should die unmarried, or in minority, after the provisions vested, all the surviving children should succeed as substitutes; but that there was no room for maintaining a conditional institution.

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The Lord Ordinary repelled this defence, and decerned in terms of the libel, adding the subjoined note.*

The Court adhered.

Lord Glenlee.—The material point is, what are the words of the settlement? These seem to me to be quite plain. The granter first settles £5000 on each of his unmarried daughters, and then provides, that in the event of any of them dying before marriage or majority, " the provisions hereby made to such daughter or daughters shall be equally divided amongst all my surviving children," &c., including the pursuer. If that be not a provision to his surviving children, bottomed on the conditions expressed, I do not know what can be called a conditional institution. Mr. Allan may not have precisely anticipated all contingencies; but it is plain that this must have been in his mind, that whatever happened, whether these ladies predeceased him or not, their share, in the event of death before marriage or majority, was to be a provision to the other children. But are we to set aside the express terms of this settlement upon a supposition, that had the granter contemplated the particular contingency of a daughter predeceasing him, he would have destined her provisions otherwise? I think the spirit of the decisions is all in favour of the pursuers.

Lord Cringletie.—When I first read this case, I certainly had considerable doubts. It occurred to me that there was an inherent condition that the substitution was to take place only in the event of the daughter having survived the granter; and this view seemed somewhat fortified by the circumstance that there was no provision made for the event of her reaching majority, and

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* " The literal interpretation of the words in question appears to the Lord Ordinary to be in favour of the pursuers. The lapse of the legacy in favour of Mary Allan does not seem to afford a sound argument; for though it had lapsed in so far as she was to receive benefit from it, or it was to have vested in her, yet it remained ' a provision hereby made to each daughter,' i. e. ' any one of my said five daughters;' and therefore, in terms of the deed, a provision which, ' in the event of the death of any of my said five daughters, shall be equally divided among all my surviving children.' Then the Lord Ordinary thinks the more loose and conjectural interpretation of the defender is too uncertain to be received. It might, for any thing that can certainly be conjectured from the deed, be the intention of the testator, not that the words should be read, ' in case of the death of any of my said daughters after my own death, but before marriage or majority,'– but that they should be read, ' in the case of the death of any of my said daughters before my own death, or even after my own death, but before marriage or majority.' The latter meaning, it will be observed, seems most probably to have been his intention in the use of a similar expression in the nomination of his disponees in the beginning of the deed: for he could not well mean that, in case of the death of his eldest son before himself, the deed should be void altogether, and that it should only benefit the after nominees in case of the death of his eldest son after himself, but before marriage or majority; yet he dispones to the second, failing the eldest son, before marriage or majority."

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then predeceasing the granter. But really, when I look at the case of Denholm, I cannot pretend to retain my doubts. It is for the interests of society that there should be no doubt or uncertainty as to the interpretation of the terms of such deeds.

Lord Meadowbank.—I was precisely in the situation of my Lord Cringletie. Suppose, as his Lordship observed, this lady had died after majority, and before the granter? That, however, is not the question for our present decision. I conceive it absolutely necessary for the interests of all that the Court should adhere to one uniform system of interpreting such clauses.

Lord Justice-Clerk.—After all I have heard, I am only confirmed in my original opinion that this is a conditional institution. Just look at the ample provisions made by this gentleman for the other branches of his family: Is there any thing inconsistent in his providing, that in the event of one of his daughters dying, whether before or after him, her share should be divided among the rest? I am clear for supporting an uniform principle of interpretation with the case of Denholm.

Authorities.—Smith, Dec. 14. 1710, (6346); Denholm, January 1726, (6346).

Brodies and Kennedy, W. S.—Allan and Bruce, W. S.—Agents.

No. 238.

James Turnbull, Suspender.—*Moir.*
David Hill, for the Montrose Bank, Charger.—*Neaves.*

Bill of Exchange.—The drawer and indorser of a bill having written a letter asking indulgence, and promising to settle it, not entitled to plead, that when he wrote this letter, he was ignorant of the legal effect of non-notification of dishonour, so as to enable him to found on alleged non-notification as a defence against payment.

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Ld. Fullerton.
R.

The suspender Turnbull drew and indorsed a bill, accepted by one Walker, which was discounted with the Montrose Bank. The bill fell due on the 2d of August 1828, when it was dishonoured. On the 6th of February 1829, the suspender received a letter from Mr. Speid, law-agent for the bank, in these terms:—"Your bill on James Walker, dated 30th April last, at three months, for £14. 10s., indorsed by you to Colin Rickard, and by him to the Montrose Bank, having been dishonoured when due, and protested for non-payment, &c.; and the contents still remaining due to the Bank, you will now have to settle the same with the cashier, or Mr. Molison, the interim agent for the Bank." The suspender replied by letter to Mr. Molison, dated the 7th of February 1829—"Sir, I received the following letter from Mr. Speid only last night, (the letter quoted). When the above bill became due, Mr. J. Walker told me it was settled; therefore I was not aware of it being still due to the Bank until last night, that I received the above letter from Mr. Speid. Not knowing before that the bill was still unsettled, I am not prepared for uplifting it just now. May I therefore beg the favour of you to write by this evening's post, to the cashier, for three weeks indulgence, and he may depend upon it being settled then. Your com

plying with this request will very much oblige, Sir," &c. The suspender obtained from the Bank this indulgence, but failed to pay it afterwards, and suspended a charge on the part of the Bank, on the ground that the bill was an accommodation one; that he had received no intimation of its dishonour for six months after it became due, by which time Walker, the acceptor, had become bankrupt; that the mora of six months, by which his recourse against the acceptor was rendered useless, was sufficient to relieve him, independently of the rules regarding strict negotiation; and as to the waiver, that his letter to the bank, craving delay, was written under ignorance of the legal effect of non-notification. The charger, on the other hand, averred that the dishonour of the bill was duly intimated to the suspender in the ordinary way of business, and that he was so connected with the bill as not to require, or be entitled to notice; but at any rate, he pleaded, that even were the facts averred by the suspender true, still his asking and obtaining indulgence was a sufficient waiver.

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Turnbull v. Hill.

Bryden &c. v. Grierson &c.

The Lord Ordinary found the letters orderly proceeded, and the Court adhered.

Lord Justice-Clerk.—I can find no ground for altering. A great deal has been said about this having been an accommodation-bill. I see no evidence of that. Then look at this man's station. There is no presumption of ignorance in his favour. My firm impression is, that he knew all about it.

Lord Cringletie.—I am of the same opinion. There is no presumption of ignorance in this man's favour.

The other Judges concurred.

J. R. Skinner, W.S.—T. Deuchar, S.S.C.—Agents.

William Alexander Bryden and Others, Pursuers.
William Grierson and Others, Defenders.

No. 239.

Testament—Clause—Trust—Expenses.—1.—Construction of an obscure dispositive clause in a family settlement.—2.—Expenses of all parties relative to the interpretation of an obscure trust-deed laid on the trust-estate.

This was an action of declarator relative to the rights of parties under a deed of settlement executed by the late Mr. James Brown of Westwood in 1813. He had two nephews, John and Adam Bryden. John, the elder, married in 1809; but had no issue in 1813, at which time Mr. Brown's settlement was made. Adam, the younger nephew, had died previous to that period, leaving two daughters. Mr. Brown was married, but died in 1815 without issue. By his settlement he gave the liferent of the lands of Westwood to his widow, and the fee, during a certain term, to William Grierson and others, his trustees. He conveyed his lands of Scalehill &c. to his trustees, "ay and until the eldest surviving child or children, to be hereafter lawfully procreated of the body of John Bryden,

Feb. 17. 1831.

1st Division. Ld. Corehouse. S.

No. 239.

Feb. 17. 1831. Bryden &c. v. Grierson &c.

during his present or any future marriage, and the eldest lawful child or children of Adam Bryden deceased, my nephews, or either of them, shall arrive at the age of twenty-one." At this period the trustees were to denude "in favours of the child or children of the foresaid John and Adam Brydens before described; and upon that child or these children attaining the age of twenty-one, I hereby revoke" the disposition to the trustees. "And I hereby give, grant, and dispone to and in favour of the children lawfully procreated of the body of the said deceased Adam Bryden, and the children to be hereafter lawfully procreated of the body of the said John Bryden, during his present or any future marriage, equally amongst them, share and share alike, the heirs-male of each of their bodies always excluding the female; and in the event of there being no male child or children in either or each of their families, then the daughters shall succeed as heirs-portioners; and the heirs and disponees of the said persons who shall succeed in virtue hereof, whether male or female, heritably and irredeemably, all and whole the lands," &c. The trustees, at denuding, were exempted from any claims of accounting in respect of their interim possession. Brown bound himself and his heirs to infeft his wife in liferent, and his trustees, "and the heirs of the said John and Adam Bryden, described in the dispositive clause of those presents, and their foresaids in fee," &c. By a subsequent clause, after ordering payment of certain legacies, he assigned all and sundry debts, &c. to his trustees; "whom failing, to the heirs of the foresaid John and Adam Bryden, male or female, as before described," &c. He further disponed an heritable bond for £500, under a certain burden, "to and in favour of the lawful children hereafter to be procreated of the body of John Bryden, during his present or any future marriage; the lawful children procreated of the body of the foresaid deceased Adam Bryden," and to the children of certain other relations, "and that equally amongst them, share and share alike."

He was survived by his widow. In November 1828, when the oldest daughter of Adam Bryden was near majority, and John Bryden had a family of four sons and two daughters, that family raised a declarator of their rights under Brown's settlement. They concluded, first, to have it declared, that as soon as any child of Adam or John reached majority, the trustees must denude, and that either in favour of the oldest son of John, as the only heir-male in heritage of both Adam and John, or in favour of all the sons of John, as the only parties to whom the designation of heirs-male could apply; or if the daughters of Adam were entitled to a share along with the issue of John, then that all the issue of John, male and female, procreated and to be procreated, should take the estate among them, share and share alike, with the daughters of Adam,—the whole grand-nephews and grand-nieces of Brown thus succeeding per capita.

The daughters of Adam lodged defences, and pleaded that it was clearly the intention of the testator to divide his land into two equal

shares, of which one was destined to them, as the issue of his nephew Adam; and the other to the issue of his other nephew John. They therefore insisted that the trustees were bound to denude in their favour of one-half of the estate, as soon as the eldest of them had attained majority.

The Lord Ordinary "found, that, by the settlement of the late James Brown of Westwood, referred to in the libel, his widow Mary Johnston is entitled to the liferent of the lands of Westwood;—that the sons born or to be born of John Bryden are entitled to one-half of the said lands of Westwood, subject to the widow's liferent, and to one-half of the lands of Scalehill or Herdsbogside, share and share alike;—that the daughters of the late Adam Bryden are entitled to one-half of the lands of Westwood, subject to the widow's liferent, and to one-half of the lands of Scalehill or Herdsbogside, as heirs-portioners;—that the defenders, the trustees under the said settlement, are bound to denude, in terms of these findings, in favour of the sons of John Bryden, as soon as the eldest son arrives at the age of twenty-one years,—good and sufficient security being found by the sons then in existence that the interest of any son or sons who may afterwards exist shall not suffer prejudice thereby; and that the trustees are bound to denude, in terms of the said findings, in favour of the daughters of the late Adam Bryden as heirs-portioners, as soon as the eldest daughter attains the age of twenty-one years; and decerned and declared accordingly;—found the defenders, the trustees, entitled to expenses of process, to be paid out of the trust estate."*

The pursuers reclaimed, and the Court "adhered, with this variation, that the trustees were and are bound to denude in favour of the sons of John Bryden, in so far as regards their one-half of the properties in question, as at the period when the eldest daughter of Adam Bryden attained the age of twenty-one years; found the pursuers and defenders appearing, equally entitled to their expenses out of the first of the rents and profits, &c.; and allowed separate extracts to go out at the instance of the daughters of the said Adam Bryden, and the sons of the said John Bryden."

W. Stewart, W. S.—W. Martin, S. S. C. Agents.

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* "Note.—The settlement admits of various constructions. The dispositive clause could not have been more obscure, though industriously written to conceal the testator's will; and no other clause in the deed throws any light upon it. The Ordinary has adopted the construction which, upon the whole, appears the least objectionable, but with little confidence in his opinion."

No. 240.

Feb. 17. 1831.
Macdonald v. Macdonald &c.

LORD MACDONALD, Pursuer.—*Keay—Jameson.*
HON. ARCHIBALD MACDONALD and Others, Defenders.—*Sol.-Gen. Cockburn—More.*

Entail—Stat. 10. *Geo. III. c.* 51.—*Process.*—Not relevant, after the lapse of the statutory limitation, to reduce a decree of declarator in absence under 10. Geo. III. c. 51, to allege that there was a misrecital of the statute in the summons; nor that no proper evidence was produced that the sum was expended in improvements; nor that the annual accounts had not been subscribed, or duly lodged and recorded along with their vouchers; nor that the expenditure related to many articles not authorized by the statute,—fraud not being libelled, nor the decree alleged to be false or improbative.

Feb. 17. 1831.

1st DIVISION.
Ld. Moncreiff. D.

THE late Alexander Lord Macdonald, the heir of entail in possession of estates in Skye and Uist, addressed, on the 12th of February 1800, a letter to his brother, the present Lord, in these terms:—"Dear Godfrey, As it is my intention to commence, immediately, various improvements on my estates in Skye and Uist to the extent authorized by the Act of Parliament 10. Geo. III. c. 51, I therefore inform you of the same, which I hope will be considered as a sufficient notification to you on this subject. I am," &c. To this letter the following answer was returned:—"My Lord, I have received your Lordship's letter of the 12th instant, intimating your intention of commencing various improvements on your estates in Skye and Uist, and of making the same a burden thereon to the extent authorized by the 10th Geo. III. c. 51. I return your Lordship's letter along with this, and hold the same as sufficient notification of your intention. I am," &c.

By 10. Geo. III. c. 51, it is provided, that "whereas questions may arise concerning the amount of the sums laid out under the authority of this act, at a great distance of time, when the material witnesses may be dead; for remedy whereof, and for ascertaining in due time the amount of the sums so expended, be it therefore further enacted, that it shall and may be lawful for every heir of entail, after he shall have laid out money upon the improvement of his entailed estate as aforesaid, and shall have completed the improvement of all or any particular part of such estate, to bring, if he shall think proper, an action of declarator before the Court of Session, or a process before the Sheriff, in which he shall call the heir next entitled to succeed after the heirs of his own body, and shall in such suit produce proper evidence of the money laid out in such improvements; and the said next heir, or any other heir of entail, shall be entitled to produce proper evidence to set aside or diminish the said claim; and it shall or may be lawful for the said Court of Session, or for the said Sheriff, to pronounce a decree for such part of the said sum as, by the true intent and meaning of this act, is intended to become a charge against the succeeding heirs in the said entailed estate; which decree, if pronounced by the Sheriff, shall become final, unless carried to the Court of Session by suspension within six months after the same shall have been pronounced; and if pronounced by the Court of Session, either

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in such process of declarator or suspension, shall be final, if an appeal is not brought within twelve months." The same statute provides, (§ 12,) that the heir of entail "shall annually, during the making of such improvements, within the space of four months after the term of Martinmas, lodge with the Sheriff or Steward-clerk of the county within which the lands and heritages improved are situated, an account of the money expended by him in such improvement during twelve months preceding that term of Martinmas, subscribed by him, with the vouchers by which the account is to be supported, when payment shall be demanded or sued for."

In the abstract of this statute, annexed to Erskine's Institutes, this 12th section is thus stated:—"That annually, within four months after Martinmas, an account of the sums expended during the year preceding that term, with the vouchers, be lodged with the Sheriff or Steward-clerk."

In reference to this statute, the late Lord Macdonald raised a declarator before the Court of Session against his brother, concluding to have the amount of the charge against succeeding heirs ascertained. His brother was duly cited, but made no appearance, and decree was pronounced, in June 1815, for three-fourth parts of £12,857. 6s. 11d., as the sum expended in terms of the statute.

Some years after the death of the late Lord, his brother (now Lord Macdonald) raised a reduction of this decree, setting forth as his reasons of reduction (after the usual one of style)—"Secundo, The same was obtained against the pursuer in absence, and when he was furth of Scotland. Tertio, In the suit or process in which the said decree is said to have been obtained, the statute was not correctly or properly libelled on, and the said Alexander Wentworth Lord Macdonald did not produce proper evidence of the money alleged to have been laid out in improvements, although expressly required by the said statute so to do. Quarto, The claim of the said Alexander Wentworth Lord Macdonald was totally groundless, and could not legally be made a debt against the pursuer, as heir of entail next entitled to succeed the said Alexander Wentworth Lord Macdonald, after the heirs of his own body, to the said entailed estate of Macdonald and others, in respect that the provisions of the Act of Parliament 10th Geo. III. c. 51, under which the same was made, had not been complied with; and, in particular, annual accounts of the expenditure were not subscribed by the said Alexander Wentworth Lord Macdonald, and were not regularly or duly lodged and recorded, and the vouchers by which the accounts were to be supported were not lodged and recorded, as required by the said act; and also in respect that a great variety of articles of expenditure stated, claimed, and comprehended in the said decree, are in no degree authorized by the said Act of Parliament, but are of a nature and description totally different from the improvements authorized to be made by the said act, as will fully appear when the evidence of said alleged expenditure shall be produced." As to the misrecital of the statute, it was alleged that the former libel had quoted, inter alia, as from the 10th Geo. III. c. 51, the following clause—"That

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annually, within four months after Martinmas, an account of the sums expended during the year preceding that term, with the vouchers, be lodged with the Sheriff or Steward-clerk." The former summons was then set forth, as libelling "that the said Alexander Lord Macdonald had, during his possession of the said entailed estate, laid out in enclosing and erecting farm-houses and offices, and other buildings thereon, the sum of £12,857. 6s. 11d., conform to accounts and vouchers thereof lodged with and recorded by the Sheriff Clerk of the said sheriffdom of Inverness, within which the said entailed estates lie, in terms of the statute before mentioned, intimation of which improvements was duly made in writing," &c., conform to the letter already quoted. In calling for production of the decree, it was described in the summons of reduction as one whereby "the Lords of Council and Session, sitting in judgment, found, decerned, and declared, that the expenses laid out by the said Alexander Wentworth Lord Macdonald, in enclosing, draining, and erecting farmhouses and offices and other buildings on the said entailed estates previous to Martinmas 1814, amounted to the foresaid sum of £12,857. 6s. 11½d. sterling; and that the pursuer, therein designed the Honourable Godfrey Macdonald Bosville, and failing him, the next heir who was entitled to succeed after the heirs of the said Alexander Wentworth Lord Macdonald's body, and others, in terms of said act, should be liable to the heirs, executors, or assignees of the said Alexander Wentworth Lord Macdonald, in £9643. 0s. 2¾d. sterling, being three fourth parts of the foresaid sum of £12,857. 6s. 11½d., with interest of the said sum of £9643. 0s. 2¾d. sterling, from the term when the pursuer, or other heir next entitled to succeed after the heirs of the said Alexander Wentworth Lord Macdonald's body their right to the rents of the foresaid entailed estate should commence,—or of whatsoever date, tenor or contents, the same may be."

The defenders pleaded, as a preliminary defence, that the decree, not having been appealed within a year from its date, was final and unchallengeable under the clause of the statute above quoted. They also added, that the late Lord Macdonald had discharged large claims against the pursuer, on the faith that the decree was to remain unimpeached.

The pursuer then moved for leave to put in a condescendence, with a view to the preparation of a record as to the preliminary defence. This was opposed by the defenders, and the Lord Ordinary pronounced this interlocutor:—"Having heard parties' procurators, and particularly on a motion by the pursuer that he be allowed to give in a condescendence, with the view of having a record made up in regard to the said preliminary defences—finds that the proposal to give in a condescendence, as explained in the debate, is confessedly equivalent to a proposal of giving in an articulate condescendence on the whole merits of the reduction;—finds that the question as to the validity of the preliminary defence, founded on the statute, as excluding any reduction of a decree such as that set forth in the present summons, must be determined by the nature of the decree as therein narrated, and the reasons of reduction as ap-

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The pursuer reclaimed; but the Court adhered.

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* "NOTE.—In the debate, very strong statements were made on the part of the pursuer, for the purpose of showing that in the process of declarator no evidence, or no sufficient evidence, had been produced to the Court to prove that the improvements libelled on had been made at all, or that they were improvements within the Act of Parliament. It was stated that it would be shown from the accounts produced or lodged in the Sheriff Clerk's office, that the claim was not warranted by the statute; and even that money which had been laid out on an unentailed estate, had been comprehended in the accounts. It was also stated that the Act of Parliament was erroneously recited in the summons of declarator, and that certain words were omitted, bearing that the accounts appointed to be lodged with the Sheriff Clerk shall be subscribed by the proprietor, while it was averred that none was subscribed in this case. The Lord Ordinary conjectured, when he heard this last statement, that the words had

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LORD BALGRAY.—This is a very serious question which the pursuer attempts to raise. The express object of intimation to the next heir, before the improvements are made, and of calling him in the action of declarator, is, that he may adduce any evidence to diminish the sums claimed to their lawful amount, and that he may state all objections to the claim at that time. The statements made now in this reduction should have been brought forward in the previous action; but this not having been done, the statute declares the decree to be final, if not appealed within a year. On the faith of this system, millions of money have been expended, and many family settlements made, it being the policy of the Legislature thus to enable men at once to make provision for their families, and carry forward the improvement of the country. But if decrees, after being allowed to become final, were open to be challenged, after a man's death, upon the grounds set forth in the summons, I think few people would avail themselves of the provisions of that statute. As regular notice was given to the pursuer, I cannot allow him now to come forward and attempt to throw every thing open, as if no decree had been obtained.

LORD CRAIGIE considered, that although no minute objections should be

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been quoted from the abstract of the statute in the Appendix to Erskine's Institute, and he finds that this is precisely the fact. But while this circumstance takes away all probability of an intentional misquotation, he is of opinion that the misrecital of a public statute would be no ground for reducing such a decree, if otherwise final, because all judges are bound to know the terms of it. And with regard to the remainder of the pursuer's plea, it appears to the Lord Ordinary, that although a case might be figured in which, on a summons plainly and directly setting forth that the whole proceedings in such a declarator had been devised and carried through from beginning to end as a fraud upon the statute and upon the Court, competent grounds of reduction might arise, the reasons of reduction, as they stand in the present summons, resolve simply into statements upon the merits of the evidence adduced in the process, and the nature of the improvements for the value of which decree was asked,—all which things were the very matters, for finally determining which the Legislature allowed the decree of declarator to be obtained, and declared it to be final, unless appealed from within twelve months. If the pursuer were to be allowed to condescend under such a summons as this, it appears to the Lord Ordinary that the provisions of the statute must become quite nugatory. The grounds taken are all such as might have been stated in the process, or upon appeal. If the present pursuer had appeared, or had appealed and stated the same things, the decree would have been res judicata, independent of the finality declared by the statute. But the Lord Ordinary thinks that if the clause of the statute has any meaning, it must import that the decree shall be equally res judicata against the next heir duly cited who does not appear, and who does not appeal within the limited time.

"In forming his opinion, the Lord Ordinary is not influenced by the statement in the end of the defences. But it is very plain that if a proprietor who bona fide brings his declarator for the very purpose of ascertaining the facts while they are recent, and all parties are alive, and for the purpose of preventing controversies concerning them at a distant period, may not rely on the decree which he obtains, notwithstanding the broad words of the statute, and if the whole inquiry may be revived after the most important settlements have been made on the faith of it, and after he himself has been dead for many years, the object of the statute in this point must be essentially defeated, and the greatest injustice may be done in many cases."

listened to, yet, when statements of irregularity were so strongly made, the Court should at least allow a condescendence. No. 240.

Feb. 17. 1831. Macdonald v. Macdonald &c. Forrester v. Mackenzie.

Lord Gillies observed, that as there was no allegation of fraud in the summons, that allegation could not now be entertained. The averments of the pursuer merely went to there having been some irregularity of procedure, or some defect of evidence as to the amount of expenditure for which decree had been taken. The objections on these points might have been effectual, if timely stated; but, after allowing decree to pass and to become final under the statute, his Lordship concurred with the Lord Ordinary in dismissing the action as incompetent, there being no allegation of fraud set forth in the summons.

Lord President.—The summons does not allege fraud, and I am also for dismissing it.

Bowie and Campbell, W. S.—V. Hathorn, W. S.—Agents.

Robert Forrester, Petitioner.—*Jameson—Deas.* No. 241.
James Mackenzie, Petitioner.—*D. F. Hope—W. Bell.*
Competing.

Bankrupt—Sequestration—Trustee.—The estates of a company which had carried on business at Inverness and Wick, and whose creditors were scattered over Scotland and England, being sequestrated, and there being no creditors near the chief seat of business who could act as commissioners—Objection repelled to a trustee, elected by a large majority in number and value, that he resided in Glasgow, where a considerable number of the creditors also resided.

Feb. 17. 1831.

1st Division. Ld. Moncreiff. H.

Kenneth and Alexander M'Rae carried on business as merchants, at Inverness and at Wick, under two different firms, the chief seat of their business being Inverness. Their estates were sequestrated under the Bankrupt Act; and at the meeting held at Inverness for electing a trustee, creditors to the value of £6582. 9s. 3d. voted for Robert Forrester, merchant in Glasgow, whom failing, James Scarth, agent in Inverness; while creditors to the value of £2479. 4s. 4d. voted for James Mackenzie, confectioner in Inverness. At this time there were 58 creditors ranked on the estate, of whom 47 voted for the first nominees, and 11 for the second. None of the creditors resided in Inverness; but the agents for three Edinburgh banks, two of whom voted for Mackenzie, and were his principal constituents, resided near it. Of the remaining creditors, twenty, who were ranked for £2221, resided in Glasgow; the rest resided in Edinburgh, Aberdeen, Bannockburn, Perth, Kilmarnock, or England.

Before the votes were taken, the party of Mackenzie objected to Mr. Forrester on the ground of his non-residence; and there being a double election, both parties applied for confirmation. A record being prepared, the Lord Ordinary "repelled the personal objection stated against Robert Forrester, the person elected to the office of trustee by the great majority of the votes of the creditors; found that he ought to be confirmed, and with this judgment made avizandum to the Court."*

* "Note.—The Lord Ordinary conceives that by the Act of Sederunt, if he gives his own judgment, it is not necessary to order Cases on the merits. The Act of Par-

No. 241.

Feb. 17. 1831.
Forrester v. Mackenzie.

Stewart v. Gordon.

Mackenzie reclaimed; but the Court adhered, confirmed Forrester, and subjected Mackenzie in expenses.

LORD PRESIDENT.—The creditors are the best judges of what is for their own interest. There is no room for the Court to interfere.

Forrester's Authorities.—54. Geo. III. c. 137, § 23 and 26; Stewart, Feb. 13. 1822, (ante, I. 315); Cheyne, July 3. 1828, (ante, VI. 1050); 2. Bell, 370; Kerr, Nov. 14. 1828, (ante, VII. 19).

Mackenzie's Authority.—Spence, Dec. 2. 1826, (ante, V. 72); 2. Bell, 371.

D. HOUSTOUN,—W. MACKENZIE, W. S.—Agents.

No. 242.

ARTHUR STEWART, Advocator.—*Skene—Neaves.*
SAMUEL GORDON, Respondent.—*Moir.*

Payment—Sale—Usage.—Circumstances in which a proof was allowed that it was the general practice of the trade between fleshers and cattle-dealers to pay for cattle on delivery.

Feb. 17. 1831.

1ST DIVISION.
Lord Newton.
H.

SAMUEL GORDON, cattle-dealer, pursued Arthur Stewart, flesher in Aberdeen, before the Sheriff, for £103. 10s. as the balance of the price of two lots of sheep,—one consisting of 64, and the other of 44, and also an ox and a cow. Stewart alleged in defence, that by the general practice among cattle-dealers and fleshers in that part of the country, cattle purchased were paid for on delivery; that, agreeably to this practice, he paid for the cattle in question on delivery, with the exception of 23 sheep of the first lot and the ox, for the amount of the price of which, being £41. 18s. 2½d., (not having cash on him at the time,) he had given

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liament only requires that the trustee shall be resident within the jurisdiction of the Court; and the general rule is, that the creditors are the best judges of the trustee most likely to attend to their interest with effect. By many decisions in very strong cases, it is settled that non-residence in the place where the bankrupt's business was carried on, or even in the sheriffdom, creates no legal disqualification in the trustee, (Stewart, Feb. 13. 1822; Cheyne v. Guthrie, July 3. 1828; Kerr, Nov. 14. 1828). The objectors in the present case rely on the case of Spence v. Eadie, Dec. 2. 1826. But the decision in that case, pronounced with difficulty, can go no further than to show that it is within the power and discretion of the Court to interfere when a strong case of impropriety or inexpediency is made out. Two of the cases above mentioned are later than that case; and in the one, the bankrupt's domicile was in Forfarshire, and the trustee resided in Edinburgh; in the other, the domicile was in Stornoway, and the trustee's residence in Glasgow.

"In the present case, the facts are very strong in support of the election made by the majority of the creditors. The company had two establishments, one in Wick, and another in Inverness. The creditors are scattered over the whole kingdom. There are hardly any creditors residing in Inverness, except one or two who support Mr. Forrester; for the bank agents are not proper creditors. Commissioners could not be found there; a large proportion of the creditors reside in Glasgow; and, finally, of fifty-eight creditors, forty-seven holding debts to the amount of £6582. 12s. 6d. voted for Mr. Forrester, while only eleven holding debts amounting to £2479. 4s. 1d. supported the opposite candidate."

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Gordon a written acknowledgment, "payable on demand," which he was willing to implement. Of this usage he offered a proof prout de jure.

He was ordered to undergo a judicial examination, in the course of which he admitted that he sometimes did not pay at the time of the purchase, but stated that he never received delivery without payment, except in the instance in which he granted the above-written obligation; and he objected successfully to a question whether he was in the practice of purchasing on credit from certain individuals. The Sheriff Substitute found that Stewart had not offered competent proof of his alleged payments in ready money, and decerned in terms of the libel. The Sheriff Depute adhered, observing, "The payment of the lot of 44 sheep seems to be the only point on which any question can be raised; and under the circumstances of this case, as appearing in the judicial examination &c., and especially with a large balance of the other purchases confessedly due and unpaid, the presumption of ready money payment, or payment simul et semel with the delivery, will not hold."

Stewart advocated, maintaining that he was entitled to a proof of the usage, which, if established, would throw the onus on Gordon of showing that it had not in this instance been acted on; at least he was entitled to a proof, prout de jure, of his payments made either at the purchase, or the delivery of the cattle. Gordon contended that proof of the usage was inadmissible, especially as Stewart admitted that he occasionally purchased on credit, and in this case had confessedly got delivery of part without payment; and, quoad ultra, that as the defence rested on payment, it could not be proved by parole.

The Lord Ordinary remitted to the Sheriff to allow Stewart a proof prout de jure, in terms of his statement on the record "that he paid the price of the whole parcel of 44 sheep last purchased, on the morning of the day when the first 20 of them were delivered, and also that he paid the price of the cow at the time she was delivered; and thereafter to do as to him shall seem just." His Lordship, at the same time, observed in a note — "The Lord Ordinary conceives it perfectly competent to prove by witnesses that payment of cattle, or other moveables purchased, was made either at the time of making the bargain, or at that of delivery;" and after adverting to the declaration, he stated, that he "is not disposed to allow the advocator (Stewart) a proof as to the general practice of butchers or cattle-dealers in the district, because this could be of little weight, if his own practice was different."

Stewart having reclaimed, and prayed to be allowed a proof of the practice of the trade—

The Court altered, so far as to allow him a proof of the practice, and quoad ultra adhered.

W. Dutrie, W. S.—G. Sutherland, W. S.—Agents.

No. 243.

Feb. 17. 1831. Blakemore and Co. v. Blyth and Co.

RICHARD BLAKEMORE and Co., Pursuers.—*Keay—Stewart.*
ROBERT B. BLYTH and Co., Defenders.—*Cuninghame—W. Bell.*

Principal and Agent—Sale.—Terms of an agreement which the Court found to import the constitution of a mercantile agency, and not a contract of sale.

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1st DIVISION. Lord Newton. H.

RICHARD BLAKEMORE and COMPANY, tinplate-manufacturers at Monmouth, entered, in 1821, into an agreement with R. B. Blyth, trading under the firm of R. B. Blyth and Company, as merchants in Edinburgh and Glasgow, of the following tenor:—"Memorandum of the terms on which the undersigned agree to transact business with each other.

"1. Messrs. R. Blakemore and Co. agree to keep a stock of their tinplates in the hands of Messrs. R. B. Blyth and Co. at Glasgow, from whence Messrs. R. B. Blyth and Co. are to be at liberty to supply their establishment at Edinburgh.

"2. R. Blakemore and Co. agree to deliver their tin-plates in Glasgow; all local and other charges, after their discharge from the vessel conveying them thither, to be borne by R. B. Blyth and Co.

"3. R. B. Blyth and Co. agree on no account whatever to sell the tin-plates of R. Blakemore and Co. at less prices than those which they may from time to time be instructed by R. Blakemore and Co. to demand; it being also the distinct understanding between the parties that R. B. Blyth and Co. are at liberty to obtain, for their own account, higher prices whenever and wherever it may appear to them, from local or other circumstances, expedient to demand them.

"4. R. B. Blyth and Co. agree to render R. Blakemore and Co. a monthly account of the sales made, and of the stock on hand, which account shall be transmitted to R. Blakemore and Co. as soon after the commencement of each month as conveniently can be.

"5. R. Blakemore and Co. agree to allow R. B. Blyth and Co. a commission or discount off the amount of sales at the following rates, viz. When the price of co. tin-plates is less than 40s. in Bristol, (the Bristol price being the standard for all other markets,) or less than 42s. 1 co. in Glasgow, (the price corresponding to 40s. in Bristol,) then at the rate of 5 per cent.; when the price amounts to 40s. 1 co. or upwards in Bristol, or 42s. 1 co. or upwards in Glasgow, then at the rate of 5 per cent.; and for the nett proceeds of each month's sale R. Blakemore and Co. are to receive the acceptance in London, by R. B. Blyth and Co., of their draft at six months, to be dated on the 4th of each month.

"6. R. B. Blyth and Co. agree, in the sale of tin-plates, not to deviate from the regulations of the trade as they may from time to time be transmitted with instructions to them by R. Blakemore and Co., and to confine their sales exclusively to those of the manufacture of R. Blakemore and Co., unless upon any special occasion they may happen to be without

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a supply, when they are to be at liberty to procure a temporary supply elsewhere.

"7. This agreement to be terminated by either party, on giving six months notice in writing to that effect."

To the above agreement there was afterwards added an article in the following terms: — "That whenever R. B. Blyth and Co. shall make any sales by wholesale of tin-plates, say in quantities of 50 boxes or upwards, they shall remit Messrs. R. Blakemore and Co., in payment for the same, the bill or bills which they may themselves receive in payment, attaching their indorsement thereto." Besides this, Blyth and Co. were eventually allowed to make a further deduction of 6d. per box for local charges. No single sale of 50 boxes was ever made at a time.

On the 5th of October 1821, Blyth and Co. wrote to Blakemore and Co., in reference to an application which had been made to the latter by another Glasgow firm to sell the tin-plates: — "If you will consider the matter, you must at once see that it would never do for you to have two houses in Glasgow selling your plates; we should be contending against each other; and I do not think your sales would be much increased by it; and it would have a strange appearance among the tinsmiths for two of us to be offering the same plate, &c. The only house, except ourselves, that have been any time sellers of tin-plates, are Kibble, who is agent for Morris and Company, and Macarthur and Co., who are agents for Ackermans of Bristol."

In 1824, Charles B. Blyth, (a brother of R. B. Blyth,) trading under the firm of C. B. Blyth and Co., was appointed agent of Blakemore and Co. for the sale of tin-plates in Glasgow, and on that occasion R. B. Blyth wrote them as follows:—"As you have expressed your wish to appoint Messrs. C. B. Blyth and Co. of Glasgow your agents for the sale of tin-plates in that city and its neighbourhood, upon their handing you my letter guaranteeing to you one-half the amount of monies they may at any one time be owing to you, I hereby become bound to you, and guarantee to you, for one-half the amount of any sum or sums, bill or bills, which Messrs. C. B. Blyth and Co. of Glasgow may at any time be owing to you, and ready at any time to execute any formal deed binding myself to you as guarantee above mentioned; and this letter shall be binding upon me ay and until the expiry of six months after I give you due and formal notice of withdrawing my guarantee. I hope your connexion with Messrs. C. B. Blyth and Co. will prove mutually advantageous, without which no connexion long continues. I feel confident no exertions will be spared on their parts, and I know there are none more capable of doing justice to your commission, and I have no doubt you will support them with stock of good quality. I remain," &c.

Pursuant to the agreement, a series of consignments of tin-plates was sent by Blakemore and Co. to R. B. Blyth and Co. of Edinburgh, who

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rendered monthly accounts of their sales, and of the stock on hand. In these accounts they charged themselves with the proceeds of the sales at the invoice prices; deducted a local charge of 6d. per box; and from the balance a commission of 5 per cent. For the nett sum Blyth and Co. granted their acceptances at six months, payable in London. One of the drafts (to which the others were similar) was in these terms:

"£215. 10. 6d. "Monmouth, Augt. 4. 1825.

"Six months after date, pay to our order in London, two hundred and fifteen pounds ten shillings and sixpence, for value delivered in tin-plates, as per advice."

(Signed) "Richd. Blakemore and Co."

(Addressed)
"To Messrs. R. B. Blyth and Co., Edinburgh."

On the 17th of February 1826, the estates of R. B. Blyth and Co. were sequestrated under the Bankrupt Act. They had granted bills, as usual, for the sales of July, August, and September preceding; but they were not paid when they fell due. No bills were granted, or payments made to Blakemore and Co., for the subsequent sales up to the date of the bankruptcy. A stock of unsold tin plates, then in the hands of R. B. Blyth and Co., was restored to Blakemore and Co. After giving credit for this, they remained creditors for £1940. 16s. 7d., but did not rank on the estate.

In December 1826, a composition of 5s. 6d. per pound on the debts of R. B. Blyth and Co. was offered, approved of by the Court, and a discharge granted.

In the mean time the estates of Charles B. Blyth and Co. of Glasgow had also been sequestrated, and they were then owing Blakemore and Co. £1036. 10s. 2d.

In April 1828, Blakemore and Co. raised an action against R. B. Blyth, libelling on the above agreement, as the constitution of a mercantile agency, and concluding, 1. For a statement of the sales of tin-plates, and for payment of the composition on the prices, so far as paid to him prior to sequestration; and, 2. For payment of the sums then outstanding, and subsequently uplifted by Blyth or his trustee; and, 3. For the amount of the composition on one-half of Charles B. Blyth's debt of £1036. 10s. 2d. under the letter of guarantee.

In defence Blyth pleaded—

1. That, under the agreement, he was a purchaser from Blakemore and Company, and not an agent; that he had offered a composition to his creditors on the faith that the proceeds of the sales were part of his estate; and the pursuers were barred from insisting against him on any other footing by their delay in not sooner making their present claim; and,

2. That he was only liable under his guarantee for one-half of the

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debt remaining due by Charles B. Blyth and Co., after deduction of any payments to account recovered by Blakemore and Company from their sequestrated estates.

The Lord Ordinary ordered Cases, under which only the question of agency was at present decided.

Pleaded for the Pursuers.—Blyth stood in the position of an agent, and not a purchaser. The pursuers agreed to send a stock of their tin plates, for the purpose of sale, to him, who was fixed to a minimum price in disposing of them; and it was only under a special provision that he could apply to 'his own account' any excess of price. The sole profit, therefore, of Blyth was (with that special exception) a commission on the amount of his sales, and six months credit on paying over the proceeds; and when any of these sales amounted to fifty boxes, he was bound to indorse the purchaser's bills to the pursuers, and give up his six months credit. As he stood del credere to them on his sales, they never inquired who were the purchasers, so long as he was solvent. It was plain, therefore, that he was a mere agent; and this was his own understanding, as appeared from the terms of his letter of October 1821, as well as of his guarantee for C. B. Blyth, and the surrender of the unsold tin-plates.

Pleaded for the Defender.—The pursuers forwarded a stock of their tin-plates to him, and kept a depôt of them in Edinburgh to accommodate him, and secure his exclusive custom. He thus acted as a middleman—that is, a purchaser for re-sale to other dealers. Whatever he took from the depôt, he took as a purchaser at the invoice price; and accordingly he never disclosed, nor was ever required to disclose, the names of the parties to whom he sold; and the pursuers received his monthly bills for the sales. But whatever was left in the depôt continued the property of the pursuers, and as such, it was returned to them on the defender's bankruptcy. The reason why he was allowed a commission on the amount of his sales was, that he might be stimulated to push the trade, and go on purchasing from the pursuers, and re-selling to his own customers; but whatever excess of price he obtained above a certain rate went all to his own account—a thing totally inconsistent with the idea of his being a mere agent. He had agreed not to undersell a certain minimum price, because he found it an accommodation to buy from the pursuers on the terms specified, and was willing to submit to some not unreasonable restrictions.

The Lord Ordinary reported the Cases.*

On advising, the Court were unanimously of opinion, that the defender

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* "NOTE.—The Lord Ordinary has taken the case to report, as involving questions of considerable difficulty. It appears to him that the defender, notwithstanding some peculiarities in the contract under which he acted, must still be considered as an agent under a del credere commission; and that had the pursuer intimated, at the time of the bankruptcy, to the purchasers who had prices in their hands, that they should pay only to him, he might have secured these sums. But it seems very ques-

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acted as an agent with a del credere commission, and that the mutual rights of the parties were to be adjusted on that footing, if the case were free from specialties. But their Lordships did not conceive the case to be sufficiently matured on the other points in the cause, and the following interlocutor was pronounced:—"In respect the defender admits that the pursuers are entitled to payment of the composition of 5s. 6d. in the pound on the sum of £1909. 17s. acknowledged to be due to the pursuers, and also upon the sum of £240. 19s. 1d. also acknowledged to be due by the defender under the guarantee for Charles B. Blyth and Co. to the pursuers,—decern against the defender for payment to the pursuers of the sum of £591. 9s. 5d., being the amount of the composition upon the said two sums, and which composition was payable, by three equal instalments, at four, ten, and sixteen months from the 23d day of December 1826, with the legal interest of each instalment from the respective terms of payment till paid; and allow an interim decree for the same to be extracted, without prejudice to the further claims of the pursuers in this action;—further find that the defender acted as agent for the pursuer;—but, before further answer, remit to the Lord Ordinary to inquire how far the defender, or his cautioners for the composition, have been or may be affected by any mora on the part of the pursuers in bringing forward their claim, and to do therein, and as to the other points of the cause, as to his Lordship shall seem proper."

MACKENZIE and SHARP, W. S.—G. TODD Jun.—Agents.

No. 244.

MRS. HELEN CUNINGHAM, Pursuer.—*D. F. Hope—More.*
A. M'GACHEN and Others, Defenders.—*Jameson—Whigham.*

Partnership—Proof—Process.—1.—Circumstances in which a claim for the joint expense of housekeeping, founded on an alleged agreement to that effect, was found not to be established.—2.—Under a summons libelling a special agreement as the ground of debt, a pursuer is not entitled to resort to other grounds.

Feb. 17. 1831. 2D DIVISION. Ld. Mackenzie. T.

THE late Mr. George M'Gachen, advocate, having been left an orphan when very young, the pursuer Mrs. Cuningham, the widow of a relation of his father, took charge of him, and he lived with her until his death in 1828. He died intestate, leaving property consisting of an heritable bond for £800, and 200 shares of the stock of the Scottish Union Insurance Company, with a few books, and other articles of trifling value. His immediate elder brother Alexander succeeded to the heritable bond, while

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tionable whether, since the pursuer took no steps to enable him to make such intimation, or to prevent payment being made to the trustee, and failed to make any claim in the sequestration, while a composition was offered and accepted, and caution found, on the understanding that these prices formed a part of the bankrupt estate, he can now compel the defender to pay them in full."

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his other brother John, and his sister, as nearest of kin, succeeded to the moveables. It was alleged that M'Gachen had, shortly before his death, expressed a desire that his whole property should be given in liferent to his sister; and that, in the event of her death, it should be equally divided betwixt his brothers John and Alexander. Accordingly John wrote a letter to his sister, binding himself not to interfere with these intentions in her favour, in so far as he had any claim upon the property; but the other brother Alexander declined to concur in this. Mrs. Cuningham (obviously with the intention of effecting what she conceived to be M'Gachen's will, and a more equitable distribution of his property) raised an action against his representatives for nearly £3000, libelling specially that she and M'Gachen "agreed and did live together in the same house, upon an arrangement and understanding that each of them should contribute equally to the support of the establishment; but, from various causes, the said George M'Gachen was prevented from regularly paying his equal share or proportion of the joint expense, and the whole thereof was in the mean time contributed, paid, and advanced by the pursuer, besides various other sums paid and advanced by her for and on account of the said deceased George M'Gachen, as after specified."

Appearance was made for Alexander alone, who denied the alleged agreement; and the only proof in support of it was, that M'Gachen held himself out, and was always understood to be, joint occupier with Mrs. Cuningham of the house which they first inhabited; that, on his coming to the Bar, a larger house had been taken, the rent for which had been, by a letter written by him, made payable by him and Mrs. Cuningham jointly, and that his name alone was on the door.

The Lord Ordinary (except as to certain small sums advanced in payment of M'Gachen's accounts) sustained the defences, and assoilzied without expenses.*

Mrs. Cuningham reclaimed, and contended that in the circumstances

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* "NOTE.— In the circumstances of this case, the Lord Ordinary is satisfied that it never was the intention of the pursuer, or the understanding either of her or George M'Gachen, that a debt for one-half of the expenses of keeping house should accumulate against him. Supposing that the pursuer had predeceased, and he had survived, the Lord Ordinary cannot think that her executors could have swept away the small funds which she had caused him to accumulate, and have held him personally liable, as a bankrupt, for the overplus of this one-half of the expenses of housekeeping. Though this would have been more inhumane, yet it would have rested on the same grounds of legal right as the present action by the pursuer against his funds on his death. In respect to the special sums, as Mr. George M'Gachen seems to have generally made such payments for himself, the Lord Ordinary does not think it is to be presumed that these were made for him animo donandi, nor any reason to hold that the pursuer made them with his money, of which no proof is offered. In respect to the other defenders, they do not appear, and nothing was craved against them."

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she was entitled to charge board against M'Gachen, and that it could not be presumed she intended to maintain him gratuitously.

LORD JUSTICE-CLERK.—In this summons a special agreement is libelled, and therefore I do not see how the pursuer can get in her argument upon a claim for board and maintenance. Now, although it is most clearly proved that this lady behaved in the kindest and most generous manner to Mr. M'Gachen, there is not a vestige of evidence in support of this special allegation of joint housekeeping. Mr. M'Gachen's name on the door as advocate saved the lady from taxes. The intention here is very obvious; but the attempt to alter the succession by this summons can never be sustained by the Court.

The other Judges concurred.

THE COURT accordingly adhered.

CAMPBELL and MACK, W. S.—J. HANNAY, W. S.—Agents.

No. 245.

DAVID SMITH, Pursuer.—*Rutherfurd.*
THOMAS FALCONER and Others, Defenders.—*Hunter.*

Triennial Prescription—Agent and Principal.—Circumstances in which the triennial prescription was found to be elided by the letters of a factor, as constructively the writ of party.

Feb. 17. 1831.

2D DIVISION.
Ld. Fullerton.
F.

MR. HAMILTON of Holmhead, and several other gentlemen, were joint proprietors of the Cowcaddens stone-quarry, near Glasgow, from 1814 to 1820. Falconer was factor and agent for Hamilton, (who had the principal interest in the quarry); and, with the consent of all the proprietors, he took charge as manager and superintendent. It was the practice to let the quarry by granting a lease of a portion of the rock to one or two tacksmen jointly for a few years, under certain restrictions and conditions of working. The pursuer David Smith, land-surveyor, was employed by Falconer, on the part of the proprietors, to ascertain whether in any part the specified depth was exceeded, or the tack otherwise infringed upon; and Smith reported from time to time to Falconer the state of the quarry, and of the workings. In 1827, Smith raised an action against the proprietors, and Falconer "as their receiver and disburser of the whole sum arising from the quarry," concluding for payment of an alleged balance on his accounts for his services, and relative outlay.

As the latest article of the accounts libelled on was dated the 21st of July 1820, the defenders, inter alia, pleaded prescription; and the chief question came to be, whether this plea was elided by letters of Falconer. It was admitted that Falconer took the chief management and superintendence of the quarry, and that he drew the rents, and accounted to the proprietors, or their separate agents. In reference to an application for payment of his accounts, Hamilton wrote to the pursuer's agent in these terms:—"Ardrossan, 22d May 1826.—Sir, I some time ago received your letter, with Mr. Smith's account, which being upon a subject that I know nothing of personally, I have instructed Mr. Falconer to join Mr.

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Grahame, in meeting you, to settle it in a proper manner," &c. Falconer also had written to the same person thus:—"Glasgow, 28th April 1826. —Dear Sir, I have received your letter of the 26th, regarding Mr. Smith's claim against the proprietors of the Cowcaddens quarry. I cannot conceive that they are indebted to him to any such extent as that mentioned by you; but certainly, whatever his claim may be, it would be ms t agreeable to me that the same were adjusted and settled," &c. In another letter, in reply to one from the pursuer's agent, intimating the intention of raising an action, Falconer wrote:—"Glasgow, 23d November 1827.—Sir, I am favoured with your letter of the 21st, and obliged for the intimation. There is an old claim of Mr. Smith against the proprietors of the Cowcaddens quarry, which certainly ought to be adjusted and settled, and it will be as agreeable to the proprietors and their agents, as it can be to Mr. Smith, to have this done," &c. These letters, the pursuer contended, must be held constructively to be the writ of the defenders, and were sufficient to elide the plea of prescription.

On the other hand, the defenders maintained that the statute expressly limited the proof to the writ or oath of party; and that the correspondence proved the reverse of an acknowledgment of the debt, even on the part of Falconer.

The Lord Ordinary found that the letters of Falconer were not sufficient to elide the plea of prescription, and therefore assoilzied, adding the subjoined note.*

Smith having reclaimed, the Court altered, found that the letters of Falconer were to be held constructively the writ of the other defenders, and that they imported a sufficient acknowledgment of the debt to elide the plea of prescription; and remitted to the Lord Ordinary to proceed accordingly.

Lord Cringletie.—I think the principle of some of the decisions quoted by the defenders might be carried to a mischievous extent. These cases cannot be held to refer to instances where the principal debtor has no knowledge or management of the matter himself, but must just refer to those where the manager is

* "Note.—If the conclusions of the summons against the defender Falconer were to be held as importing his personal liability, his defence on that point must have been sustained, as no ground is laid, either in the summons itself, or in the record, for subjecting him to said liability. The summons describes him as agent of the proprietors, and bears that he has been required to pay, as "the receiver and disburser of the whole sums arising from the quarry." It therefore appears to the Lord Ordinary that the conclusion against him must be held to be limited to a responsibility in these characters. Considering the letter of the defender Mr. Hamilton, of the 22d of May 1826, expressing his ignorance of the state of the pursuer's account, and his instructions that it should be adjusted by Mr. Falconer, the Lord Ordinary is inclined to think that the letters of Mr. Falconer might be held constructively to be the writ of Mr. Hamilton himself. But those letters do not seem sufficient to exclude the plea of prescription, as they do not amount to an acknowledgment of any debt being actually due by the defenders to the pursuer."

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under a principal. I think in this case Mr. Falconer had clearly the sole management, and that the letters of Mr. Falconer and of Mr. Hamilton go to prove this, and also the existence of the debt.

Lord Glenlee.—I am entirely of that opinion. The import of the decisions is just this, that where a business is carried on by direction or interference of a principal, though having a manager under him, the principal is the one to look to. But here the principals had no superintendence. As to the import of the letters, I am much inclined to treat a correspondence of this sort as if it were a reference to Falconer's oath. I do not think it is absolutely necessary that there should be an out-and-out admission that this debt is due to the full extent. Falconer says, in his letter of the 23d of November 1827, "there is an old claim which ought to be settled." This admits a claim unsettled. I think there is sufficient to elide the plea of prescription, and parties must go into the charges.

Lord Meadowbank.—I have no doubt of the law as stated by your Lordships; but my doubt rests upon the letter of the 28th of April 1826, as not exactly importing an admission of the debt. It only says, "whatever his claim may be," &c. I think it rather stretching the point to hold an admission of the debt from this correspondence.

Lord Justice-Clerk.—My opinion is, that the letters admit the claim, but deny the extent of it. This I think their true construction. Then the letter of the 23d of November 1827 clenches the whole, and clearly admits an unsettled claim. I agree that the cases of præpositura are very different from the present; for instance, the case of a housekeeper. It would be too much to refer to the oath of the housekeeper a debt against one's self. Every man is understood to take a certain management in his own house, and is bound to look after his own affairs. But this is a case of entire management, without intervention of the principal. Could Falconer not have been directly pursued? The Lord Ordinary evades that in his interlocutor. I think the plea of prescription elided. The quantum of the debt is another question.

Pursuer's Authority.—Buchanan, Nov. 20. 1828, (ante, VII. 35.)

Defenders' Authorities.—1579, c. 83; Marquis of Annandale, Feb. 11. 1724, (11101); Bruce, Dec. 10. 1765, (11109); Gilmour, June 20. 1797, (12042.)

A. Douglas, W. S.—Gibson and Hector, W. S.—Agents.

No. 246.

J. Spence, Pursuer.—*Skene—Currie.*
F. Grahame, Defender.—*Sol.-Gen. Cockburn—Buchanan.*

Feb. 17. 1831.

Special case of accounting involving no question of law.

2d Division.
Ld. Fullerton.
T.

W. Elmslie,—J. J. Fraser, W. S.—Agents.

GEORGE HUNTER, Pursuer.—*Sol.-Gen. Cockburn.*
COCHRANE'S TRUSTEES, Defenders.—*Forsyth—Maconochie.*

No. 247.

Hunter v. Cochrane's Trustees.

Process—Partnership.—1.—Objections to the report of a surveyor as to the value of an estate having been repelled, and the report approved of, incompetent afterwards to bring forward further objections that the value of woods, minerals &c., had not been specially considered and included.—2.—One of two joint proprietors of an estate purchased on speculation, not allowed to charge a commission for his trouble in management.

Feb. 18. 1831.

2D DIVISION. Ld. Mackenzie. T.

THE pursuer Hunter, and the late Honourable Basil Cochrane, purchased jointly the estate of Auchterarder as a speculation, which led to a long litigation, wherein it was settled that Cochrane should take the estate at a valuation to be made by a valuator mutually agreed on. A report was thereafter made by the valuator, stating his opinion as to what was a fair price for the estate generally, without specifying any particular value as put upon the woods, minerals, &c.; but specially excepting from the valuation a share of a common muir, in respect he did not consider himself a good judge of such property. Objections were given in by Hunter to this report, which, however, was finally approved of, and the value of the muir was also settled as mentioned ante, VIII. 171. Thereafter Hunter put in a minute, craving that, in addition to the value put upon the estate by the surveyor, additional sums ought to be allowed for the church-seats attached to the estate, for the woods, and for the minerals; and he also claimed a commission for alleged trouble in managing the estate, while it remained in the joint possession of the parties.

To this it was answered, that though no value was specified by the reporter as separately effeiring to the church-seats, woods, and minerals, these were necessarily included in his general valuation of the estate, which having been now approved of, it was incompetent to bring forward these special objections; and as to the claim for commission, that the whole transaction having been a joint speculation, neither of the parties could be entitled to commission, unless specially stipulated for and agreed to.

The Lord Ordinary found, "that after the approval of Mr. Brown's report, which is final, it is not competent for the pursuer to bring forward the present objections;" therefore repelled them, and also the claim for commission.

The Court adhered.

D. FISHER, S. S. C.—T. PAUL, W. S.—Agents.

No. 248.

Feb. 18. 1831. Lawson v. Burman.

JAMES LAWSON, Advocator.—*Pyper.*
PETER BURMAN, Respondent.—*D. F. Hope.*

Compensation—Bona Fides.—Circumstances in which a plea of compensation was repelled, as not in bona fide.

Feb. 18. 1831.

2D DIVISION. Ld. Mackenzie. T.

BURMAN raised an action in 1828 against Lawson, before the Sheriff of Forfarshire, for £102. 10s., being the balance of the price of 20 stots which the latter had purchased from him. Lawson pleaded compensation on a bill for £300 sterling, dated 16th January 1815, which he produced with the diligence thereon. The Sheriff having repelled the defence, Lawson brought an advocation, in which the Lord Ordinary pronounced the following interlocutor, embodying the material parts of the case:—"Finds it proved that the sale of the cattle libelled was for a price to be paid immediately;—finds it proved that the claim on which the advocator now attempts to plead compensation is an old claim, which had been long ago intended to be, and considered by the parties to be settled, and which is now very doubtful;—finds, in these circumstances, that the advocator is not in bona fide to plead compensation on that claim; therefore remits the cause simpliciter," &c.

The Court adhered.

MACMILLAN and GRANT, W. S.—D. FISHER, S. S. C.—Agents.

No. 249.

Feb. 19. 1831. Morland v. Sprot.

CHARLES MORLAND, Petitioner.—*More.*
MARK SPROT, Respondent.—*Jameson.*

Cautioner—Curator—The cautioner for a curator bonis held not liable for a bill as forming part of the curatorial estate, which, after the expiration of the curatory, was delivered to trustees (of whom the curator was one) under a deed of settlement executed by the party who had been under curatory; and the contents of which were thereafter recovered by the curator qua trustee.

Feb. 19. 1831.

1ST DIVISION. Ld. Moncreiff. D.

MR. BOYD of Mertonhall was named factor or curator bonis on the estate of William Angus, a person in imbecility, and Mr. Sprot became his cautioner. Boyd, along with certain other parties, had granted a promissory note for £400 to Angus, of whose curatorial estate it formed a part, and as such was given up in the inventory. After it had fallen due, and some time prior to 1825, Angus died, whereby the curatory came to an end. Previous to his imbecility, Angus had executed a trust-deed of settlement, under which Boyd was, with others, appointed trustees, and he afterwards acted as agent of the trustees.

In 1826 Boyd became bankrupt; and the other trustees being dead or abroad, Mr. Charles Morland was named curator bonis on the trust-estate. He then raised an action of accounting against Boyd as the curator of Angus, and Mr. Sprot as his cautioner, in which a question arose, inter alia, whether Mr. Sprot was liable for the contents of the

note for £400. On 4th December 1829, the Court, on reviewing a judgment of Lord Fullerton, ordered a remit to an accountant, before answer, "to report whether the £400 contained in the promissory note was recovered by Mr. Boyd during the subsistence of the factory; or whether the said £400 was outstanding and unpaid in the year 1825, and the promissory note for the same was then in the hands of the agent for the trustees."

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The accountant reported "that the whole contents of the promissory note for £400 were unpaid to Mr. Boyd previous to the 5th of July 1825, and that the bill was in the hands of the agent for the trustees at that date."

The Lord Ordinary then ordered a minute from Morland of the precise date at which the contents of the note were paid to Boyd. From this it appeared that they had not been paid sooner than the 2d of December 1825; and that two-thirds, with interest at four per cent., were then received by Boyd, who granted this holograph acknowledgment in pencil, addressed to one of the acceptors:—"Mr. Marshall and Mr. M'Bryde (two of the co-acceptors) have paid your father's bill to Mr. Angus at the rate of four per cent. interest, which I hope will be accepted of, and I shall give you the bill the first time I am at home, to show it is discharged, all but the one per cent. difference of interest." The Lord Ordinary, "in respect it is admitted that the bill for £400 was in the hand of the agent for the trustees of Mr. Angus on the 5th of July 1825, and that the cautioner for Mr. Boyd consents that the balance against him shall be held as struck at the 29th of November 1825; and that it is admitted that the bill for £400 was not paid prior to that period, adheres to the principle of Lord Fullerton's interlocutor, and finds that the said bill can form no charge against the cautioner; and, with this finding, of new remits to the accountant to bring down the balance of the curatorial accounts, and to report,—reserving all questions as to the expenses."

Morland reclaimed, and pleaded that Boyd should have recovered the contents of the note while curator, and therefore his cautioner was liable; but at least, as he was one of four co-acceptors of the note which fell due during the curatory, he must be held to have had his own proportion of it actually in his hands as curator; and consequently his cautioner was in the same situation in the accounting for this fourth part as for any other sums which came into the hands of Boyd as curator, and were not now forthcoming.

Sprot answered—It was now proved that the sum in the note had not been uplifted, and it had not been prescribed during the curatory, which was of short duration. It was a good document of debt at its close, and was put into the hands of Boyd as the agent for the trustees, and consequently the cautioner could not be responsible for it or its contents. Besides, several years elapsed after the expiry of the curatory before any of the

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Morland v. Sprot.

contents of the note were recovered, so that it was as trustee, and not as curator, that Mr. Boyd had intromitted with the amount.

The Court unanimously adhered, and allowed additional expenses.

J. Donaldson, W S.—Steuart and Sprot, W. S.—Agents.

Morrice v. Scott &c.

No. 250.

Alex. Morrice (for Aberdeen Bank), Pursuer.—*D. F. Hope—Lumsden.*

David Scott and Others, Defenders.—*Skene—Rutherfurd—Moir.*

Cautioner—Mora—A party operating on a cash-credit dated in 1804, having become bankrupt in 1825; and his three co-obligants being some time predeceased—Held, that although the credit had been rarely operated on for five years, and not at all for two years prior to the bankruptcy, and no intimation of the death of co-obligants had ever been given by the Bank, the bond was still effectual against their representatives.

Feb. 19. 1831.

1st Division. Ld. Corehouse. D.

In 1804, a bond for a cash-credit of £500 was granted to the Aberdeen Banking Company by George Burnet, John Wilson, James Scott, and William Scott, to be operated upon in the name of Burnet. James Scott died in 1815, John Wilson in 1818, and William Scott in 1822. In December 1820, the balance against Burnet was £516. 2s. 7d. From that date till December 1821, only four transactions took place on the debit side, and two on the credit side of the account, leaving Burnet debtor for £520. 19s. 3d. Till December 1822, eleven drafts were entered to Burnet's debit, and two payments to his credit, leaving a balance against him of £530. 14s. 10d. Till December 1823, only one transaction appeared on each side of the account, and the balance against him was £559. 4s. 4d. In June 1825, he effected a loan of £500 from a public establishment in Aberdeen, and the Bank discounted a bill of his for £150 on the 21st of November; but, between December 1823 and December 1825, no transaction whatever took place on the account. In that latter month Burnet became bankrupt, and, by the annual addition of interest, the balance against him was £606. 2s. 2d. Until recently before his bankruptcy, he enjoyed general good credit as a merchant.

In December 1828, Morrice, as cashier of the Aberdeen Bank, raised an action against Burnet, and also against David Scott and others, the representatives of the three deceased co-obligants in the bond, concluding for £442. 13s. 3d. as the balance then due on the cash-account of Burnet, besides a certain sum of interest. It appeared from the account that Burnet had been occasionally allowed to overdraw his credit.

Burnet made no appearance; but the other defenders stated in defence, that the Bank knew that the deceased obligants were truly cautioners, though nominally co-obligants; that it was the practice of respectable banking establishments to give notice to co-obligants when one of their number died; but the Bank had omitted this, though in the perfect know-

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ledge of the successive deaths of the parties; that they, the representatives, could have got Burnet to pay up his bond, had they been duly advertised of its existence, even as late as the last death in 1822; that the cash-credit had not been fairly operated on, in the ordinary course of business, (as all the cautioners had a right to rely that it should be, so long as not called up,) because, for five years prior to the bankruptcy, there were only few and small operations, and for the last two years none at all; and that the Bank had long known Burnet to be in embarrassed circumstances, but had concealed this from the cautioners. The defenders also made a special objection to the account, as including certain overdrafts, and interest on them; and the son of one of the cautioners, named Wilson, further alleged that he had been told by the pursuer, on his father's death, that his father lay under no obligation to the Bank.

The pursuer denied the alleged practice of banks, and any knowledge of Burnet's embarrassments till very recently before his bankruptcy; and he maintained that it was the duty of co-obligants to look to each other, and to notify to the bank when any of their number died; that representatives were equally bound with their predecessors, and if they wished to withdraw, they ought to have insisted on the bond being retired; that although the cash-account was latterly less frequently operated upon, this did not dissolve the obligation in the bond; and that the statement by Wilson was not true.

The Lord Ordinary "found that the defenders have not proved, or offered competently to prove delay, irregularity, or negligence on the part of the Banking Company of Aberdeen, sufficient to relieve them from the cautionary obligation in question, and therefore decerned in terms of the libel;" but found no expenses due.*

The defenders reclaimed, and stated that, about the year 1821, a change took place in the mode in which the Bank dealt with Burnet, in respect that subsequently they never placed the proceeds of bills discounted by

* "NOTE.—It is admitted that the representatives of the cautioners are liable, in express terms of the bond, to fulfil an obligation which their predecessors undertook. It is not stipulated that when any of the obligants dies, or becomes bankrupt, notice should be sent to the co-obligants or their representatives; and whatever may be the practice in some banks, it is not offered to be proved that there is a general usage to that effect. It is not competent to prove by parole evidence that the pursuer told the defender Alexander Wilson, in a conversation twelve years ago, that Wilson's father owed nothing to the Aberdeen Banking Company. The documentary evidence, which is said to prove that the Banking Company knew Burnet to be in labouring circumstances for some years before his bankruptcy, is not conclusive; and, lastly, it is thought that the cautioners in a bond for a cash-account are not freed from their obligation, because the person for whose behoof it is granted does not operate upon it frequently, or ceases to do so for a period of one, or even two years, before his bankruptcy. But the pursuer, in propriety, and for the manifest convenience of the defenders, ought to have given them notice when the events alluded to took place, and his indifference to their interest seems a fit ground on which to withhold expenses."

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Rome v. Halden.

him to his credit in the cash-account, although they had usually done so before that period. The Court ordered the pursuer, before answer, to produce a note of the bills discounted for six years prior to the 1st of December 1821, and the correspondence between the Bank and the co-obligants relative to the cash-accounts for five years prior to the bankruptcy, and to the date of the action.

From the productions made under this order, it appeared that no marked change had taken place in the Bank's mode of dealing with Burnet at the time alleged, and that no letters had been sent by the Bank to the co-obligants relative to the account, except the mere formal demand of payment preparatory to raising the summons.

On resuming the case, their Lordships "adhered in so far as respects the general liability of the defenders for the sum due to the pursuers under the bond libelled on; but remitted to the Lord Ordinary to hear parties as to the amount of the alleged overdraft, and its effects upon the balance concluded for against the representatives of George Burnet's co-obligants, and to do therein as to his Lordship shall seem just."

THEIR LORDSHIPS were understood to rest their judgment on the grounds stated in the Lord Ordinary's note.

J. TURNER, W. S.—INGLIS and DONALD, W. S.—CARNEGY and SHEPHERD, W. S.—Agents.

No. 251.

ANDREW ROME, Petitioner.—*W. Bell.*
JAMES HALDEN, Respondent.—*Rutherfurd.*

Bankrupt—Sequestration.—A party having been assoilzied with expenses from an action raised by a bankrupt, and insisted in by the trustee,—the subsequent decree of discharge and exoneration in the sequestration qualified by a reservation of the claim for these expenses, but limited, as against the bankrupt, to the composition on any claim falling under the sequestration.

Feb. 19. 1831.

1ST DIVISION. H.

ROME, a bankrupt under sequestration, petitioned, along with his trustee, for approval of an offer of a composition of 1s. per pound, and for discharge and exoneration respectively. He offered caution, as usual, for the composition, and the expenses of the sequestration. Halden, who had not ranked, opposed this on account of alleged unwarrantable litigation which had been instituted against him by the bankrupt before sequestration, and insisted in by the trustee, from which he had been assoilzied; and he maintained that either the decree should not be pronounced till his expenses were paid, or it should only be pronounced under reservation of his claim for expenses.

The Court pronounced the usual interlocutor approving of the composition; but "reserving to the respondent James Halden his whole claims against the trustee William Hamilton jun., and the whole of the creditors ranked on the estate, or concurring in the petition for discharge, and particularly for the expenses found due to the respondent in the conjoined actions mentioned in the respondent's answers,—and also reserving to

these parties all competent objections, as accords,—declaring that the above reservation, as against the bankrupt, shall not be held to give the respondent or his agent a right to receive more from him than the composition on the amount of any of the said claims which may be found to fall under the sequestration."

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Feb. 19. 1831.
Rome v. Halden.

M'Gregor v. Gibson &c.

HUNTER and WHITEHEAD, W. S.—SCOTT, FINLAY, and BALDERSTON, W. S.—Agents.

ROBERT M'GREGOR, Advocator.—*Thomson.*
JOHN GIBSON and Others, Respondents.—*Skene—Wilson.*

No. 252.

Bill of Exchange—Proof.—The drawer of a bill having pursued the acceptors for relief of a proportion of its contents, upon the allegation that all parties had joined in the bill for the accommodation of a third person not named therein—Found that the joint liability created against the acceptors, ex facie of the document, must receive effect, subject to the admitted proportional restriction, unless taken off by the writ or oath of the drawer.

M'GREGOR drew a bill at three months, dated the 21st of February 1826, for £72. 10s. sterling, upon Andrew and John Gibson, which they accepted. It was alleged by M'Gregor that this bill was so drawn, accepted, and afterwards negotiated, solely for the accommodation of Wardlaw, a third party, whose name did not appear on the bill, and that the proceeds were applied to his use. Wardlaw having become bankrupt, and the bank at which the bill was discounted having raised diligence thereon, part of it was paid by Andrew Gibson, and the balance of £54. 7s. 6d. by M'Gregor. An action was then raised by M'Gregor before the Sheriff of Fife against the Gibsons, proceeding on the footing that each was liable in one third part of the bill, and, after giving credit to Andrew for what he had paid, concluding for relief accordingly. The defenders denied M'Gregor's allegation, and stated that they had accepted the bill for the accommodation of the pursuer and his brother; and that they knew nothing about Wardlaw, who, it appeared, was in trade with the pursuer and his brother; and they maintained that he could only prove his allegation by their writ or oath.

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2D DIVISION.
Ld. Fullerton.
F.

The Sheriff, in respect that "no sufficient evidence has been condescended on by the pursuer to instruct that the application of the proceeds of the bill was made with the knowledge or concurrence of the defenders, so as to warrant the pursuer's claim, found that the pursuer can only prove the averments, upon which he rests his claim, by the oaths of the defenders."

M'Gregor having advocated, the Lord Ordinary remitted the case to the Sheriff, "with instructions to recal the interlocutor complained of; to find, in respect the pursuer's averment of the equal responsibility of himself and each of the defenders for the amount of the bill truly forms, in a question between these parties, a restriction of the liability appearing, ex facie of the bill, to be contracted by the defenders, that that averment

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Feb. 19. 1831. M'Gregor v. Gibson &c.

must be sustained, unless disproved by the pursuer's writ or oath; and, with this finding, to proceed in the disposal of the cause in usual form, and agreeably to the merits of the case, as they may be ultimately ascertained." His Lordship added the subjoined note.*

Gibsons reclaimed; and, besides the above plea, they maintained that they were not bound to refer to M'Gregor's oath an allegation on their part, that he had not handed over the proceeds to Wardlaw.

LORD GLENLEE.—All that is to be referred to the pursuer's oath is the nature of this transaction; but it will still be open to prove aliunde on the merits, as to payment, that M'Gregor never gave the money to Wardlaw.

Skene for the Respondents.—If that question be open, I have no objection to the Lord Ordinary's interlocutor.

THE COURT accordingly adhered.

Advocator's Authorities.—Wallace v. Barrie, Nov. 20. 1793, (1484); Barrie v. Murdoch, Feb. 15. 1822, (ante, I. 328); Dixon v. Boyd, June 7. 1827, (ante, V. 773.)

Respondents' Authority.—Halliday, Dec. 13. 1826, (ante, V. 116.)

A. WILSON, S. S. C.—J. DONALDSON, S. S. C.—Agents.

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* "NOTE.—The acceptors are, by the form of the document of debt, held to be the parties truly liable in payment in all questions with the drawer. In accommodation bills the same presumption holds, and it is not taken off even by the admission of the drawer that he discounted the bill, when that admission is qualified by the statement that the proceeds were handed over to the acceptor; Wallaces v. Barrie, Nov. 29. 1793; Barrie v. Murdoch, Feb. 15. 1822, (Shaw, I. 328.) It does not appear to the Lord Ordinary that the application of the rule in question is affected by the admission of the drawer, in the present case, that the bill was intended for the accommodation of, and the proceeds received by a third party (Wardlaw) different from the acceptor; because still the acceptor, being the party properly bound by the form of the document, must be held to have contracted, in regard to the drawer, a liability for the accommodation so afforded to that third party; and there is evidently, to say no more, as little reason for holding as extrinsic, in such a case, the qualification that the third party drew the proceeds with the knowledge and at the desire of the acceptor, as there would have been in the case of Wallaces v. Barrie for rejecting, as extrinsic, the qualification attached to the drawer's admission of discounting the bill, that he paid over the money to the acceptor. The principle which seems to be adopted, and, as it appears to the Lord Ordinary, justly adopted in such cases, is, that amongst the parties to a bill, whether an accommodation bill or not, the liabilities created ex facie of the document must receive effect, unless taken off by the writ or oath of the apparent creditor. The burden of proof seems clearly to lie on the party who avers that the liability really contracted was different from that appearing to have been contracted on the face of the document of debt. But there is the less difficulty here, as, even on the supposition of a less rigorous construction of the liability of parties to a bill admitted to be an accommodation bill, there can be no doubt that the acceptors must be presumed to have contracted at least an equal responsibility with the drawer, unless the contrary be made out by the requisite proof; and that is all which is necessary to support the pursuer's demand, as set forth in the summons."

LAWRENCE WILSON, Pursuer.—*Cuninghame.*
WILLIAM BEVERIDGE, Defender.—*Christison.*

No. 523.

Feb. 19. 1831.
Wilson v. Beveridge.

Judicial Examination.—Circumstances in which judicial examination of copartners allowed before answer.

Special case of accounting between copartners, in which the Lord Ordinary, with reference to a question, as to how long one of them was to be considered to have been a partner of a certain concern, "before answer, appointed the parties to be judicially examined," on grounds appearing from the subjoined note.*

Feb. 19. 1831.

2D DIVISION.
Lord Medwyn.
T.

The Court adhered.

W. RENNY, W.S.—W. H. SANDS, W.S.—Agents.

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* "NOTE.—There is a vagueness in the denials of the defender, and a want of explicitness in his statements, which, in a case such as this, between partners acting in all the confidence of such a connexion, warrants, in the opinion of the Lord Ordinary, the judicial examination of the defender, as likely, with the facts which appear already sufficiently established, to decide the cause without further proof. The parties seem to have dealt very confidentially and loosely together. The contract of copartnery was at first verbal, and, after some time, was reduced into writing by means of a minute neither very formal nor business-like. It is admitted that the pursuer was to take the active charge at the mill, on which account he was to have a half share, while the defender and the other partner Kirk were each to receive one-fourth. Kirk is said by the pursuer to have retired in 1819; and although this is disputed by the defender, it is admitted that he died in 1821. But the defender does not allege that any alteration was made on the shares of the remaining partners, which would have been necessary, if he still was in the concern. It seems quite plain that a considerable change took place, subsequent to June 1820, in the mode of carrying on the business—not decisive, indeed, of the pursuer being the sole partner, but certainly not very reconcileable on any other principle. The social firm is no longer used in bills granted. The defender himself settles an account for a correspondent at Perth, in May 1821, with the pursuer as an individual, while, in April 1820, he had settled another with the firm. Then the nature of the business is twice changed subsequent to 1820, without any communication with, or remonstrance from the defender. For some of the first years of the concern, the defender had sold many of the goods of the company, occasionally superintended the books, and granted accommodation-bills for their behoof—none of which he appears to have done subsequent to 1819. On the other hand, the denial of the averment as to the retirement of M. and J. Beveridge's bills is material, and the Lord Ordinary does not observe that the averment is corroborated by production of the bills. Further, the pursuer's statement as to a dissolution is rendered probable by the defender, an active man of business, not having asked for a settlement for so many years, or even so much as made an inquiry, so far as is seen, as to how the concern was going on. Although the light, which is defective in the case, will most probably be obtained by the examination of the defender, the examination of the other party has been allowed also, in case the defender should require it."

No. 254.

Feb. 22. 1831.
2D DIVISION.
Bill-Chamber.
Ld. Moncreiff.
F.

Black v. Bell.

DAVID BLACK, Suspender.—*Keay—Christison.*
JOHN BELL, Charger.—*D. F. Hope—Neaves.*

Bill of Exchange.—Bill of suspension, on caution, of a charge upon a bill of exchange on a general allegation of usury, and of a partial payment not credited. There being no reference to oath in the bill of suspension, the Lord Ordinary refused it; and the Court concurring with his Lordship on advising a reclaiming note, an offer of reference was then made, which their Lordships remitted to the Lord Ordinary to receive.

W. MILLER, S. S. C.—J. LEVEN, W. S.—Agents.

No. 255.

Feb. 22. 1831.
Cowan v.
Campbell.

JOHN COWAN, Suspender.—*Gillies.*
PETER CAMPBELL, S. S. C. Charger.—*J. Anderson.*

Law Agent—Meditatio Fugæ—Mandatory.—Law agent in an application for a meditatio fugæ warrant, in a jurisdiction where the applicant was not resident, not considered responsible as a mandatory.

Feb. 22. 1831.

2D DIVISION.
Ld. Fullerton.
T.

IN January 1829, an application was presented to the Justices of the Peace of Dumfries-shire at the instance of Agnes Watt, to have Cowan apprehended as in meditatione fugæ. Cowan having removed to Edinburgh, a petition was presented to the Justices of that county, on which a warrant was granted in common form. In this second application, the charger Campbell, S. S. C., acted for Watt under the ordinary mandate to an agent, and he subscribed the papers as "acting for, and procurator for the petitioner." A bill of suspension at the instance of Cowan, directed both against Watt, and against Campbell as her mandatory, and resting chiefly on the ground of an erasure in the warrant, having been passed, as mentioned ante, VII. 272. 558, (which see,) the letters were expede; and no appearance being made for Agnes Watt, the letters were, quoad her, suspended simpliciter. Campbell, however, appeared, and objected to his having been made a party at all. But, instead of discussing this as a preliminary question, and although the question was now necessarily limited to a claim for expenses of process against him on Cowan's part, a record was made up with him. In support of this claim, Cowan pleaded that Campbell had exercised the character of a mandatory, having signed papers in the proceedings both as 'procurator,' and as 'acting for' Watt; and that although Watt was in this country, there was a peculiarity in a case regarding an application for a meditatio fugæ warrant, which rendered it necessary, where it was made in a jurisdiction in which the applicant, though within Scotland, did not reside, that the applicant should have a proper mandatory, who could himself make oath; and consequently that Campbell was to be considered as having incurred the responsibility of a mandatory.

The Lord Ordinary found no expenses due on either side; and the Court refused a reclaiming note for Cowan, without calling on Campbell's counsel to answer. No. 255.

Feb. 22. 1831.
Cowan v. Campbell.

W. Martin, S. S. C.—P. Campbell, S. S. C.—Agents.

Sinclair v. Erskine.

George Sinclair, Advocator.—*D. F. Hope—Shaw.*
C. W. T. Erskine, Respondent.—*Maitland—Neaves.* No. 256.

Agent and Clerk.—Action by Erskine, who had been for two years clerk in the employment of Sinclair, writer in Glasgow, for remuneration. The defence was an allegation of misconduct, negligence, and desertion. The Magistrates of Glasgow, before whom the action was brought, allowed a proof of this defence; and having found that Sinclair had failed to make out his allegations, they decerned in favour of Erskine for £50 per annum as a fair remuneration; and, in an advocation, the Lord Ordinary and the Court remitted simpliciter.

Feb. 22. 1831.
2d Division.
Ld. Fullerton.
T.

C. Fisher,—J. Cullen, W. S.—Agents.

Alexander Dewar, Suspender.—*Cuninghame—Shaw—Speirs.*
Robert Munnoch, Charger.—*Keay—Moir.* No. 257.

Feb. 23. 1831.
Dewar v. Munnoch.

Process—Partnership.—In an action to constitute a debt against a company, although dissolved and bankrupt, all the partners must be called.

The suspender had been a partner of the company of Robert Dewar and Co., which was dissolved and bankrupt. The charger raised an action before the Magistrates of Glasgow for the balance of a debt said to have been contracted by the company previous to its dissolution. In this action he only called as defender Alexander Dewar, the suspender. The Magistrates repelled a preliminary defence that the other partners ought to have been called, and sustained the action against the suspender, "in respect the defender has not denied the alleged bankruptcy and dissolution of the company by which the debt libelled is alleged to have been contracted.

Feb. 23. 1831.
2d Division.
Ld. Fullerton.
T.

In a suspension of the Magistrates' ultimate judgment, Dewar repeated, inter alia, this preliminary objection, maintaining that where a debt was not constituted, the circumstance of dissolution or bankruptcy was no reason why all parties interested should not be called.

The Lord Ordinary found "that, in the action before the Magistrates, all parties interested were not called, and therefore sustained that reason of suspension," &c.

The Court adhered.

Suspender's Authorities.—Thomson, July 2. 1812, Mactavish, Feb. 3. 1821, Stevenson and Co. Nov. 14. 1757, (14560); Reid, July 11. 1814, (F. C.); Crawford, Nov. 16. 1752; Bell and

No. 257.
Feb. 23. 1831.
Dewar v. Munnoch.

Others, July 8. 1822, (1. Shaw's App. Ca. 220); Johnston, Jan. 20. 1824, (ante, II. 225); Geddes, June 2. 1827, (ante, V. 747, and VI. 193.)

Charger's Authorities.—Thomson, (ante, V.); Bell, II. 618.

A. P. HENDERSON,—JAMES MALCOLM,—Agents.

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Feb. 24. 1831.
Paisley Union Bank v. Hamilton &c.

PAISLEY UNION BANK, Chargers and Pursuers.—*D. F. Hope—Jameson—Penney.*
WILLIAM HAMILTON, Suspender and Defender.—*Murray—J. Paterson.*
DAVID MARSHALL and Others, Defenders.—*Rutherfurd—Anderson—W. Bell.*

Process—Diligence—Cautioner—Bank Agent.

1. Where it was provided in a bond by a bank agent that a stated account from the bank books, 'certified and signed by the cashier,' should constitute the balance against the agent—Held that an account merely dated and subscribed by the accountant and cashier, although having the letters E. E. (errors excepted) subjoined, was sufficient, without further certificate, to warrant diligence on the bond.

2. Untaxed law expenses, in relation to bills for which the agent was liable, incurred by the bank after the agency had terminated, not a proper charge in the certified account to the effect of summary diligence.

3. The agent being bound to account to the bank, whoever might be the partners for the time, and to the cashier for the time; and execution being made competent, either at the instance of the bank or of the cashier; and horning being raised in name of the partners and cashier; and, after the death of some of the partners, a charge being given in name of the survivors and the same cashier—Held that the charge was good.

4. Circumstances held sufficient to establish that, at substituting one bond of caution for another, and changing one of the cautioners, a new liability was incurred by the agent and cautioners for part of a past balance under the old bond not expressly referred to in the new, and for which the agent was not liable under the old bond.

5. The arrestment of a large sum belonging to the agent, and the restriction of it to the sum contained in the warrant, whereby the agent was enabled to uplift the balance, held not to liberate the cautioners, though without their consent.

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1st DIVISION.
Lord Newton.

A vacancy having occurred, in 1808, in the agency of the Paisley Union Bank at Hamilton, it was arranged that Mr. William Hamilton, writer there, should be appointed agent. In June of that year, the Bank cashier wrote him—"It is expressly understood that no commission is to be charged by you on the discount of bills, &c. The allowance to be made you for risk, trouble, servants' wages, and office-rent, shall be fixed by the Bank partners at the 30th June 1809," &c.

Pursuant to this, a bond was signed in the same month by Mr. Hamilton and two cautioners, Mr. Boyes of Wellhall, and Mr. Marshall of Neilsland, containing, among others, the following clauses:—"That the said William Hamilton shall well and truly account to the said Paisley Union Bank, whether carried on by the said present partners thereof, or by any of them, or any others who may for the time be partners thereof, and to the said John Likly, present cashier of the said company, or his successors in office, for behoof of said company, for all sums

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of money, &c. And further, that I the said William Hamilton shall make good the regular payment of all bills," &c., except those of certain Iron Works, including the Omoa Company. "And it is hereby declared that a stated account, made out from the books of the said Union Bank Company, certified and signed by the cashier thereof for the time being, shall be sufficient to constitute, upon all occasions, a balance and charge against us, the said principal and cautioners in the premises; and that execution shall be competent to pass hereon, and on such certified and signed account, at the instance either of the said company, or of the said John Likly as their cashier, or his successor or successors in office, for their behoof." The liability of the cautioners was then limited to £3000, with interest:—"And I the said William Hamilton do hereby agree to leave it to the said Bank Company to fix and determine, at the 30th of June 1809, the extent of the remuneration to be allowed to me for my risk and services in the premises, and for stationery and incidental expenses,—it being understood that no commission shall be charged by or allowed to me on the discount of bills, notes, or drafts, and only the regular and customary charges in all cases where bills are dishonoured."

In 1809, the Bank having fixed the salary of Mr. Hamilton at £200, this was communicated to him by the cashier, who, in August of that year, received from him the following answer:—"I received your favour by Mr. Millar, and I am satisfied with the salary of the company;—it is indeed exactly what I had fixed in my own mind. I will therefore take credit on Monday for £200 in my account," &c.

During several subsequent years, the Bank sent him annually a notice in these or equivalent terms:—"You will please take credit in next account for £200, being salary to the end of June last," which he accordingly did. The same allowance was made till the termination of the agency, and no objection was taken to it for many years afterwards.

In August 1818, Mr. Boyes, one of the cautioners, being dead, a new bond of caution was required. By this time the Omoa Company had stopped payment; and Mr. Dalrymple, the only partner of that company, had died, and his estate was under the management of trustees. Three of his bills were lying over dishonoured, with a balance of them unpaid of about £160. Several other bills of different parties were also noted as protested for non-payment. No clause was inserted in the new bond restricting the liability of the agent as to bills discounted by the Iron Works, (none of which, except the Omoa, had transacted business with the agent); and no express reference was made to any of these works. Mr. Marshall, the former cautioner, also became bound under the new bond, and General Baillie of Carnbroe joined with him. They bound themselves "that I the said William Hamilton shall guarantee and make good the regular payment of all bills, promissory notes, or drafts which have already been or shall be discounted by me

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as agent foresaid; and that I shall render a just account of all such bills &c. as shall be discounted by me," &c. The bond, in other respects than those above mentioned, was the same as that of 1808, which was now cancelled.

In October of the same year, a supplementary bond was signed by the same parties, on the narrative that Hamilton had granted bond, in 1808, "guaranteeing the regular payment of bills &c., and for performance of the other obligations in said bond mentioned," &c.; that, on the death of Mr. Boyes, the Bank had agreed to cancel that bond on a new one being granted, and that this was done accordingly in August last, "for my the said William Hamilton's faithful execution of the said office, and specially, inter alia, for my guaranteeing and making good the regular payment of all bills, promissory notes, or drafts which had then already, or should be discounted by me as agent foresaid; and also" for payment "of all sums of money, balances, or deficiencies that may at any time arise in the business of said agency &c., as the said bond more fully bears." It then set forth: "And whereas it was understood by us, in granting of said bond, that in regard certain bills, promissory notes, or drafts discounted by me the said William Hamilton in the course of my carrying on the said agency, prior to the date of said bond, had been dishonoured, and were still lying over unpaid in whole or in part, and were included in the balances of accounts stated and brought forward against me at and prior to the date of said bond, that our obligation of guarantee, warranty, and payment should extend to and include all such bills, promissory notes, or drafts previously dishonoured and lying over unpaid as aforesaid, and in general the balance of accounts brought forward and standing against the said William Hamilton at the date of our said bond, as well as all such bills, promissory notes, or drafts discounted by me the said William Hamilton, as were then current, and such as should be discounted by me in future; and it having been required by the said Bank Company, at the presenting of the said bond to them, that, agreeably to the said meaning and understanding, we should grant the supplementary and corroborative bond underwritten: Therefore" the parties bound themselves, in supplement of the former bond, "to make good, not only all bills &c. discounted, or which shall be discounted, by me the said William Hamilton &c. since the date of our said bond, and in time coming, but also all such bills &c. as had been discounted by me prior to the date of our said bond, and which had not been honoured, and were at that time lying over unpaid in whole or in part, or were at that date current and not due or payable, and in general the whole balance stated and brought forward against me, the said William Hamilton, in my accounts with the said Bank, as the same stood at the date of the foresaid bond, or do now stand or may arise in time coming," &c.

Besides his proper accounts as agent, Hamilton had a private account with the Bank, settled yearly on the 30th of June. In the private ac-

count of 30th June 1814, after debiting himself with cash received from the Bank, he added on the same side of the account—

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"1814.

"May 18. The following past due bills prior to the 1st of July 1813, outstanding in account, and interest to this date, transferred; viz."

There was then inserted a list of bills lying over of the above date, at the head of which were the three Omoa bills. He debited himself with them without distinction, and balanced his account with the Bank on that footing.

In April 1816, the Bank notified to Hamilton that they were to remove him on the 4th of May, on which day a meeting was held, for adjusting his accounts, at the branch office in the town of Hamilton, which was attended by the Bank cashier, and by Hamilton and his cautioners. A statement of his accounts was made up, to which the following docquet was subjoined:—"The foregoing statement of account of William Hamilton, as agent for the Paisley Union Banking Company, under two bonds of cautionry and guarantee granted by Mathew Baillie, Esq. of Carabroe, and David Marshall, Esq. of Neilsland, to the said Bank, as his sureties, has this day been made up from his books; and the balance, being £3168. 3s. 6d. due to the Banking Company, is hereby certified to be a just and true state of accounts between the said William Hamilton and the said Bank Company at the date hereof, as far as can now be ascertained. The bills and promissory notes lying over unpaid, and diligences &c., as relative thereto, specified in an inventory thereof, and subscribed as relative hereto, amount to £3142. 6s. 6d., forming part of said balance, have" been delivered to the Bank, with the exception of certain specified bills then the subject of prosecution by action or diligence; "but Mr. Hamilton and his sureties engage that these bills, or their amount, shall be delivered to the company, and that the Bank shall be relieved of all expenses incurred or to be incurred thereon, being delivered over to the said Bank Company, to be recovered and made effectual, in so far as may be practicable; but without prejudice to their operating payment from the said sureties in the mean time, to the extent of the sum guaranteed by the said bonds, and also without prejudice to the effect provided by the said bonds, to be given to a stated account by the cashier of said Bank, for the purpose of raising execution thereon, if such should at any time hereafter be found necessary,—it being understood that the Bank shall be entitled to apply the free proceeds which may be recovered, after deducting charges and expenses, towards payment of the foresaid balance, or of any sum or sums that may fall to be due by Mr. Hamilton, from such bills and notes discounted by him as are now current, and may happen not to be paid when due, or from any other

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transaction of his agency,—it being understood that, in their endeavours to effect recovery of the past due, or of any now current that may not be paid when due, the said Banking Company shall not, in any question with Mr. Hamilton or his sureties, be held liable in strict diligence, or for omissions, or in any manner for more than may be actually recovered; and if any such bills, notes, or diligences, or any balance of money recovered, shall remain in their hands after full payment of Mr. Hamilton's debt to the Bank, the same shall be given up to him or his sureties, with assignments of such unrecovered debts and documents, if required, at the expense of the receivers, and without any warrandice or recourse on the Bank. In stating the foregoing account, there is not included an account of expenses incurred by the Bank for prosecuting for payment of two bills on Kennedy in Dublin for behoof of Mr. Hamilton, the amount of which, when ascertained, will fall to be placed to Mr. Hamilton's debt. On the other hand, no salary has been placed to his credit for the current year; but when this is fixed at a final settlement of accounts, the balance will be thereby so far diminished."

Annexed to this docquet, and signed as relative to it, was a list of the past due bills, including the Omoa bills, at the debit of the agent, amounting to £3142. 6s. 6d.

From 1816 to 1823, repeated delays and indulgences were applied for by the agent and his cautioners, and were granted by the Bank. At the same time, various legal proceedings were adopted for recovering the contents of the outstanding bills; and the balance claimed by the Bank was reduced, as on the 30th of June 1823, to £1836. 7s. 3d. In the course of these proceedings, the name of the Bank was chiefly used; but it was apparent from the correspondence of the parties that they were truly carried on for behoof of the agent and cautioners, and substantially under their directions,—the Bank merely lending the use of their name at the request of these parties. These proceedings related, inter alia, to bills bearing the names of Williams and Whyte, and Fleming and Leiper.

In 1823, an account was made up, entitled "Dr. Mr. William Hamilton in account with the Paisley Union Bank Co., as their agent at Hamilton, Cr." After bringing out the balance already mentioned, it was dated and subscribed "Paisley, June 30. 1823, E. E., Thomas Risk, accountant; John Scott, cashier." An extract was made from the Bank books of the appointment of Mr. Scott as their cashier; and this was registered along with the account, and the bonds of August and October 1813.

Letters of horning were raised at the instance of the partners, and Scott as cashier, for the above sum of £1836. 7s. 3d., with interest on £1586. 7s. 1d. thereof from June 18. 1823, and a charge was given to Hamilton and the cautioners; but it was not then insisted in.

In May 1826, the Bank heard that Hamilton had a sum of £5000

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lying at his credit with the Thistle Bank of Glasgow, and they used arrestments on their letters of horning for £4000, more or less. By a subsequent extrajudicial arrangement with Hamilton, the Bank loosed their arrestments, on consignation being made in the Thistle Bank of a sum of upwards of £2000, (being equivalent to the sum in the horning, with interest to that date,) to abide the issue of the Bank's claim on him. The balance of the deposit in the Bank was then drawn out by Hamilton. In this proceeding the cautioners were not consulted.

Two of the partners of the Bank, in whose names the letters of horning were raised, died before March 1827, when a new charge was given on the same letters at the instance of the surviving partners, and of Mr. Scott, the cashier.

Hamilton presented a bill of suspension, which was passed on consignation.

Prior to this, General Baillie had died; and the prosecution of legal measures on several of the bills handed over to the Bank had occasioned additional expense, which increased the claim against Hamilton since June 1823. The Bank, in consequence, on the 22d of April 1828, raised an ordinary action of count and reckoning in name of their cashier, as well as of the surviving partners, against Hamilton, and the surviving cautioner Mr. Marshall, and the representatives of General Baillie, concluding for £2749. 0s. 1d., and also to be relieved of all pending claims of liability arising from any unsettled transactions of the agency.

Hamilton raised a counter action of count and reckoning against the Bank, and concluded for payment of an alleged balance, which he claimed as due to him, in respect, inter alia, that the Bank were bound to allow him a salary of £500 per annum in accounting, whereas they had stated it at £200. These actions were conjoined with the suspension, and a record was made up. Besides several special questions of accounting which do not require notice, Hamilton stated the following reasons of suspension and defences, which involved also the merits of his counter action.

1. The diligence was incompetent and irregular, because, (1.) Although the state of accounts was signed by the accountant and the cashier, it was not certified; and the letters E. E. (or 'errors excepted') showed that the sum claimed was not regarded as duly liquidated. (2.) It included law expenses, incurred, after the close of the agency, in prosecuting diligence, or opposing suspensions, in order to recover the proceeds of the bills given up to the Bank. (3.) After the death of some of the partners to whom the bond was granted, the claim under the bond could only be enforced by the survivors, or their cashier, in an ordinary action; and at all events, as the letters of horning were in name of the then partners, a charge in name of some of them only, after the others were dead, was incompetent.

2. Hamilton was not liable for the bills of the Omoa Company. Un-

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der the first bond, all liability for them was excluded; and the new bonds could not cover them, because the general reference to prior bills past due was qualified by the statement that they were "the whole balance stated and brought forward against me, the said William Hamilton, in my accounts with the Bank." But the Omoa bills had not been formerly so stated against him. As to his subsequent entry of them to his debit in the Bank books, and the settlement of accounts on the 4th of May 1816, the first was a matter of necessary form, so long as he was custodier of the bills; and the second was extorted under a threat of diligence, and was a hasty and incomplete adjustment, bearing on the face of it that it was not a final adjustment, but only "as far as can now be ascertained."

3. For several bills delivered up to the Bank in 1816, and for certain law expenses in attempting to recover their contents, he was not accountable, the Bank having been so negligent or imprudent in their proceedings as to free him.

4. The salary should be stated at £500, instead of £200. The business transacted by him amounted to nearly £90,000 or £100,000 per annum of discounts, which he guaranteed. A salary of £200 was quite inadequate for so much trouble and risk, and there was no conclusive agreement as to that amount of salary. It was left open in both the bonds, and was also unascertained, to a certain extent, in the docquet to the account of the 4th of May 1816. In the case of Hamilton v. Geddes in 1805, an enlarged salary was allowed in circumstances not less adverse to the claim than those which occurred here.

In addition to these pleas, the cautioners maintained—

1. As to the Omoa bills—That they understood the new bonds in 1813 to be a mere continuation of Hamilton's liability under the first bond of 1808; and as liability for these bills was thereby excluded, the cautioners, and particularly Marshall, could not be held to have taken that burden on them without express words. But there was no such obligation; and the general words of the bond could not bind the cautioners, unless there was a debt against Hamilton under the old bond. The subsequent act of Hamilton in debiting himself with these bills could not extend the liability of the cautioners; and when they docqueted the account, they were not made aware that it included these bills.

2. The cautioners had been liberated by the conduct of the Bank in loosing their arrestments, on consignation of about £2000, without the consent of the cautioners; and this the more especially, when there were eventual additions to their claim against Hamilton still to accrue. At all events they should not have loosed without notice to the cautioners, who might themselves have taken steps to arrest the surplus.

The Bank answered—

1. The regularity of the diligence involved only a question of expenses, as the conclusions of the ordinary action embraced all the matters in dis-

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pute. But it was quite unobjectionable. (1.) The state of accounts was taken from the Bank books, and entitled "Dr. Mr. William Hamilton in account with the Paisley Union Bank Co., as their agent at Hamilton, Cr." It consisted of a minute statement of the debtor and creditor sides of the account, and drew out the balance, dated and subscribed by the accountant and the cashier. The letters E. E. prefixed were the usual mercantile addition of style, utterly unimportant, except as the more clearly evincing that this was really an account certified to be correct, under the common qualification which is applicable to all commercial accounts. (2.) The necessary law expenses were properly included in the account, as incidental to, and forming a part of the charges against the agent. The expenses of protesting bills might certainly be added; and when further judicial proceedings were required, in following out diligence, or opposing a suspension, their expense was equally chargeable against the parties; and, (3.) The bond provided that action or execution should be competent to the partners and to the cashier. The letters of horning were competently raised, and the charges regularly given, being at the instance of the same cashier throughout, and of the existing partners at each charge.

2. Hamilton and the cautioners were liable for the Omoa bills; but the second bond expressly bore that Hamilton and the cautioners were to be liable for "all bills which have already been or shall be by him discounted," without any exception; and to remove all ambiguity, a supplementary bond was taken, expressly including "all bills &c. discounted by him prior to said bond, and which had not been honoured," &c. Besides, the actings of the parties showed that they construed the bonds as applying to these bills; for Hamilton, at the end of the year 1813, placed the Omoa bills to his debit in his account with the Bank, and reported them as bills guaranteed by him, and on which he was entitled to make his own recoveries for his relief; and, at adjusting the accounts on the 4th of May 1816, a balance was struck, and subscribed by him and the cautioners on the same footing. They could not now go back upon this, especially after they had asked and obtained so many years indulgence, on the faith that this balance was not to be disputed.

3. The Bank undertook the recovery of the bills handed over by the agent, only to the amount they should recover, and on terms which excluded their further liability; and even if not protected by this clause, their proceedings were not such as could have subjected them.

4. The agent's salary was fixed from the first at £200, and as covering risk, trouble, office-rent, and servants' wages. It was continued every subsequent year at the same rate, and so stated in all the accounts. At the adjustment in May 1816, it was mentioned that the salary 'for the current year' was still unpaid, not having fallen due; but it was subsequently notified as allowed at £200, and formed part of the accounting as such, without the least objection, till after the charge under suspension.

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With reference to the separate pleas by the cautioners, the Bank answered—

1. That, for the reasons already stated, the cautioners were liable for the Omoa bills; and,

2. That when the Bank used arrestments against Hamilton, they held no warrant to a greater extent than £1836, with certain interest. They loosed only on consignation of all they had attached, and therefore the cautioners sustained no prejudice. If the cautioners wished to protect themselves, they should have used arrestments at their own instance. A creditor is not bound to acquire additional securities for behoof of cautioners.

The Lord Ordinary ordered and reported Cases.*

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* "NOTE.—The Lord Ordinary does not think there is much in the objections which have been made to the charge in point of form. But there is more difficulty with regard to some of the articles in the accounting.

"One point regards the bills which had been discounted to the Omoa Company. By the original bond of 1808, the liability of the agent was declared not to extend to the bills discounted to certain foundry companies in the neighbourhood, &c.* It was, no doubt, in the power of the parties, when this bond was cancelled, and a new one granted, to extend the guarantee to all bills without exception then lying past due; and the question is, whether this was actually done. The principal bond of August 1813 is very comprehensive in its terms; but some doubt having occurred as to its application to bills past due, a supplementary bond was granted to regulate this matter. The obligation here is expressed, in the outset, in terms broad enough to include all bills whatever; but there is an explanatory addition subjoined, which tells strongly the other way, as the parties, after binding themselves to make good to the Bank the whole bills &c. which had been discounted by the agent prior to the date of the principal bond, and which were lying dishonoured or unpaid, add, "and in general the whole balance stated and brought forward against me, the said William Hamilton, as agent foresaid, in my accounts with the said Bank, as the same stood at the date of the aforesaid bond, or may now stand," &c. These words would seem to confine the liability to such past due bills as the agent was accountable for previous to the granting of the new bond, and of course to such of these only as he was bound to guarantee under the former bond of 1808. It will be for the Court to judge whether the inference arising from this clause is to be overruled by the documents and circumstances founded on by the chargers as proving the understanding of all parties that the bills in question were included under the guarantee.†

"It does not appear to the Lord Ordinary that the suspender is entitled to any higher salary than what has been credited to him; and as to the plea of the cautioners, founded on the proceedings which followed the arrestment in the hands of the Thistle Bank, he thinks it clear that the Bank, by confining their arrestment to a sum not less than the amount of the debt and interest specified in the horning, which was the warrant for arresting, did not diminish the security they held in virtue of their diligence, nor give ground for any valid defence on the part of the cautioners."

* His Lordship then made some observations as to a point which was superseded by the production of the original bond at advising.

† His Lordship then alluded to certain alleged losses arising from not ranking on bankrupt estates, not necessary to be noticed in the report.

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Lord Balgray.—I have formed a clear opinion on this case. The words used in the new bond of 1813 make it obvious that the parties intended the guarantee to cover all past due bills. The words are, "that I shall guarantee all bills which have already been or shall be discounted by me as agent foresaid." This clearly embraces the whole bills lying over; and lest dishonoured bills prior to the bond might be thought not included, a supplementary bond is taken expressly to cover them. Then look to the actings of the parties. Mr. Hamilton expressly transfers the Omoa bills to his debit under the new bond. He does not afterwards object to this as an erroneous statement of the accounts, detected at any subsequent periodical adjustment; and on the 4th of May 1816, when he is removed from the agency, the cautioners and he examine and docquet the account with the Bank on the footing of the Omoa bills not being excluded from his liability. Several years then follow, during which no objection is made to this state of accounts, nor is any stirred till after the charge in 1823. I cannot, therefore, allow this item of the account to be now objected to.—*

The arrangement which the Bank made with Hamilton regarding the arrestments cannot liberate the cautioners, because it in no way prejudiced them. The arrestments could not exceed their warrant, which related to a sum of £1836, and certain interest. By the consignation, the whole of this sum and interest was secured, and the loosing of the arrestments was only what the Bank might have been compelled to do upon such consignation.

The objections taken to the title of the chargers are hypercritical. The signature of the account is equivalent to a certification of it; and the instance at which the diligence is first raised, and finally insisted in, is specially provided in the bond. But the law expenses ought not to have been charged for. The consent to the registration of a certified account made up from the Bank books did not embrace any charges for law expenses which the Bank might pay, and claim against the agent.

As to the amount of the agent's salary, it was left to the Bank to fix. It was regularly fixed as early as 1809, and notified to him, not only without objection, but with his approbation; and the same salary is constantly continued throughout the agency, without a word of objection, till many years after its close. It is impossible, therefore, to allow him now to go back and insist for an increase. The case of Geddes was one of a very peculiar kind, and quite different from this.

Lord President.—I am of the same opinion. The second bond in 1813 was merely supplementary to the first, and without prejudice to it. I conceive, from the terms of these bonds, that the Bank, from observing the proceedings of their agent, or from some cause with which we have nothing to do, had distinctly notified to him, that unless he found a guarantee for all the dishonoured bills then lying over, without exception, they must put a stop to his agency. He wished, however, to continue it, and accordingly he procured

* His Lordship then adverted to a separate point depending upon specialties.

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two cautioners to sign the bonds of 1813 in the very unequivocal terms now before us.

Lord Craigie expressed his concurrence in the opinions of the preceding Judges.

Lord Gillies.—I am sorry to differ from your Lordships on one point of this case, which is of deep importance to the law of the country. I allude to the liability of the cautioners for the Omoa bills. I think they are not liable. It is quite clear that the cautioners were not bound to guarantee these bills under the bond of 1808. In 1813 a cautioner dies;—the Bank very naturally require a new bond of caution—but a bond which, according to the fair meaning of all parties—at least as explained to the cautioners—was to have no effect in subjecting them to a liability for any past balance against the agent, for which neither he nor his cautioners were liable under the first bond. But, at the date of the new bonds in 1813, the Omoa Company were insolvent, and their bills were lying over dishonoured in the agent's hands. They, at that time, formed no claim against the agent, and were no part of the past balance due by him. At taking the new bonds, the Bank may perhaps have privately intimated to their agent that he must take on himself these debts as the price of their continuing his appointment; if they did so, it was a departure from the practice of bankers, and would require to be very clearly proved by them. But suppose they did so, was it enough to make this intimation to Hamilton, in order to bind his cautioners? Mr. Marshall, as cautioner under the first bond, and continuing so under the renewals, should have been expressly informed of this change in the liability of the principal; and I think he has the right to insist that the fact of his having received such communication should be sent to a jury. In imposing an obligation on a cautioner, the words must be express in order to bind him. I do not conceive the words of the bonds bear the interpretation of Lord Balgray. It is true they begin by making the guarantee extend to all bills which have been or shall be discounted; but they do not end there. We must not stop in the middle of a clause in order to learn its meaning; we must hold that all the words used in it are meant to have an effect, and we cannot arbitrarily overlook or suppress any of them. The Rosebery cause we decided as we did, because we found the word 'their' standing in the place where we thought the word 'her' was probably meant to have stood. But there we found it, and were obliged to apply it. Now look at the clause of guarantee in the supplementary bond, the avowed purpose of which was to adjust the liability for past due balances. It begins, "Whereas it was understood by us, in granting said bond, that in regard certain bills had been dishonoured &c., and were included in the balances of accounts stated and brought forward against me at and prior to the date of the said bond, that our obligation of guarantee should extend to all such bills," &c. Therefore they bound themselves, in the words quoted by Lord Balgray, for all bills which have been or shall be discounted, and which at that time lay over unpaid, "and in general the whole balance stated and brought forward against me, the said William Hamilton, as agent foresaid, in my account with the said Bank, as the same stood at the date of the foresaid bond," &c. Now, when due effect is given to these words, as qualifying the whole obliga

tory clause, I conceive that the cautioners undertook no obligation for any dishonoured bills which were not claimable against the agent as part of the balance due under the bond of 1808, and stated and brought forward against him in the balance arising under that bond. Such was the fair and natural arrangement of the parties, and such is the just construction of the bond. The Omoa bills were not claimable against the agent under the former bond, and I do not think them guaranteed by the cautioners in the substituted bonds. Any other result seems to me to be arrived at by the suppression of an important portion of the clause, contrary to every just principle of interpretation. In other respects, I concur with the rest of the Court.

Lord President.—The clause founded on by Lord Gillies does not stop with referring to the accounts as they stood at the date of the bond, but the accounts "as the same stood at the date of the foresaid bond, or do now stand, or hereby arise in time coming." This prevents the interpretation contended for.

The Court, then, having "considered the conjoined actions of suspension and count and reckoning, &c.; and particularly having considered the bond granted by William Hamilton the suspender, and his cautioners, to the Paisley Union Bank Company, dated the 9th of August 1813, and supplementary bond by the same parties, dated the 9th and 29th of October 1813, and account between the suspender and the chargers, the Paisley Union Bank Company, settled and docqueted the 30th of June 1814, and account adjusted betwixt the chargers and the suspender and his cautioners, and docqueted the 4th of May 1816, and letters of horning raised on said bonds, with the charges given thereon;—find, 1. In the suspension, that the charge was irregular, in so far as the same comprehended the claim of the chargers for certain law expenses stated to have been debursed on account of the suspender after the close of his agency, and to that extent sustain the objections to the charge; but, quoad ultra, repel the objections to the regularity of the charge, reserving to the chargers to claim and instruct such expenses in the ordinary action: 2. In the ordinary action at the instance of the chargers, repel the objection to their title as pursuers. In the conjoined actions of count and reckoning at the instance of the parties, 3. In respect of the terms of the bonds executed in August and October 1813, and the settled account between the chargers and William Hamilton, dated the 30th of June 1814, and the terms of the docquet on the account adjusted 4th May 1816, find that the said William Hamilton is not entitled to claim any deduction from the balance due by him for the contents or balances of any bills discounted by him for the Omoa Company. (4. and 5. Special findings that the Bank had done nothing to free the agent from his liability for certain bills of Williams and Whyte, &c.) 6. Sustain also the defence of the chargers against the suspender's claim for additional salary or remuneration. 7. Of consent of the chargers, find that the cautioners of the suspender are to be relieved of whatever sums of interest arising on the

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sum of £1836. 7s. 3d. arrested in the hands of the Thistle Bank may not be recovered by the chargers from the consigned money;—quoad ultra, repel the defences and pleas of the cautioners and their representatives, and remit to the Lord Ordinary to ascertain the said sum of interest, if such does exist. 6. Find the suspender and cautioners liable to the chargers in relief as libelled. Lastly, Remit to the Lord Ordinary to remit the accounts of law expenses, stated in the account for the chargers as paid, to the Auditor of Court, to be taxed as between agent and client, and to report; and when the said accounts are so taxed, to ascertain the ultimate balance which may be due either by the suspender, or by him and his cautioners jointly, in terms of the preceding findings; and to do further therein as he shall see cause, and decern."

Suspender's Authorities.—3. Ersk. 3. 54; Stirling, July 26. 1733, (2930); Carrick, August 5. 1778, (2931); Keith, Nov. 14. 1792, (2933); 3. Ersk. 1. 21. and 3. 37. and 53; 1. Bell, 453; Stark, June 26. 1714, (3540.)

Cautioners' Authorities.—3. Ersk. 3. 66; 1. Bell, 359; Hamilton, July 4. 1628, (1. Supp. 158); Boyes, Jan. 10. 1738, (Elchies v. Cautioner, No. 7); Thomson, June 11. 1824, (2. Shaw's App. Ca. 317); Stirling, June 13. 1821, (1. Shaw's App. Ca. 37); Fleming, May 23. 1826, (2. W. and S. 277); Rees, 2. Vesey jun. 540; Samuel, 3. Merivale, 272; Youngson, Jan. 12. 1830.

Chargers' Authorities.—Commercial Bank, July 28. 1828, (3. W. and S. 365); Fisher and Hepburn, Dec. 7. 1827, (ante, VI. 216.)

J. Court, S. S. C.—F. Hamilton, W. S.—Hunter and Whitehead, W. S.—A. Clason, W. S.—Agents.

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James Young, Advocator.—*Jameson—Monteith.*

Elizabeth Cuddie, Respondent.—*Skene—Brown—Penney.*

Property—Servitude—Res Judicata.

1. Circumstances where it was held that, in rebuilding an old tenement within burgh, strict conformity to the old plan was not necessary; but a remit of the new plan to men of skill granted to ascertain that the servitude oneris ferendi was not thereby increased, nor any injury done to the inferior tenement.

2. A previous decision as to the incompetency of certain alterations proposed on the same building, found not to afford a plea of res judicata.

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Young was proprietor of the third floors and garret, and Mrs. Cuddie of the second and shop floors, of an old tenement in Glasgow. In 1805, these parties had respectively applied to the Dean of Guild to be allowed to make certain alterations and additions on their different portions of the tenement; and in an advocation the Lord Ordinary (Hermand) found, "that independent of the idea of danger, the parties have no right to make the additions and alterations respectively proposed by them upon the tenement;" and this interlocutor became final.

This tenement having been taken down as ruinous in 1828, Mrs. Cuddie rebuilt her lower portion according to the old plan, and then presented a petition to the Dean of Guild, praying that Young should

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be interdicted from rebuilding his property on a plan he had adopted, which, it was alleged, was calculated to increase the servitude oneris ferendi, besides altering the former character of the building. The Dean of Guild ultimately found that Young was not entitled, in rebuilding his part of the tenement, to increase the burden or servitude on the lower part by converting it into a square story, and granted the interdict. In an advocation brought by Young, the Lord Ordinary "recalled the interlocutor hoc statu, and remitted to the Dean of Guild with instructions to remit to a builder or builders of skill to inspect the plan produced in reference to the situation of the intended building with regard to the neighbouring tenements, and to report whether the alteration from the two stories in the old tenement into one story, as now proposed, will increase the burden on the inferior property, and if the chimneys are such as to prevent smoke in the respondent's tenements, or can be made so."

Mrs. Cuddie reclaimed, and maintained that the interdict was properly granted, both because Young had no right to alter the form of the building, and still less to increase the weight upon her tenement; and that, at any rate, the very same alteration had been proposed in 1805, and decided to be incompetent by the interlocutor of Lord Hermand, which made the question res judicata.

Lord Justice-Clerk.—If this interlocutor was not careful to protect the inferior property from any additional burden upon it, I could understand the opposition; and I suppose there can be no objection to the words being added, "or of any other inconvenience whatever." As to res judicata, the whole building has been pulled down since 1805, and the rebuilding must just be regulated by the common principles of law. I think that the Lord Ordinary should remit at once to men of skill, and not to the Dean of Guild.

The other Judges concurring, the Court adhered, with the variation proposed.

J. Pattison, W. S.—J. and W. Jollie, W. S.—Agents.

Mrs. C. Cochrane and Others, Pursuers.—*Keay—A. Maconochie.*
T. and R. Fergusson, Defenders.—*Jameson—Hamilton.*

No. 260.

Oath, Reference to—Cautioner.—A tenant pursued, along with his cautioner, for rent after the lapse both of the quinquennial and septennial prescription, having, on an oath on reference, stated that the cautioner had conducted a sale of his stocking, out of which he considered the rent to have been satisfied—Found incompetent to prove resting-owing by the oath of the cautioner.

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2d Division. Lord Medwyn. T.

In July 1819, the defender Thomas Fergusson took, for one year from Martinmas thereafter, a farm on the estate of Auchterarder, belonging to the late Honourable Basil Cochrane, at a rent of £120, for payment of which his father Robert Fergusson, the other defender, became cautioner.

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In the spring of 1820, Thomas absconded; and in the course of that year two public sales—one of the crop, and the other of the stocking—were made by the father Robert. On the first of these sales being announced, the landlord executed a sequestration; but the sales were allowed to proceed. In 1827, the pursuers (trustees of Cochrane, who was now dead) raised an action against the Fergussons for payment of £35, as an alleged balance of rent, credit being given for £85 as the proceeds of bills granted by the purchasers at roups, and which had been lodged with one Clark, who, on realizing the amount, had paid it to Cochrane. The defenders pleaded the quinquennial prescription of mails and duties, and Robert further pleaded the septennial limitation of cautionary obligations. Interruption was averred by the trustees; but this was repelled by the Court, as mentioned ante, VIII. 324, (which see.) Thereafter, on the cause returning to the Lord Ordinary, the pursuers gave in a minute, referring to the "oaths of the defenders" whether the debt was resting-owing. This was objected to by Robert Fergusson the cautioner, who contended that his obligation was extinguished by the lapse of seven years, so that it could not be revived by his oath or otherwise; and consequently that any reference to him was incompetent, whether in regard to the claim against himself, or that against the principal debtor, who could not be affected by his oath.

The Lord Ordinary, on advising the minute and answers, sustained the reference, "reserving to be heard on the import of the oath when emitted." Fergussons, considering this reservation as intended to keep open their objection to the competency of Robert's oath being given effect to in any respect, did not reclaim against this interlocutor, and the oaths of both parties were accordingly taken.

Thomas, the principal debtor, deponed, that, in spring 1820, he left his farm in consequence of certain irregularities regarding the revenue; that, during his absence, his father Robert Fergusson assisted his family, who continued to reside on the farm, in the management of it; that there were two roups of his property on the farm,—the first of the crop, and the second of the stocking; that his agent and his father took charge of the first roup; that he understood that Pedie, the landlord's agent, had at first stopped that roup, but that it was allowed to go on upon an arrangement that Pedie was to get as many of the bills as would satisfy the rent; that he understood that Clark was requested by Pedie to attend the second roup, in order to get payment out of the proceeds of as much as had not been provided for by the bills of the first roup; and that he (the deponent) never employed Clark to uplift the proceeds of the sales; that he never made any payment in money to account of the rent; that he never applied for a discharge from the landlord; that on a demand being made, before this action was raised, for the balance sued for, he had answered that he did not owe any balance, as those acting for the landlord had taken more at the roups than extinguished the rent; that

he did not remember of having applied to Clark to account for the bills received by him, or for payment of the balance which he considered due out of these transactions; that he did not remember of having had any communications with Clark, the business being managed principally with his father; and he finally deponed negative in answer to a general interrogatory whether the debt sued for was still resting-owing.

Robert Fergusson deponed, that when his son left the farm, he looked after it, and the crop, which was disposed of by two several roups,—the one about Lammas, the other about Martinmas; that he employed M'Pherson, a man of business, to attend the first, and he himself was present at both, his son being absent; that on the first roup being advertised, sequestration was used by Peddie, the landlord's agent, who, however, agreed to let the sale proceed, on condition of his receiving as many bills as would cover the rent; that the bills for the first roup were left with deponent; that, at the second sale, Peddie sent his clerk, in consequence of his not having received any of the bills of the first sale; that, in consequence of M'Pherson being from home, deponent applied to Clark, who sent a clerk to attend the roup; that in the evening Peddie's clerk accompanied him to Clark's, and deponent there delivered to Clark about £70 odds of bills of the first roup, those of the second not being then granted; that he never received back any of these bills, and never heard, with the exception of one of small amount, that they were not paid; that Clark was to obtain the bills for the second roup, and that he did not think that he (deponent) got any of them; that he never heard that any of the second roup bills had not been paid; that he has had no accounting yet with Clark, but that Clark has raised an action of accounting against him; that he did not recollect of ever asking a receipt for the rent, and that he never got such receipt; that no demand was ever made on him for payment of this rent, after the last sale, till the summons in the present action was served on him, and that Clark never told him there was a balance of rent still due.

The Lord Ordinary pronounced this interlocutor:—"Finds that although the defender Thomas Fergusson depones negative, at the close of his deposition, on the interrogatory if the debt be resting-owing, this must be taken in conjunction with, and as explained by, the previous part of his deposition, wherein he does not allege that he did any thing himself to the discharge of the said debt, but refers to what was done by his father, the other defender;—finds, on referring to the deposition of the said Robert Fergusson, that no payments are deponed to as having been made by him, which are not already credited in the libel, and therefore that the balance concluded for is resting-owing; decerns, therefore, ut libellatur, against the defender Thomas Fergusson, with expenses applicable to this defender; allows an account thereof to be given in, and when lodged, remits the same to the Auditor of Court to tax and report: With regard to the other defender Robert

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Ferguson, sustains the defence of the septennial prescription of cautionary obligations; and as he is concluded against solely as cautioner, adheres to the interlocutor of the 20th of December 1828, assoilzieing the said defender with expenses; reserving to the pursuers to bring a new action against him on any competent ground, and to him his defences thereto as accords."

Thomas Fergusson having reclaimed, and also the pursuers with regard to the absolvitor of Robert, the Court ordered minutes of debate, "both on the competency of the reference in this case, and on the import of the depositions that have been taken."

Argued for the Pursuers—

1. The father was not only cautioner, but, after his son's departure, negotiorum gestor for him; and in that character a reference to his oath is competent, on the principle on which reference is allowed to that of a wife in regard to claims against her husband for obligations contracted by her, or to that of a mandatory, or the factor of a foreign merchant.[1]

2. At all events, Thomas in his oath refers to the transactions conducted by his father, as the only circumstances on which he rests his general deposition that the debt is not resting-owing; and this makes it competent to receive the father's oath, just as the factor's books were received in the case of Cooper v. Hamilton.[2]

3. Taking the oath of the father, as instructing the only mode in which Thomas avers the debt to have been paid, it does not show that any payments were made to any one for behoof of the landlord, as Clark is deponed to have been employed by himself; and at all events it does not appear from it that more than £70 odds, being the bills of the first roup, were appropriated to this purpose; and,

4. Even looking to the oath of Thomas alone, while it admits the constitution of the debt, the special mode of payment mentioned is not sufficient to support the general denial of resting-owing. All he says is, that he heard or understood that the proceeds of the roup were thus applied by his father; but this is extrinsic, and can as little support a general denial as the statement of the defender in the case of Hay v. Fulton[3] that he had been desired by the pursuer to pay the debt to a creditor of his (the pursuer), and that he had done so accordingly.

Argued for Fergussons—

1. Whatever claim the pursuers may have against the father as negotiorum gestor, they can only rest here on his character of cautioner, on which alone they libel; and his plea of liberation by the lapse of seven

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[1] Young, Trotter, and Co. v. Playfair, Dec. 2. 1802, (12486); Colbrook v. Douglas, July 18. 1780, (9374); Douglas, Heron, and Co. v. Alexander, (ibid.) [2] Feb. 20. 1824, (ante, II. 728.) [3] June 21. 1786, (13220.)

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years, having been sustained, he is no longer a party, or to be held liable for the debt; and any reference to him as such was utterly incompetent.

2. When a party to whom a reference is made, refers in his deposition to books or documents, he makes them parts of his deposition, and it is consequently competent to look at them; but no allusion to a third person can render it competent to receive his testimony as equivalent to the oath of party.

3. Even taking both depositions, there is nothing to prove resting-owing, the onus of which lies on the pursuers. On the contrary, the strongest presumption is raised that the whole rents were paid out of the proceeds of the two sales, as Clark (to whom the bills for the first sale were delivered with the concurrence of the landlord's man of business, and who is admitted to have accounted to the landlord for more than the amount of the bills) must be held to have received the bills for the second also, and to have received them for behoof of the landlord; and,

4. It is impossible to maintain that Thomas's deposition, taken per se, proves that the debt is resting-owing, when he positively swears it is not, and gives a probable account of the mode in which he considers it to have been paid out of his funds to a party acting for the landlord.

Lord Glenlee.—There can be little hesitation in adhering as to Robert Fergusson as a cautioner; and it is in that character alone that he is concluded against. As to the effect of his oath with regard to Thomas, I have great doubts as to the interlocutors, particularly after the case of Robertson v. Thomson* in this Division. In that case the deposition of the defender was liable to the objection, as here, that he could not tell precisely when or to whom he had paid, but merely that it was paid to some one having authority. Yet we there held the oath negative, and assoilzied, there being strong probabilities that it was paid, as there had been previously pressing demands, which thenceforward totally ceased. Now, here, what strikes me is, that Cochrane's trustees were in possession of an actual sequestration, and it is difficult to see how they could have lost the benefit of it. According to their own account, their agent entered into a transaction with Robert to let him hand over the bills. It is admitted that they got bills to a certain extent, but they say they got no more. The natural presumption is, that they did get more; because, if they had not, they would have applied for a warrant to the Sheriff, who would have treated the people who got bills as intromitters with hypothecated goods; and therefore there is a strong natural probability that the amount did come into their hands. Thomas Fergusson depones not resting-owing, and says that his father took charge of the sale of the crop, and that he understood the bills ultimately came into the hands of Clark, with Cochrane's agent's acquiescence. Even supposing that Thomas refers to Robert as the author of his information, there is nothing inconsistent deponed to by him. Clark gets the bill in the presence of the pursuer's agent's clerk, and, it must be held, with his

* Ante, VIII. 810.

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authority; and Clark afterwards gets the bills for the second roup. Is it not the natural presumption that he got these also for behoof of the pursuers? and is this not sufficient to account for a probable way in which the money was paid? This is not like the case where a party deponed that the creditor gave an order to pay to a creditor of his own, and where there was no evidence to support the statement. On the whole matter, it is very doubtful if, even in conjunction with what Robert says, there be sufficient to support the interlocutor; and I am not sure that we are entitled to consider what he says.

Lord Justice-Clerk.—I do not think it competent to take Robert's oath into consideration at all. He is only concluded against as cautioner, not negotiorum gestor, as now alleged, and as to which there is no evidence. Then a reference is sustained to the oath of Robert as well as Thomas, but reserving to be heard on the import of the depositions. Had a reclaiming note been put in, we would have held the reference to Robert quite incompetent. The principle is, that the party referred to must have an interest, and Robert could have none after the judgment here. This case is not at all similar to that of Cooper, where the books were made part of the oath. If you do take Robert's oath, are you not just giving effect to a single witness? Therefore I must hold the reservation intended to apply to this objection; and I consider it incompetent to refer to Robert at all. Then looking at Thomas's deposition, it is clear that it does not establish the debt to be resting-owing, and I think we must alter.

Lord Cringletie.—I concur. The party referred to must have an interest. The difficulty is, whether, when the proper party refers to a living man, it is not just the same as if he had referred to books; and it seems to turn on this, if from the oath of Thomas it is made out that Robert was præpositus. Robert's oath should not, in point of form, have been taken when it was taken; and I think we are not entitled to look at it, and therefore resting-owing is not proved.

Lord Meadowbank.—This is a case of considerable difficulty. It is not necessary, in order to make the reference competent, that Robert should have been concluded against as a party in the summons; and therefore it is not a sufficient answer that he is only called as a cautioner. I am not much moved by the objection in form that it should not have been taken at the time it was, as that is remedied by acquiescence, and especially by the death of the party. But the question is, whether the situation of Robert was such as to have warranted a reference to his oath, as acting for the party? In that view I felt very great difficulty, and I thought there was a competency in the circumstances; and if we admit it, the result of the oaths is, that the debt is resting-owing.

The Court accordingly refused the reclaiming note for the pursuers, and in that for Thomas Fergusson altered and ascilsied.

T. Paul, W. S.—J. Mowbray and A. Howden, W. S.—Agents.

WILLIAM SIM, Suspender.—*Skene—Jameson—Shaw.*
NINIAN HODGERT and Others, Chargers.—*D. F. Hope—Speirs.*

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Sim v. Hodgert &c.

Jurisdiction—Stat. 46. *Geo. III. c.* 116.—*Clause—Process.*—Held,

1. That under a local police statute conferring authority on Justices to prevent nuisances on the streets, they had no power to interdict de futuro.

2. That a petition praying for such interdict, and otherwise not strictly in terms of the statute, and not referring to it, was incompetent.

3. That, under these circumstances, an appeal to the Quarter Sessions, in terms of the statute, from the Justices' decree in absence, was not necessary; and that a suspension was competent and well founded.

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2D DIVISION.
Lord Medwyn.
T.

THE Paisley Police Act, 46. Geo. III. c. 116. provides, inter alia, that a majority of the Commissioners present at any meeting called for the purpose shall have full power and authority, from time to time, to make rules &c. "for the better execution of this act; for removing obstructions, and preventing nuisances of every kind on the foot-pavements, streets, and other places within the said burgh and suburbs, and in general for all other purposes connected with the preservation of peace and good order, and the general safety and comfort of the inhabitants; and to enforce the same by such pecuniary penalties as they shall think proper, not exceeding in any case the sum of five shillings sterling for each offence." For due performance of the obligations of the statute, jurisdiction is given to Bailies within burgh, and Justices in the suburbs, and actions are to be at the instance of the respective Procurators-fiscal, "with concurrence of any of the said Commissioners for the time being, or for any one or more of the said Commissioners," &c. An appeal was, by the 107th section, allowed "to the Justices of Peace for the county of Renfrew at their then next General Quarter Sessions assembled, who are hereby empowered to hear and determine the matter in dispute, and whose order thereon shall be final and conclusive."

The suspender Sim was proprietor of a soap-work situated near the water of Cart, on a piece of ground called the Smith-hills Quay, which had been many years ago feued out for building in forty-two different lots. The suspender possessed five of these lots.

In November 1828, Ninian Hodgert and others (chargers), designing themselves Commissioners of Police for the new town of Paisley and suburbs thereof, presented a petition to the Justices of Peace for the county, which set forth that, immediately adjoining to the suspender's soap-work, "there is a vacant space of ground, to which the feuars in the new town, in virtue of their titles &c., have a common right, and which is used as a convenience for unloading goods from boats trading on the Cart; that, for a long time bypast, the said William Sim has exercised a most unwarrantable and offensive use of the said vacant space of ground" in laying down his soap waste, which the petition further stated to be an infringement of the rights of the feuars, and the legitimate purposes of the quay; and prayed that the Justices should "decern

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and ordain the said William Sim instantly to remove the nuisance complained of, and interdict him from laying down his soap waste on the said vacant ground, in order that the public may be protected against so offensive an annoyance."

Instead of lodging answers to this petition, the suspender wrote to the agent for the chargers, deprecating this interference with what he considered a legal use of his own property, and promising to control that use as much as possible. He then (as alleged by him) received a verbal assurance that his letter should be laid before the Commissioners; that he would receive intimation to attend and state his case; and that, in the mean time, the petition would not be proceeded in till further notice. Notwithstanding this alleged arrangement, decree in absence was taken against him before the Justices; and, after some attempt on his part to settle the matter extrajudicially, he brought a suspension of the charge thereon.

Pleaded, inter alia, for the suspender—

1. To warrant proceedings under a statute, it is necessary to libel upon it, and more especially where it is a local statute introducing penalties and forfeitures.[1]

2. As the petition and procedure were incompetent, and the Justices exceeded their powers, and as the action was not founded on the statute, the suspender was not bound to appeal to the Quarter Sessions.[2]

The chargers maintained—

1. It was not necessary to libel upon the statute. It is declared by sect. 112 to be a public act, and shall be judicially taken notice of by all Judges and others, without being specially pleaded.

2. At any rate, this is a suspension of a decree in absence of the Justices of Peace; and the proper remedy in such cases is provided by the statute 6. Geo. IV. c. 12.

3. The statute declares the Quarter Sessions to be the proper court of review, and a suspension is incompetent.[3]

The Lord Ordinary pronounced the following interlocutor:—"Repels the plea of the respondents (chargers) that this suspension is incompetent because the suspender did not appeal to the Quarter Sessions, in respect that this is a decreet in absence, obtained, as is alleged, by the suspender after he was given to understand that the case would not be proceeded in without further notice, and which was extracted before he knew that it had been pronounced, so that he had no opportunity of applying to the Quarter Sessions; and that the penalty for not appealing first to the Quarter Sessions, which has been enforced in proceedings under statutes similar

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[1] Parlane, June 28. 1825, (ante, IV. 121); Pollock, Nov. 12. 1829, (ante, VIII. 1.) [2] Brown, Feb. 1. 1825, (ante, III. 430); and Cases there quoted; Ross, March 2. 1826, (ante, IV. 514.) [3] Alexander, Dec. 2. 1828, (ante, VII. 117); Miller v. Craigie, (2. W. and S. 642.)

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to the Police Act of Paisley, seems only to apply where the decree of the Justices has been pronounced, not in absence, but on hearing the parties in foro;—finds, under all the circumstances of the case, that if a remit were to be made to the Justices, with instructions to open up the decree, and hear the suspender on his defences, it would be without calling upon him to pay any previous expenses; and as various objections have been stated, some of them very critical, to the form of the application to the Justices, which may be obviated in a new petition, suspends the letters and charge, and recals the interdict, but finds no expenses due,—without prejudice to the respondents, or those interested, presenting another petition to the Justices, or the Judge Ordinary, on the subject-matter of dispute, and to the suspender his defences as accords; and decerns."

Both parties reclaimed.

Lord Justice-Clerk.—It does appear to me that there is no power in this Police Act by which the Justices can interdict any thing de futuro. I could understand the competency of praying for removal of the soap-waste; but the other part of the prayer, to interdict &c., is not warranted by the act. It is a local act, in which the Justices' powers are defined, and it must not be extended. But this is not all. I see nothing in the statute authorizing a decree in absence. Look at the ninth section. Parties must be heard. The Justices might grant warrant to enforce appearance, and they ought to proceed either upon proof or confession; therefore I am clear that, as the statute was not adhered to, this party was not bound to go to the Quarter Sessions. The suspender made a perfectly fair offer, and, having been driven into this litigation, should have his expenses. I do not entirely approve of all the procedure he adopted, and therefore the expenses may be modified; but I think the proceedings should be suspended in toto, and not, as the Lord Ordinary has done, partly sustained.

Lord Glenlee.—I am of the same opinion. I would prefer a judgment suspending simpliciter to that pronounced. The petition ought to have set forth the particular complaint, and have referred to the statute. The material point here is, that the petition sets forth a nuisance, not in respect of private, but of public property. Were the Justices a proper court for such a question? I think the application itself was irregular and incompetent; and as that gave rise to the litigation, expenses should follow.

Lord Cringletie.—I doubt whether this case falls within the statute. Look at the words "foot-pavements, streets, &c. within burgh and suburbs." But this is a quay at the river-side. Then observe the precise power given. The Justices may decern the offenders to pay, &c. But the prayer of this petition is not conform, and the Justices have not exercised the powers given; and the petition and complaint is not justified by any clause of the act before us. I think the charge should be simpliciter suspended; and considering the fair offer in the suspender's letter, that he is entitled to modified expenses.

Lord Meadowbank.—I am of the same opinion. This interlocutor should be recalled, and another pronounced suspending in toto. I agree that the case does not come under the act at all, and certainly there is no power to interdict;

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but I am by no means prepared to say that the Justices could not pronounce decree in absence, all parties being properly called.

THE COURT accordingly recalled the Lord Ordinary's interlocutor, and suspended the letters simpliciter, without prejudice to all parties proceeding as accords; and found the suspender entitled to expenses, subject to modification.

MACLEAN and GIFFIN, W. S.—W. PATRICK, W. S.—Agents.

No. 262.

GEORGE PENTLAND, Advocator.—*Buchanan.*

JAMES BOOTH (for ROYAL EXCHANGE ASSURANCE Co.) Respondent.—*Jardine.*

Interim Execution pending Appeal. — Decree against a tenant for rents having been appealed against, and interim execution granted—Held that the landlord was entitled to recover the rent by means of sequestration, on finding caution in terms of the judgment awarding execution.

Feb. 25. 1831.

2D DIVISION.
Ld. Mackenzie.
T.

LORD and LADY ELIBANK, in consideration of a loan made by the Royal Exchange Assurance Co. of London, became bound in payment of an annuity during his Lordship's life, and in security granted an assignation to the rents of the estate of Bachilton in favour of the respondent Booth, as trustee for the company, on which he was infeft. In an action of maills and duties against Pentland, the tenant in these lands, Booth obtained decree for the rent, inter alia, of the year 1827; and on Pentland's entering an appeal, he obtained warrant for interim execution, on caution, in common form. Pending this action, he applied for sequestration to the Sheriff of the county where the lands lay, as to the rent of 1827, and also the rent of 1828, for which last he had not obtained decree. In an advocation of this process ob contingentiam of the action of maills and duties, Pentland contended, inter alia, that Booth could only proceed under the warrant for interim execution. The Lord Ordinary pronounced this interlocutor:—"In respect of the warrant obtained by the respondents, the Royal Exchange Assurance Co., for interim execution, finds that they are entitled to proceed by sequestration and sale, before the Sheriff, for recovery of the rent 1827 decerned for by this Court; but finds that they have not obtained decreet for the rent 1828, and therefore that they are not entitled to proceed by sale to recover the same during the dependence of the appeal,—without prejudice, however, to their securing the crop hypothecated for the rents of any other year by sequestration; and, with these findings, remits the cause to the Sheriff to proceed accordingly; and decerns."

The Court adhered, adding the condition that caution should be found, in terms of the judgment awarding interim execution.

J. J. FRASER, W. S.—W. DICKSON, W. S.—Agents.

WILLIAM FRASER, Advocator.—*Cuninghame.* No. 263.
JAMES BRISTOW FRASER, Respondent.—*R. Thomson.*

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2D DIVISION.
Ld. Mackenzie.
R.

Fraser v. Fraser.

Hutcheon v. Scott.

Special Case, in which a landlord having pursued a tenant for arrears of rent, the latter pleaded compensation, which he attempted to instruct by bills and other documents. The Sheriff sustained compensation to a trifling extent, but generally repelled the defences as not proved. The Lord Ordinary dismissed an advocation, and the Court unanimously adhered.

ÆNEAS MACBEAN, W. S.—JAMES MARTIN,—Agents.

THOMAS HUTCHEON, Pursuer.—*D. F. Hope—Cuninghame.* No. 264.
ANDREW SCOTT, Defender.—*Skene—Marshall.*

Agent and Client.—A law agent having extrajudicially employed an accountant to make up a state of accounts for behoof of his client—Held that although the agent had not received payment from his client, he was liable to the accountant.

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1ST DIVISION.
Ld. Corehouse.
S.

ON the death of a person named Fortune, his trustees made a claim against one Reynolds, who had been a partner of Fortune. Reynolds granted bills to the trustees; and being pressed for payment of a bill for £50 by the agent for the trustees, he applied to Mr. Scott as his law agent, who wrote, on the 21st of December 1821, to the agent of the trustees, that "after paying the whole, except this £50 bill, Reynolds showed me the books of the company; and that we might be satisfied of the accuracy both of them and of the statement made out by Mr. Fortune's trustees, I laid these books before an accountant to make up a correct state of the company concern, and I expect to receive it in the beginning of the week." Scott accordingly asked delay until the result of this investigation was known. The accountant alluded to was Mr. Spence.

Delay was granted; but as Spence did not return the report, Scott wrote him in September 1822, saying, "If we wish to prevent judicial measures (against Reynolds) from being resorted to, we must have the state of accounts to show the executors." Again, on the 11th of October, Scott wrote to him—"I am daily harassed about Reynolds' business, and am afraid that very serious consequences will result, if the trustees of Fortune are not satisfied one way or other. I therefore beg you will send me your report to-morrow, or Monday at latest." On the 24th Scott wrote—"The trustees have executed horning upon Reynolds' bills. The consequences will be ruinous to him and his cautioners, unless means are immediately used to prevent their progress; and I entreat that you will send me this evening your report." On the 3d of October, he wrote

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to the agent of the trustees, with " the day-book and ledger of the company of Fortune and Reynolds, and the state of their affairs made up from these books by Mr. Spence, accountant," &c.

Reynolds and the trustees of Fortune having afterwards entered into a submission of their differences, Scott, in September 1823, wrote to Spence — " Along with this I beg leave to send you the draft of a claim for Mr. Reynolds, which I will thank you to correct, as it has been hurriedly written, and I set off to-morrow for the west for a few days. You have the state which was made up by you upon the affairs."

Scott, in the mean time, entered charges in his books against Reynolds for drawing his papers &c., but apparently received no payment. In 1826 he wrote Reynolds, reminding him " that he has not yet paid him one farthing to account, either of Mr. Spence's charges for making up the state of the books, or Mr. Scott's own account. He therefore requests Mr. R. will make a payment without further delay."

In February 1828, Spence wrote to Scott, claiming a sum of £31. 10s as the amount of his account for the above business, which, with four years interest, made a charge of £37. 16s. Scott, in answer, expressed his surprise at the demand, now for the first time made, " as he never considered himself liable for any such sum," &c. Spence then assigned his account to Hutcheon, who raised an action against Scott.

Scott alleged in defence that Reynolds had become bankrupt, and had not paid him his own accounts; that as Spence did not prepare his report under any judicial remit, but merely in an extrajudicial case, he knew that he had only to look to the responsibility of the party, and not to that of the agent; and the consciousness of Spence that he had no claim against the defender was apparent from his allowing above four years to elapse without making any demand upon him. He specially objected to the claim for interest, the account not having been rendered, and insisted that the account must be taxed.

Hutcheon answered, that the letters quoted proved that Scott was the actual employer of Spence, who knew nothing of Reynolds prior to the employment. It was therefore immaterial whether or not the case was in Court at the date of the report. After these letters were produced, it lay with Scott to prove that Spence had undertaken the employment on the footing of having no claim, except against Reynolds. He had failed in this. The delay of Spence was at best a slender presumption on the subject; but it was removed by the explanation that certain old counter claims of Scott and a Mr. Hannay against Spence had recently been pressed, instead of being allowed to lie over, as before, as a set-off against this one.

The Lord Ordinary " found it not proved that John Spence, the pursuer's cedent, in examining the books of Reynolds and Co., and reporting on the state of their affairs, acted on the employment of the defender, or that the defender rendered himself liable to pay Spence's account for

transacting that business, and therefore assoilzies the defender from the claim of the pursuer, founded on that account."* No. 264.

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The pursuer reclaimed; and the Court (Lord Craigie dissenting) "altered, found the defender liable to pay the account libelled on, as the same may be taxed, to the pursuer, and also liable for expenses of process," &c.

R. Macfarlane, W. S.—A. Scott, W. S.—Agents.

William Scott, Pursuer.—*D. F. Hope—Patison.* No. 265.
J. Russel and J. Wilson, Defenders.—*Jameson—Neaves.*

Expenses—Jury Trial.—A verdict being returned for the defenders in a Jury trial, and the pursuer, a trustee, having thereafter obtained an order for a new trial; but his title as trustee being subsequently reduced before further proceedings—Found that the defenders, who had compromised the case with a new trustee, were not entitled to the expense of the trial with the former.

William Scott, as sole surviving trustee under a postnuptial contract of marriage betwixt John Chalmers and Margaret Newland his wife, became pursuer of an action of reduction against John Wilson and Russel his trustee, for setting aside two deeds, by which Chalmers had conveyed in favour of Wilson a succession of £7000, which had fallen to Mrs. Chalmers, as nearest of kin to John Newland in Jamaica. It was alleged that Wilson had taken advantage of the ignorance and facility of the parties, and purchased for a small sum the succession, fortifying his right by obtaining the deeds sought to be reduced. A verdict was, in the first instance, given for the defenders; but Scott, the trustee for Chalmers, afterwards obtained an order for a new trial, upon payment of some previous expenses. While matters were in this state, certain other trustees, appointed by Chalmers, now deceased, raised an action to reduce the postnuptial contract under which Scott had acted; and they also, at the same time, raised an action of reduction of the two deeds in favour of Wilson. The postnuptial contract was reduced, and Scott's title accordingly fell to the ground. Chalmers' new trustees then made the following offer to Russel, trustee for Wilson:—"The trustees of John Chalmers having succeeded in obtaining a verdict reducing the postnuptial contract of marriage and deed of trust by Chalmers and his

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* "Note.—In judicial proceedings, if a case is remitted by the Court to an accountant, the agents who do not oppose the remit are held as representing their clients to become liable to the accountant for his trouble. But the same liability is not presumed in extrajudicial proceedings; because the accountant may have acted on the employment of the party, and not of his agent, as Spence is averred to have done in this case. That averment is rendered probable by various circumstances, particularly by Spence's delay in demanding payment from the defender for a period of five years, and Reynolds had become bankrupt. His excuse for the delay is not satisfactory."

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wife Margaret Newland, and being willing to avoid the expense of trying their action for reducing the deeds granted by the said John Chalmers to John Wilson of Guildhouse, hereby offer to James Russel, Esq. writer in Falkirk, trustee for Wilson's creditors, to take the action out of Court on the following terms:—1. That it shall be held that a verdict for the pursuers has been pronounced in the action. 2. That the trustees of Chalmers shall pay £500 to Mr. Russel, as trustee foresaid, out of the first and readiest of the funds which they may receive from the estate of the late John Newland of Jamaica, and which shall be understood to include all claims and demands which the said John Wilson, and his trustee or creditors, may have in virtue of the deeds under reduction or otherwise. 3. That each party shall pay their own costs. This offer was accepted by Russel on the part of Wilson.

Russel and Wilson now presented a note, praying that the order for a new trial in the action at Scott's instance might be discharged, and full expenses awarded against him, on the ground chiefly that, though the case had been compromised, yet Scott having pursued, as it turned out, without any title whatever, they were entitled to the expenses of the trial in which they had obtained a verdict.

The Court unanimously refused the demand.

W. Smith, W. S.—W. Scott, W. S.—Agents.

No. 266.

James Blair, Advocator.—*Keay—A. Dunlop.*
John Blair, Respondent.—*Skene—Monteith.*

Legacy—Process—Summary Application.—Two brothers in this country being appointed residuary legatees by a brother dying abroad; and one of them having desired the foreign administrators to send him a trunk of wearing apparel of the deceased, at an appraised value, instead of exposing it to public sale; and this having been done—Held,

1. That the other legatee was nevertheless entitled to an actual division of the contents of the trunk; and,

2. That he might competently sue for delivery in the form of a summary application.

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2d Division. Ld. Fullerton. T.

The late Dugald Blair of Nassau, New Providence, by his latter will, bequeathed all his property to his two brothers, John and James Blair, whom he appointed his executors in this country, where they were both resident, while he nominated certain individuals in New Providence to be his executors there. The executors abroad having declined to act, administrators were appointed by the proper authorities in the colony. Under their direction, a regular appraisement was made of the effects of the deceased, which were thereafter disposed of by public roup, bringing in some instances more, and in others less than the appraised value, though, in the whole, the proceeds of the sale exceeded the amount as

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appraised. Among the effects belonging to the deceased was a trunk of his own wearing apparel, in regard to which James Blair wrote to the administrators:—"I hope you have not brought his body-clothes or linen to the hammer. These I should like to be sent me per Rolla. Get them appraised, and in the mean time put them to my debit." In answer, one of the administrators wrote—"His personal property was appraised, you will perceive, at £382. 12s. only, but sold for £408. 3s. All the articles appraised have been sold, with the exception of a trunk of wearing apparel appraised at £4, a writing-desk appraised at 16s., and an iron chest at £3. 4s. The trunk of wearing apparel will be sent you by Mr. Dewar (the other administrator), in whose possession it is, by the present opportunity." The trunk was accordingly dispatched to this country; and, in a subsequent letter, the administrator stated—"I have debited you with £4. 16s., being the appraised value of the clothes and desk. The latter I shall send by the first opportunity." On the trunk being received in this country by James Blair, John presented a summary application to the Sheriff of Renfrewshire, (both parties residing in Greenock,) praying to have James ordained to deliver over to him "his equal half or share of the said trunk and wearing apparel, and other effects contained therein;" or, on failure, to pay £20 as the value of such share. After some procedure, the Sheriff remitted to the clerk of Court to divide the articles contained in the trunk "into two equal parts, as nearly as possible, and deliver over one to each party." James thereupon brought an advocation, in which he pleaded—

1. That John had such real right in the particular articles, as to authorize him to apply for delivery of them in the form of a summary application.

2. That the transaction on the part of James with the administrators, who had the disposal of the effects abroad, was a purchase of the trunk at a fair price, which was effectual to him; and that even if the price was considered inadequate, John's claim for the loss lay against the administrators; and,

3. That, at all events, the utmost John could demand was the sale of the effects, and the division of the proceeds; but that he had no right to insist for delivery of the ipsa corpora of one-half of the effects, James having at least a joint interest in every individual article.

The Lord Ordinary remitted simpliciter, adding the subjoined note;* and the Court adhered.

JOHN PATTEN, W. S.—JAMES PATTISON, W. S.—Agents.

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* "The respondent had, by will, a joint interest in the very trifling articles in dispute, of which interest he could not be deprived by the alleged private arrangement between the advocator and the persons administering the estate in New Providence. The actual division of the contents of the trunk directed by the Sheriff, instead of the

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WILLIAM WALKER, Pursuer.—*More.*
PETER THOMSON and Others, Defenders.—*W. Forbes.*

Mar. 1. 1831.
1ST DIVISION.
Ld. Corehouse.
H.
Walker v. Thomson &c.

Agent and Client.—Mr. Walker, W. S., raised an action against several defenders for the expenses incurred by him as their agent in a series of relative suits. One of the defenders attempted unsuccessfully to separate herself from the others, in relation to part of these proceedings. But the Lord Ordinary and the Court decerned in terms of the libel.

J. RENTON, W. S.—J. JOHNSTON,—Agents.

No. 268.

ALEXANDER CRICHTON, Suspender.—*Cuninghame.*
ALEXANDER WATT, Charger.—*Skene—Shaw—Speirs.*

Mar. 1. 1831.
Crichton v. Watt.

Process—Proof—Bill of Exchange.

1. A Lord Ordinary having found a payment of a bill proveable only by writ or oath of a charger, and granted diligence to the suspender to examine havers; and the diligence being extracted, and the charger examined as a haver; and the suspender having afterwards reclaimed against that part of the judgment which limited the mode of proof—Not thereby barred from so reclaiming.

2. The drawer of a bill having charged the acceptor for payment of the amount; and the acceptor having alleged that he had sent the money by a third party, who had paid it to the drawer; and the drawer having admitted that he received a sum from the third party, but alleged that it was in payment of a debt due to him by that party, and maintained that payment could be proved only by his writ or oath—A condescendence, before further answer, of facts by the acceptor, allowed.

Single Bills, &c.

GRAHAM v. D. and A. BOOSIE.

Mar. 1. 1831.
1ST DIVISION.
Graham v. Boosies.

Process—Record—Advocation.—In an advocation at the instance of Graham, "the Lord Ordinary, (the respondents failing to appear,) in respect the record, as closed in the Inferior Court, is not objected to, declared the record closed in this Court, and appointed parties to be ready to debate."

The respondents reclaimed, and the Court remitted the cause to the Lord Ordinary, "with power to his Lordship to repone them, on payment of such expenses as he shall see to be reasonable."

G. RITCHIE, W. S.—T. PAUL, W. S.—Agents.

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division of the price to be produced by sale, might perhaps be questionable; but as that mode of extricating the rights of the parties must be understood, from the advocator's own statements in the record, to be that which, if there is to be a division at all, he would prefer, the Lord Ordinary sees no reason to make any alteration."

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Mar. 1. 1831. Crichton v. Watt.

Watt sold Crichton several horses, valued at £60, under the condition that he might return such as did not please him, and charge for the expenses of their keep. Crichton granted his bill for £60, falling due on the 2d of December 1828. Prior to that date, he returned one of the horses, valued at £27, and made a charge for its keep. He alleged that when the bill for £60 fell due, he sent one Dunlop with a sum of £31 to Watt to retire the bill; that Dunlop paid it to Watt, but that he did not get up the bill; and that, at this time, Dunlop owed nothing on his own account to Watt. Watt admitted that Dunlop had paid the above sum, but he alleged that he did so in extinction of a bill of the same amount past due to him by Dunlop. In about three weeks afterwards, Watt raised diligence on Crichton's bill, and gave him a charge for £31. 15s., as the balance remaining due, after deducting £27 for the horse returned, and £1. 5s. for its keep.

Crichton suspended, mainly on the allegation that the £31 carried by Dunlop to Watt had been delivered to Watt in payment of the bill, and that this was explained to Watt by Dunlop at the time of its delivery; but that the bill had not been given up, because there was a dispute as to the charge for the keep of the horse.

Watt answered, that possession of the bill proved non-payment; and that as Crichton alleged payment, he could only establish this by writ or oath.

The Lord Ordinary "found that the payment of the balance of the bill charged on can only be proved by the writ or oath of the charger, and granted warrant for letters of incident diligence at the suspender's instance against havers, for recovery of all books and other writings belonging to the charger," that excerpts might be made, &c.

Crichton extracted the warrant, and examined Watt as a haver, and recovered various documents. He afterwards, within the reclaiming days, presented a reclaiming note against the Lord Ordinary's judgment, and craved the Court "to recal it, in so far as it finds that the payment of the balance of the bill charged on can only be proved by the writ or oath of the charger; to suspend the letters," &c.

The charger objected to the competency of the note, on the ground that Crichton, by examining him as a haver under the Lord Ordinary's interlocutor, had adopted and homologated the judgment, so as to be barred from reclaiming against it.

Crichton answered, that he only reclaimed against a portion of the interlocutor which he had never homologated, and that the warrant granted by the Lord Ordinary to examine havers was not allowed on any condition that he should not reclaim against the rest of the judgment.

The Court repelled the preliminary objection.

On the merits—

Lord President.—The question is not, whether the sum of £31 was paid by Dunlop to Watt—for that fact is admitted;—but merely for what purpose

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was the payment made? On what account was it made? This is a matter of fact which appears to me to be proveable prout de jure. Suppose that the trustee on a bankrupt estate pays a sum into a bank in name of the estate, and the bankers do not dispute the fact of payment, or the amount paid, but allege that it was applicable to another account than the estate, perhaps to the private account of the trustee as an individual; could they insist that the proof of this must be rested on their writ or oath? I think not; and I conceive that, in this case also, the charger cannot insist on such a limitation of the suspender's proof. I would allow the suspender to lodge a special condescendence as to the purpose of the payment of £31.

Lord Balgray.—I should incline to allow an investigation of the state of accounts as between Dunlop and Watt, which appears to me to enter deeply into this question. There are some features in Watt's case which I do not like, particularly that the past due bill of Dunlop, which the suspender says was fraudulently reared up by the charger, bears no mark of noting, although the charger had taken care to note the suspender's bill for £60, which shows that he was acquainted with regular procedure. But the suspender says that Dunlop was owing nothing to the charger when he paid him the £31, and consequently that the payment could only refer to the suspender's bill. This is a fact which might be expiscated by investigating the accounts of the parties; and if the suspender's averment be proved, it might save further discussion. I would recal the interlocutor, with a view to allow a special condescendence by the suspender, and an investigation of these accounts.

Lord Craigie was understood to say that there was not sufficient real evidence in support of the suspender's averments to allow of any deviation from the ordinary rule of limiting the proof to the writ or oath of the charger.

Lord Gillies.—I agree with the Lord President. The fact of payment of a sum having been made, and the matter of fact for what purpose it was made, are two things essentially different. Parole proof as to the quo modo the money was paid, may be allowed. The payment of £31 is admitted; but parties are at issue on the matter of fact, whether it was a definite or indefinite payment. The charger is not entitled to insist that the proof of this must be confined to his own writ or oath.

The Court therefore "recalled, &c.; and, before further answer, remitted to the Lord Ordinary to receive a special condescendence by the suspender as to the payment of £31 admitted to have been made by Dunlop to the charger, and on what account, or towards what debt, that payment was made, reserving all questions as to expenses."*

Greig and Morton, W.S.—J. Wilson, W.S.—Agents.

* The record in this case had been closed; but no objection on that ground was made to the order for the condescendence.

JOHN ALLAN, Suspender.—*D. F. Hope—R. Allan.*
ALEX. ALLAN and Co., Chargers.—*Sol.-Gen. Cockburn—Whigham.*

No. 269.

Mar. 1. 1831.

Allan v. Allan and Co.

Bank—Payment, Appropriation of.—A drawer of a bill of £704, discounted with a bank, having offered to retire it by transmitting another of £140, and applying in payment of the balance a sum at his credit in his account; and the offer being accepted, and the new bill transmitted; but the drawer thereafter becoming bankrupt, while the bill of £704 still remained with the bank—Found, in a question with the acceptor, that the bank could not impute the second bill, and the balance at the credit of the account, to other transactions with the drawer, so as to have recourse upon the acceptor of the bill for £704.

Mar. 1. 1831.

2D DIVISION. Ld. Mackenzie. F.

THE chargers Alexander Allan and Co. acted as bankers for Rennie of Phantassie; and, among other bills, they discounted for him two drawn by him upon and accepted by the suspender John Allan,—the one for £704, due on the 30th, and the other for £1000, due on the 31st of July 1829. On the 30th of July, the chargers sent Rennie a statement of the balance of his account, in which he was credited with £575. 8s. 8d.; they at the same time stated,—"We trust John Allan will attend to his acceptance here to-day for £704, as well as the one due to-morrow for £1000 sterling. If he does not, we shall send him a horning without delay; and if Allan does not pay to-day, you need not draw upon us." Rennie wrote in reply, on the 31st:—"Yours I received; as also one from John Allan, who is in London, about getting his estate sold. He encloses me a stamp, which I have filled up for £1000, which I hope you will discount, and I shall draw none," &c. "If I had a stamp, I would have sent you a draft for £140, which I will do, that would cover Allan's due yesterday with what is in my account." To this the chargers replied on the 1st of August:—"We have received your favour of yesterday, covering John Allan's acceptance for £1000 sterling, to meet his due this day for the same amount. We trust the other of Allan's for £704, due on the 30th ult., will be taken up, as you propose, immediately." On the same day Rennie wrote to the chargers,—"I here enclose a bill for £140, and the cash at my credit will pay Mr. John Allan's bill for £704; and I hope you have renewed the one for £1000."

Immediately after this, Rennie stopped payment. Allan and Co., besides the bill for £140, which was duly retired, still held possession of the bill for £704; but solely, as was alleged by the suspender, in consequence of Rennie's absence in England. The suspender paid the bill for £1000; but the chargers insisted that they were entitled to enforce the bill for £704 against him; and that as they were creditors of Rennie to a considerable amount, to impute the bill for £140, and the balance in his account, in payment of their debt.

Allan suspended a charge upon the bill of £704, for this among other reasons—That the bill had been retired by a completed transaction betwixt Rennie and Allan and Co., in whose hands it remained from acci-

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dental circumstances only; and that Rennie was entitled to point out which of his debts was to be extinguished by the remittance he made.

The Lord Ordinary suspended simpliciter, and the Court unanimously adhered.

Suspender's Authorities.—Ersk. 3. 4. 1; 1. Bell, 535.

J. Wright, W. S.—Allan and Bruce, W. S.—Agents.

No. 270.

John Thomson, Pursuer.—*More.*
W. Gilkison and Others, Defenders.—*Skene—Maitland.*

Also,

Alexander Paterson, Advocator.—*Skene.*
John Thomson, Respondent.—*More.*

Writ—Bill of Exchange—Stamp—Process.

1. A letter, undertaking to pay a subsisting debt of a mercantile character, held to be a document in re mercatoria probative, without the solemnities of the act 1681, and not to be a promissory note requiring a stamp.

2. One of several copartners having subscribed an obligation as treasurer of the concern, and being cited as such in an action for payment; and thereafter a supplementary action having been brought against the partners, himself included, and conjoined with the first process; the Court refused to dismiss the first process.

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2d Division. Lord Medwyn.

The defenders Gilkison &c. were proprietors of the Glasgow Free Press Newspaper. On the 28th of March 1826, the following letter, in the handwriting of Northouse, the editor of the paper, and signed by the advocator Paterson, one of the proprietors, who acted as treasurer, was delivered to the pursuer Thomson, agent at Glasgow for the Royal Bank:—"Glasgow, 28th March 1826.—Sir, As the treasurer appointed by the Company of Proprietors of the Glasgow Free Press, I hereby undertake to pay to you, for behoof of the Royal Bank, Glasgow, Two Hundred Pounds sterling, as a debt due to you by Mr. William S. Northouse." On this letter Thomson raised an action against Paterson before the Magistrates of Glasgow, who decerned for payment of the £200. Paterson then brought an advocation, in which he contended that the proper parties were not called, and that the action was incompetently brought against him as treasurer. This plea was, however, held to be sufficiently elided by a supplementary action at Thomson's instance against the individual proprietors, including Paterson,[1] in which a record was made up on summons and defences, and which was conjoined with the previous advocation, as mentioned ante, p. 27. In his summons, Thomson alleged that when the letter of guarantee was granted, a bill for £350, drawn and indorsed by Northouse, the editor, was lying past due in the hands of the Bank; that diligence had been done upon

[1] See ante, VII. 646.

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it; and that the letter had been granted in security of the debt in the bill. On the other hand, the defenders, while they admitted that the letter had been granted with their authority, denied that it was intended as a guarantee of the alleged bill due by Northouse, of which they averred they knew nothing; and they stated, that when the letter was granted, they were in terms with the Bank for a cash-credit to the extent of £1000, which only required the sanction of the directors at Edinburgh; that in the mean time, in order to obtain an advance of £200, this letter was granted on the understanding that it was to be replaced as soon as the cash-credit was obtained; but that no advance was ever made, though the letter was still retained, and was now attempted to be applied to Northouse's bill. They pleaded, in point of law—

1. The letter, if considered as a guarantee, is improbative, and cannot be held to be in re mercatoria, so as to take it from under the provisions of the act 1681; and,

2. If considered as constituting a primary obligation for payment of money, it is a promissory note, and null for want of a stamp, which cannot now be impressed on it.

The letter having been stamped as an obligation, the Lord Ordinary, with reference to the pleas above stated, pronounced this interlocutor:—"Finds it admitted by the defenders, that the proprietors of the Glasgow Free Press authorized the defender Alexander Paterson to subscribe the document libelled on, as their treasurer;—that it is holograph of the defender Mr. Northouse, and that he was then editor of their newspaper;—that this document is not a promissory note, but is a letter of guarantee, and it is so termed by the defenders themselves in their defences; and that the objection that originally it was unstamped has been obviated;—that the letter of guarantee undertakes to pay £200 as a debt due by Mr. Northouse, and that the debt so due is sufficiently set forth in the summons; and as the said letter was written and subscribed by the servant of the defenders, if there be any defect in it from want of specification, it must be interpreted against them; besides that Mr. Northouse is a defender, and has not appeared to dispute the statement that he was, and still is, due the sum in the bill dated 12th September 1825;—that this letter of guarantee, being thus granted for the debt constituted by said bill, is a document in re mercatoria, and therefore probative, without the solemnities of the act 1681;—but finds it alleged by the defenders that the said document was, by their authority, subscribed by Paterson, in order to obtain an advance of cash to the extent of £200, which was to be replaced by means of a cash-credit, about which the parties were then negotiating; and that although the document was put into the hands of the pursuer, or of his law-agents, that no advance of money was made by the pursuer upon it; and as this is a relevant defence, appoints the cause to be called, in order to be put in a train for enabling the defenders to prove said defences." His Lordship at the same time refused an application on the part of Paterson, as

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respondent in the advocation, to have that process dismissed as improperly brought against him individually, in respect that "being himself one of the proprietors, and acting as their treasurer, there seems to have been no very good reason for insisting on the rest being called; and that at all events he must remain a defender in the process, and incurs no additional expense by the advocation not being immediately disposed of."

Gilkison &c. and Paterson reclaimed, and contended, inter alia, that the finding of the Lord Ordinary, as to the letter being a document in re mercatoria, was founded on the assumption that it was granted in guarantee of a bill of exchange, while this was denied, and admitted to proof by the interlocutor itself.

Lord Glenlee. — If these parties had, from the beginning, put the case on the matter proposed by the Lord Ordinary to be remitted to proof, it would have been unnecessary to determine any thing else; but as they insisted on the other grounds independent of that, it was right in the Lord Ordinary to decide as to these. Then it is plain, that whether this be considered as a letter of guarantee or an obligation, it is not a promissory note requiring to be written on paper previously stamped. As to its being improbative, I remember a decision by the late Lord Newton, that an obligation for a debt already due could not be considered as in re mercatoria; but if the debt be of a mercantile character, I think that the obligation should also be considered as in re mercatoria. I am therefore for adhering.

Lord Meadowbank.—I am of the same opinion.

Lord Justice-Clerk.—This is undoubtedly a letter of obligation—not a promissory note; and it falls under the class of documents in re mercatoria.

The Court accordingly adhered.

J. Dundas, W. S.—J. Cullen, W.S.—Agents.

No. 271.

Charles M'Caul, Pursuer.—*Skene—Thomson.*
Monkland Railway Co., Defenders.—*More—Dick.*

Contract—Submission.—Construction of clauses in a contract for the formation of a railway, by which the parties agreed to refer disputes as to the rate of payment for extra work to men of skill, and as to the general interpretation of the contract, to Professors of Law.

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2d Division.
Ld. Mackenzie.
T.

The pursuer (a road-contractor) and the defenders entered into contracts relative to the formation of certain parts of the Monkland and Kirkintulloch Railway. After fixing the mutual obligations, these contracts, (which were all in the same terms,) contained a clause providing that in case the company shall require any new or additional work to be done, or any alteration in the mode of doing it, or any part of the work to be left undone, &c., then the pursuer should act accordingly, and "be paid the price for any additional work, and allow a deduction from the price for any part that may be left undone, as the case may be. The rates or prices to be paid for additional work, or to be deducted for work not required to be done, shall be fixed between the said Charles M'Caul and

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Thomas Grainger, at present engineer to the said first party, or any engineer whom the said first party may appoint; and in case of their differing in opinion, then the rate of the price for such additional work ordered by the company, or for any part of the work left undone by their order, shall be fixed by two arbiters of skill in such works, mutually chosen; and if these arbiters cannot agree, then the superintendent of public works for the city of Glasgow," &c. The contracts concluded with another clause, providing that "in case any disputes or differences shall arise between the parties relative to the meaning or execution of these presents, all such disputes are and shall be submitted to the decision and decreet-arbitral of Robert Davidson, Esq. advocate, Professor of Laws in Glasgow College; whom failing, by death, absence, or refusal to act, then of George Joseph Bell, Esq. advocate, Professor of Laws in Edinburgh College, as sole arbiter, &c."

After the work was completed, M'Caul raised an action of count and reckoning against the company, to enforce a settlement of a balance of the contract prices alleged to be still due. In this action, the defenders disputed, inter alia, the accuracy of certain charges for extra work in lots 9 and 10—first, on the ground that a great deal so charged was not extra work, and, secondly, that the remainder was overcharged; and they objected to an alternative conclusion in the summons, that the disputes should be referred to men of skill. In reference to this they maintained this preliminary plea,—that special provision being made in the contracts for settling, by the arbitration of the Professors of Law, any dispute concerning their meaning and execution, the summons was incompetent, in so far as it called for count and reckoning respecting the contract prices of lots No. 9 and 10; and in so far as it concluded for payment of the account of work done upon these lots, that work being alleged by the defenders to be not extra work, or at least that it could be sustained only to the effect of having the whole dispute regarding these lots, together with the counter claims of the defenders, remitted to the arbiter provided by the contracts.

The Lord Ordinary sustained "the dilatory defences, to the effect that the questions betwixt the parties in this cause must be submitted to Messrs. Davidson or Bell; and sists process for fourteen days, that the defenders may put into process a draft of the submission."

The pursuer having reclaimed, the Court "adhered to the interlocutor complained of, with this variation, that only the question as to the true meaning and execution of the contract referred to shall be submitted to the arbiter named in the contract; and remitted to the Lord Ordinary to proceed accordingly with this further instruction, that process shall be sisted as to the further points in dispute, until such submission shall be disposed of, and reserve all questions as to expenses hinc inde; quoad ultra, refused the desire of the note," &c.,

R. and A. Kennedy, W. S.—W., A. G., and R. Ellis, W. S.—Agents.

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Mar. 1. 1831. Cleland &c. v. Mack.

Hunter v. Pearson &c.

MRS. MACK or CLELAND &c., Pursuers.—*Skene—G. G. Bell.*
JOHN HAMILTON MACK and Others, Defenders.—*D. F. Hope—Jameson.*

Process—Exhibition.—A party requiring exhibition of the whole correspondence of her deceased father for a course of years, and declining an offer of exhibition in his house where the documents were—Found liable in the expense of an inventory thereof, if removed for exhibition elsewhere.

Mar. 1. 1831.

2D DIVISION. Ld. Mackenzie. T.

THIS was an action at the instance of Mrs. Cleland, as a joint disponee with her brothers and sisters, under the deed of settlement of their father deceased, calling for exhibition of his writs and papers, and for count and reckoning. The Lord Ordinary, "of consent of all parties, appoints the books, vouchers of debt, letters, and papers of the deceased William Mack, now at Fruitfield, or in custody of all or any of the defenders, to be deposited by inventory, in hoc statu, at Glasgow," &c.; "there to remain open and patent for the inspection of the pursuers and all concerned," &c. Under this interlocutor, a deposition was emitted, and productions made, by one of the defenders John Hamilton Mack, who had taken the principal charge of the affairs of the deceased; but Mrs. Cleland, not being satisfied therewith, insisted for a further exhibition of the whole letters received by the deceased during the last ten years of his life, and such copies of his own letters as might be found in his repositories. The defenders offered exhibition of these to her agents at Fruitfield, or elsewhere, if she paid the expense; but she declined going to Fruitfield for personal reasons, and proposed a house in Airdrie,—the defenders to be at the expense of inventory, &c. The Lord Ordinary found, "that if the pursuer insists that these documents shall be inventoried, or removed to another house, the expense of said inventory must be borne by the pursuer in the first place," &c.; and the Court adhered.

W. DOUGLAS, W. S.—W. WOTHERSPOON, S. S. C.—A. MILL, W. S.—W., A. G., and R. ELLIS, W. S.—Agents.

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1ST DIVISION. Ld. Moncreiff. Bill-Chamber. S.

JAMES BLAIR HUNTER, Suspender.—*Wilson.*
MRS. FORD or PEARSON and HUSBAND, Chargers.—*Maidment.*

Bill of Exchange.—A domestic servant having, as indorsee of a bill for £10 drawn and indorsed by her master, charged the acceptor, and, on a reference to oath, deponed that she had received it in part payment of her wages—Held that she was an onerous indorsee.

JAMES BLAIR HUNTER, writer, Edinburgh, presented a bill of suspension of a charge by Mrs. Ford or Pearson on his acceptance, in favour of R. Dunlop, W. S., for £10, alleging that the charger, who was the indorsee of Dunlop, was his domestic servant; that she had paid no value for the

bill, and that Dunlop had given no value to Hunter for it. Having referred to her oath, she deponed that it was indorsed to her in part payment of a sum of £12. 10s. then due to her for wages; that she had asked Dunlop to keep the bill for her, and had authorized him to raise diligence on it in her name. The Lord Ordinary, "in respect that the deposition is negative of the matter referred, and imports that the bill was indorsed to the charger for value in wages, refused the bill, found expenses due," &c.

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Hunter v. Pearson &c. ·· Gibson &c. v. Stewart.

Hunter reclaimed, but the Court adhered.

G. Lang, W. S.—R. Dunlop, W. S.—Agents.

No. 274.

William Gibson and Mandatory, Pursuers.—*Keay—Miller.*
Duncan Stewart, Defender.—*Murray—Cuninghame.*

Foreign—Prescription—Domicile.—Where a party had come to Scotland within a year after the contraction of a debt under the law of England, and continued domiciled in Scotland, found that he could not plead the English Statute of Limitations.

Mar. 2. 1831.

1st Division. Lord Newton. D.

In 1822, William Gibson of Liverpool and mandatory raised an action, before the Court of Session, against Duncan Stewart of Borrowstounness, concluding for payment of £1272. 8s. 7d., as the balance due on his eighth share in a certain ship and cargo which had been fitted out on a joint adventure from Liverpool to the Slave Coast in 1806, in which year it was seized on that coast, and confiscated; for the sum of £1132. 9s. 4d., as money received by the defender, in the island of Barbadoes, from agents of the pursuers; and also for the sum of £139. 16s. 6d., conform to state of accounts.

On the 7th of March 1828, the Court "sustained the defence founded on the illegality of the adventure, and assoilzied the defender from the conclusions of the libel, so far as the same relate to the sum of £1272. 8s. 7d." &c.; and "in regard to the other conclusions of the libel, remitted the same" to the Lord Ordinary to proceed with the cause.[1]

A record was made up, in which the pursuer claimed the above-mentioned sum of £1132. 9s. 4d., as "advances made to the defender, in the year 1807, by Messrs. Francis Dixon and R. A. Hyndman, the pursuer's agents in the island of Barbadoes, which were by the defender applied exclusively to his own private and personal purposes." In the record the items of the account were stated in some detail, such as £745 twice paid as costs of a Barbadoes lawsuit relative to the seizure of the ship, &c.

The defender denied the accuracy of the pursuer's accounts; but he pleaded, 1. That even if true, still, as they related to the adventure,

[1] Ante, VI. 733.

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held to be illegal, they could not be enforced; and, 2. That the claim was barred by the English Statute of Limitations.

After closing a record, and hearing parties, the Lord Ordinary ordered the cause to the roll, issuing the subjoined note;* and he thereafter "appointed the defender to give in a minute, stating, more specifically

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* "The Lord Ordinary, on advising the cause, does not think it ripe for the decision even of those points to which counsel confined themselves at the hearing, and he has therefore ordered it to the roll.

"When the cause was debated, the defence principally insisted on was that founded on the English Statute of Limitations, which is said to apply to and preclude the claim; and the only other defence brought under consideration was that said to arise from the illegality of the original adventure. These points were argued as in some measure preliminary, it being unnecessary, until their termination, to consider the particular items of the claim.

"In regard to the latter of these defences, it does not appear to the Lord Ordinary to be well founded. The greater part of the sums claimed, if due to the pursuer, appears to be debts which originated in transactions subsequent to the seizure of the vessel, and which are not of a nature to be affected by the illegality of the adventure in which it had been employed, although there may be some, such as the premiums of insurance, or the expense of the litigation with the underwriters, which may be affected by that illegality, supposing it originated in the culpable conduct of the pursuer.

"As to the prescription, which was the point mainly argued, two answers were made,—1. That it does not apply at all, the defender being domiciled in Scotland since 1808; and, 2. That suppose it does apply, its operation is excluded by the defender's residence in Scotland during part of the six years; and also, independently of this, by the interruption effected by the action in 1811.

"It seemed to be admitted, on the part of the defender, that, in such claims as the present, the locus solutionis regulates the forum; and that the debt being simply a personal one, without any specified place of payment, the proper forum is that of the debtor's domicile. The parties, however, differ as to the fact of his domicile,—the defender averring that he was domiciled in England for at least six years after the debts claimed were incurred,—while the pursuer asserts that he was domiciled in Scotland ever since 1808.

"Now, if it shall turn out that the domicile has been in Scotland for such a period as that the six years had not run before its commencement, the English prescription will not apply. If, on the other hand, it shall appear that the defender's proper domicile for the whole of the six years was England, then it will be a question of English law, to be decided on the opinion of English counsel, whether residence in Scotland during a part of the period (as may be inferred from the defender's averment on the record that he has been always resident, not in England, but in Great Britain) may have had the effect to stop the currency of the prescription; whether the action in 1811 may not have operated as an interruption; or whether the defender's letters, which are founded on as admissions of part of the debt claimed, may not have saved these items from the operation of the statute. The question of domicile appears, therefore, to be the primary one, which cannot be settled without further investigation, as the averments of the parties are completely contradictory. As they are, however, exceedingly general and vague, it is questionable whether any investigation could be made without a much more specific statement on this point than appears at present on the record."

than is done by him in the answers to the foregoing condescendence, where his residence has been since 1808." No. 274.

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A minute was accordingly lodged, in reference to which the Lord Ordinary pronounced this interlocutor:—"Having considered the foregoing minute, and whole process, finds that as it is admitted by the defender that he has been constantly residing in Scotland since November 1807, and has been settled as a surgeon at Borrowstounness ever since May 1809, the English Statute of Limitations cannot apply to the present claim, repels the defence founded on that ground; and in respect parties have not been fully heard on the other defences, appoints them to debate thereon."

Stewart reclaimed, and founding on the case of Glyn and Co.,[1] pleaded, that as England, or at least a country subject to the law of England, was both the locus contractûs and locus solutionis, the law of that country must determine the existence of the debt, or its extinction by prescription.

The pursuer answered, that, in the case of Glyn and Co., the question was as to a bill of exchange, the locus solutionis of which was specified to be London; and that the point in dispute was as to the admissibility of parole evidence, consistently with the principles of the English law, to prove in our Courts the terms on which the bill was deposited in the hands of a banker in that city. But the present case related to a personal debt, without any specific place of payment; and the proper forum for trying what prescription reached it, was necessarily the domicile of the debtor.

Lord Gillies.—In a bill of exchange, the place of payment is specified; but in such a debt as this, having no specific locus solutionis, that must be held to be the place of payment where alone payment can be effectually demanded—that is, the domicile of the debtor.

The Court accordingly adhered, and found expenses due since the date of the interlocutor.

J. Mackenzie,—J. Baird, W. S.—Agents.

Lord Macdonald, and Hon. A. Macdonald, Complainers.—*Jameson.* No. 275.
William Thomas Grant, Respondent.—*D. F. Hope—Buchanan.*

Freehold Qualification—Acquiescence—Prescription.

1. Commissioners of Supply having pronounced a decree of division in 1774, which was ex facie regular; and five freeholders being enrolled on the portions as split; and successive enrolments having taken place without objection till 1826, when a claim was made on one of these portions—Objection repelled, that the Commissioners had slumped two cumulos before splitting.

2. A barony containing 46,000 acres being valued, in 1691, at £2208; and 48 acres

[1] June 8. 1831, (ante, VIII. 889.)

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of it being acquired by the Crown in 1692; and the remainder having paid cess on a valuation of £2208, as before; and the above proceedings having taken place in 1774 and 1826 respectively.—Objection repelled, that the Commissioners had divided the whole £2208, as if no part of it rested on the 48 acres.

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1st Division. Ld. Moncreiff. D.

The barony of Glenelg, Inverness-shire, is thus entered in the valuation-book of 1691:—

	"Killichuymen in Glenelg.		
"The laird of M'Leod and his mother, - - -	£1508	0	0
"The laird of M'Leod, in vice of the Lady M'Leod elder, for her rent in Glenelg, - - - - -	700	0	0
	£2208	0	0"

In August 1774, the Commissioners of Supply pronounced a decree of splitting and division of the valuation of the barony, and in the same year five freeholders were enrolled upon the divided valuation. Among these, Mr. Campbell of Milfordhall was enrolled on the lands of Leolbeg &c., Bernera &c. &c., rated at £442. 6s. 5d. At enrolment he produced a certificate from two Commissioners, and the Clerk of Supply, that "the above sum of £442. 6s. 5d. is the total valuation of the lands above mentioned, and that they pay cess and other public burdens accordingly, as appears from the valuation and cess-books of the said shire." From that time till 1826, there have always been five freeholders enrolled on the Glenelg valuation, although occasional changes have occurred among the individuals. In 1826, Mr. William Thomas Grant made a claim of enrolment, as in right of a portion of the barony, being the same which formed the basis of Mr. Campbell's qualification. Along with his titles, he produced a certificate by two Commissioners, and the Clerk of Supply, that these lands "were, by decreet of splitting and division pronounced by the Commissioners &c. on the 29th of August 1774, ascertained to be as follows; viz. lands of Leolbeg &c., Bernera &c. &c., £442. 6s. 5d.; and that the said lands pay, or are liable to pay, cess and public burdens agreeably to said valuation."

Mr. Grant was admitted to the roll. Lord Macdonald, an Irish peer, who had stood on the roll since 1802, and his brother, the Hon. Archibald Macdonald, complained of this enrolment,—1. That, in 1774, the Commissioners had irregularly slumped the two cumulos of £1508 and £700, and divided the conjunct cumulo, and that the decree of division had never entered the cess-books. 2. That a part of the barony called Bernera had been acquired by the Crown in 1692, and that no corresponding deduction from the valuation of the barony had been made by the Commissioners. It was true that the Crown had subsequently executed a reconveyance of this land, but only under the condition of its being resumable at pleasure; and thus a portion of that part of the barony which formed the basis of the respondent's titles, was held

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by a defensible tenure, and the complainers offered to prove that he had not the requisite valuation without it. The respondent denied that the Commissioners had really slumped two separate cumulos in 1774, but pleaded that the allegation was quite irrelevant. Because, 1. There had been a decree of division in 1774, ex facie regular, and whether entered in the cess-books or not, it could not be set aside by way of exception, or in any other mode than by reduction. But it had been entered in the cess-books, as was evinced by the fact that five separate freeholders had been enrolled on the barony from 1774 downwards, without any challenge, through all the changes till 1826; and all these had produced certificates, before enrolment, that the lands on which they claimed stood valued in the cess-books at the several sums affixed to them by the decree of splitting. And, 2. The portion of the lands of Bernera acquired by the Crown, and since reconveyed, only extended to 48 acres, while the whole barony contained 46,000; and therefore, even if its proper valuation had been thrown in with that of the rest of the barony in 1691, it was of so small relative importance as to be immaterial. But, at all events, as the barony of Glenelg, (even after deduction of this part of Bernera,) had stood in the cess-books, from 1691 downwards, rated at £2208, and paid cess accordingly, it was impossible now to disturb that valuation. Of course, the subsequent acquisition of the portion of Bernera, on the condition of its being resumable by the Crown, could not affect the valuation of the barony, since the total separation of that part was of no moment, from its having no portion of the £2208 attached to it.

The Lord Ordinary having reported the cause, the Court dismissed the complaint, with expenses.*

Respondent's Authorities.—(1.)—Wight, 185; Elect. Cases, 1796, p. 28; Bell on Election, 225, 226; Sinclair, March 8. 1826, (ante, IV. 537); Barkley, May 31. 1826, (ante, IV. 635.)—(2.)—Gordon, March 11. 1819, (F. C.); Bell on Election, 204; Wight, 49; Blackwell, July 4. 1822, (ante, I. 577.)

Bowie and Campbell, W. S.—H. Macqueen, W. S.—Agents.

No. 276.

John M'Farlane, Advocator.—*Cuninghame—Patton.*
Mrs. Jane Greig and Husband, Respondents.—*D. F. Hope—Gillies.*

Poinding—Bankrupt—Stat. 54. Geo. III. c. 137. § 5.—The creditor of a tenant, after executing a poinding, and obtaining warrant of sale, having abandoned his diligence, and allowed the sale to proceed at the instance of the tenant; and another creditor having rendered the tenant bankrupt within sixty days, and claimed a share of the proceeds of the sale under § 5 of the bankrupt statute—Held, that as the sale was not under the poinding, the claim could not be sustained.

* The Court at the same time dismissed several other complaints at the instance of the same parties, and involving similar questions.

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1st Division.
Lord Newton.
H.

M'Farlane v. Greig &c.

On the 3d of November 1827, Mr. and Mrs. Greig, as proprietors of the farm of Hoole in Perthshire, obtained and executed a warrant of sequestration of the effects of the tenant Gowans. The advocator M'Farlane, an auctioneer, on the 16th of the same month, as indorsee of a bill for £89. 3s. 6d., accepted by Gowans, and apparently drawn and accepted by his aunt Julia Bone, executed a poinding of the same effects. On the 17th, he presented a petition to the Sheriff, praying for a recal of the sequestration,—consigned one term's rent, which was past due, and found caution for the rent of the next term. Before this petition was disposed of, he applied, on the 19th, to the Sheriff for warrant to roup the "goods, gear, and effects, poinded by the petitioner, or as many thereof as would satisfy and pay his debts," &c. The Sheriff granted warrant "to sell the effects mentioned in the execution of poinding," &c.; the roup "to be previously advertised at the next three adjacent parish churches, and to take place within twenty, and not sooner than eight free days," &c.

No publication was made at the church-doors; but, on the 23d of November, an advertisement was issued by hand-bills, and inserted in a Perthshire newspaper, notifying that the whole crop and stocking would be sold, and that Mr. M'Farlane was to act as auctioneer. It did not mention any thing as to the poinding, or at whose instance the sale was to take place.

On the 2d of December, the sequestration was recalled; and, on the 4th, the effects were sold by public roup.

M'Farlane acted as auctioneer at the roup. Gowans himself was present, and it was intimated that the roup was at his instance. On proceeding to sell the dung, one of the spectators objected to the sale, unless authority for making it were exhibited. Upon this, M'Farlane drew a paper from his pocket, showed it to the objector, who expressed himself satisfied, and the sale went on. M'Farlane at the same time stated that if the landlord claimed the dung within fourteen days, he should have it in preference to the purchaser.

The effects sold amounted to about £400; and M'Farlane intromitted with as much of this sum as satisfied his own expenses, the servants' wages, and the rent of the landlord, which he had consigned and secured; but he did not take payment of any part of the bill for £89. 3s. 6d. No minute of the sale was lodged with the Sheriff, as in the case of a sale under a poinding; nor were the notices to the Excise, requisite in such sales, given.

In January following, Mr. and Mrs. Greig, having, as ordinary creditors, obtained decree against Gowans for arrears of rent, rendered him bankrupt; and then raised a summons against M'Farlane before the Sheriff, founding on the 5th section of the Bankrupt Act, and claiming a share of the proceeds of the poinded goods.

In defence, M'Farlane stated that the bill had been indorsed to him

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for behoof of the drawer Julia Bone, who had desired him to abandon the poinding, and not to sell under it; that the sale was a private one by the tenant, and not under the poinding; and therefore no claim could be made against him as a poinding creditor.

Mr. and Mrs. Greig, besides contending that the sale had taken place under the poinding, endeavoured to make out a case of fraud; and a proof having been allowed, in which Julia Bone was examined, the facts above stated were proved; and also, that although she had authorized her name to be put on the bill, yet she could not write, and had only received £1 in relation to it. The only bill recovered, in relation to the roup, was found to have been granted to M'Farlane, who also kept the roup-roll.

The Sheriff "found that the sale was made in virtue of the poinding," —ordered a scheme of division to be prepared, and decerned accordingly.

M'Farlane advocated; and the Lord Ordinary "found, that the sale of the tenant's effects on the 4th of December 1827 did not take place under the warrant of sale obtained by the advocator in following out his poinding, but was a voluntary sale by the tenant, though conducted by the advocator as auctioneer;—that the provision as to poindings, contained in the 5th section of the act of the 54th Geo. III. c. 137, is not applicable to the case;—therefore sustained the defences, assoilzied the advocator, and decerned;—but, in the particular circumstances of the case, found no expenses due."*

Lord Balgray.—I have seldom seen such a transaction as this. The foundation of M'Farlane's proceeding is a bill said to be drawn by Julia Bone,

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* "Note.—The Lord Ordinary thinks there is great reason to suppose that the bill to Julia Bone, if really granted originally for value, was indorsed to the advocater, not for the purpose of enforcing payment, but as a device for obtaining a recal of the sequestration, and so enabling the tenant to dispose of his whole effects; and that the proceedings which followed were all part of the same plan. This is put almost beyond doubt by the evidence in process, and particularly by the fact that the advocator had advertised a sale of the whole effects, which could only have proceeded at the tenant's instance, while he was continuing to take steps for getting the sequestration recalled, on the ground of its being an obstacle to his following out his poinding, and that he retained, according to his own account, no part of the proceeds of the sale towards payment of the very debt for which he was doing diligence. Still the Lord Ordinary cannot see how, holding the advocator to have acted in concert with the tenant in such a way as to mislead the respondents, or even to have subjected himself to a claim of damages, the Sheriff could give redress by finding the sale to have proceeded on the poinding, when it did not so proceed. The terms of the advertisement are inconsistent with such a supposition, and there is abundant evidence in the depositions of the witnesses called by both parties, that the sale was distinctly stated at the time to be made in the name of, and at the instance of the tenant. Nor do the circumstances sworn to as having occurred when the dung was set up to sale, at all prove that the advocator held out that he was selling as poinding creditor."

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and indorsed to him; but she, on her examination, depones that she cannot even sign her name. M'Farlane says he granted her an obligation to account for the contents of the bill; she swears to the contrary, and that she never got any cash but £1 on account of it. Then the poinding is executed by M'Farlane; the sequestration is recalled at his instance, on his satisfying the landlord's hypothec; a roup follows, at which M'Farlane is present; yet he now says it had nothing to do with his poinding, and that his bill is not yet paid. At this roup M'Farlane acts as auctioneer, and when an objection is made to the authority for the roup, he has the paper ready in his pocket, which removes all scruples; and the only bill for the proceeds of the roup, which has been recovered, is found to have been granted to M'Farlane, who also has the roup-roll in his custody. After all this, can he be allowed to plead that this sale had no reference to his poinding, but was merely an ordinary sale at the instance of the tenant? I am not much moved by the statement that at the roup the sale was given out to be in the tenant's name; for this is a common arrangement between the creditor and debtor, in order to induce purchasers to come forward freely, which they seldom do at a sale under diligence. Looking, then, to the whole circumstances of the case, and that the plea maintained by M'Farlane is bottomed on fraud, I conceive that he cannot avail himself of it. Dealing with this, therefore, as a sale of poinded goods, the provision of the bankrupt statute reaches it, and I incline to alter the judgment of the Lord Ordinary, and affirm that of the Sheriff.

Lord Gillies.—I am of a different opinion. It is true that Julia Bone did not draw or indorse the bill for £89, as she swears she cannot write; but she also swears that the adhibition of her name was done by her authority, and that she gave full value for the bill. Such facts go deeply into the question whether there was any fraud, or merely some irregularity, in the original proceedings. But it is quite out of place for the landlord to maintain under this libel that the bill or the poinding was false and fictitious; for the foundation of his action is rested on the assumption that there was a poinding, and a sale of poinded goods, of which he claims a share. If he cuts up the poinding by the roots, he destroys his own claim under this libel. He might not be without his recourse, but it would be necessary to seek it in another shape. Indeed it is because I hold that there was no sale of poinded goods, that I am constrained to concur with the Lord Ordinary. After the landlord used sequestration, M'Farlane executed a poinding. As he could not proceed with this until sequestration was recalled, he regularly applied for recal, and obtained it, on satisfying the landlord's hypothec. After that, he stops short in his diligence; he was not bound to go on with it; the landlord had no interest to insist that he should proceed, his hypothec having been already satisfied. M'Farlane then stays his diligence, and it is the tenant who goes on with the sale which follows. This is clear not only from the proof that intimation to this effect was made at the sale, but from the fact that the sale, according to advertisement, was of the whole effects of the tenant to an amount above fourfold greater than the debt which was the ground of the poinding. The sale, then, is at the tenant's instance, and was not at the instance of the poinder, whose author and employer, Julia Bone, expressly swears that she allowed the sale to proceed at the instance of the tenant. This is decisive of

the whole question at issue; there was no sale of poinded goods, and therefore the action is unfounded. No. 276.

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Lord Craigie.—So far as the landlord's case is rested on allegations of fraud, it appears to me that they are irrelevant in this action. If they be true, they may justify him in an action of damages; but they militate against him in the present case, where the first step which he has to make, is to prove that there was a sale of poinded goods. This is not established, and I am for adhering.

Lord President.—The complexion of the defence maintained by M'Farlane is a bad one; but my opinion in regard to the legal import of it is the same with that of the majority of the Court. The roup was of the tenant's whole effects, consisting of a stock which produced about £400. As a poinding creditor, M'Farlane could not sell for more than his debt of £89, and expenses. Beyond this he would have acted with gross oppression, and have incurred a severe responsibility. Looking to this fact, along with the proof, I cannot hold the sale which took place to have been at the instance of the poinder, and therefore the claim for equalization under the bankrupt statute has no place. The poinder might stay his diligence at any period he chose; and having stopped short of selling, I concur in the judgment of the Lord Ordinary. Under all the circumstances, I would allow no expenses.

The Court accordingly adhered.

Respondent's Authorities.—54. Geo. III. c. 137. § 5; A. S. Dec. 14. 1805, § 3; Tullis, June 18. 1817, (F. C.); Lawson &c., May 15. 1822, (ante, I. 445); Lyle, June 27. 1827, (ante, V. 845.)

A. Shepherd,—A. Greig, W. S.—Agents.

Madame Lina Taline Sassen, Petitioner. No. 277.

Sir James Campbell, Respondent.—*Cuninghame.*

Poor's Roll.—It is no objection to a party getting on the poor's roll that she may be unable to pay previous expenses before she can be reponed against an interlocutor,—that being a subsequent question.

In an action at the instance of Madame Sassen, who was on the poor's roll, against Sir James Campbell, an interlocutor of absolvitor pronounced by the Lord Ordinary became final, through her inability to print the record along with her reclaiming note. Having subsequently obtained the means of printing it, she applied for renewal of the privilege of suing in forma pauperis. On a remit by the Court to the lawyers and agents for the poor, they reported that she had a probabilis causa litigandi; but that as, according to the decision in the case of Pratt v. Lord Dundas,[1] she could only be reponed on payment of part of the previous expenses, and as she was utterly unable to pay any part of these, they could not recommend that her action should proceed. The Court, however, did not consider this circumstance a bar to her getting on the poor's

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[1] See ante, III. 120.

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roll, and they admitted her accordingly, without determining any thing as to the terms on which she should afterwards be reponed.

G. Ritchie, W. S.—Adam and Brown, W. S.—Agents.

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2d Division.
Ld. Mackenzie.
T.

Cruttenden, M'Killop, and Co. v. Pentland.

Cruttenden, M'Killop, and Co., Pursuers.—*Jameson.*
George Pentland, Defender.—*D. F. Hope—Buchanan.*

Reclaiming note for Pentland against a decree of adjudication pronounced by the Lord Ordinary, reserving all objections contra executionem. The note was put in obviously for the purpose of delay; and Pentland being unable to state any thing in support of it, the Court refused it.

W. Renny, W. S.—J. J. Fraser, W. S.—Agents.

No. 279.

Mar. 2. 1831.
2d Division.
Lord Medwyn.
R.

Atkinson &c. v. Beattie.

Matthew Atkinson &c., Pursuer.—*D. F. Hope—Robertson.*
Ebenezer Beattie, Defender.—*Skene—Anderson.*

Sale.—Special case, in which the pursuers claimed the balance of the price of a number of sheep sold to the defender by Macdonald, their salesman. The chief defence was, that the sheep were purchased from Macdonald, acting on his own account; but the defenders had previously written to the pursuers, acknowledging the debt, and transmitting two bills in part payment. The Lord Ordinary decerned for the balance, and the Court adhered.

L. Mackintosh, S. S. C.—Horne and Rose, W. S.—Agents.

No. 280.

Mar. 3. 1831.
Howatson v. Murdoch.

William Howatson, Pursuer.—*D. F. Hope—Whigham.*
John Murdoch, Defender.—*Keay—Shaw Stewart.*

Process—Record—Expenses.—The pursuer of a reduction on the head of fraud &c., having, before closing the record, recovered documents on which he meant to found an alternative conclusion of declarator of trust; and having raised a supplementary declarator of trust—Actions conjoined, reserving all questions of expenses.

Mar. 3. 1831.

1st Division.
Ld. Moncreiff.
D.

William Howatson raised a reduction of a disposition by his late brother Andrew Howatson to John Murdoch, libelling on the act 1621, and also on fraud. Defences were lodged, and condescendence and answers had been revised, preparatory to closing the record, when a diligence against havers was obtained by him. He then recovered documents, under which he obtained leave to libel, as an additional reason of reduction, that the disposition in favour of Murdoch, though ex facie absolute, was in reality only a trust-right. Murdoch objected that the new reason was irrelevant in a reduction, and could merely found Howatson in a declarator of trust. Howatson then raised a declarator of trust, libelling, inter alia, the state of the previous process, and specially the defence that the above documents "could only found an action of declarator of trust—a defence which renders the present supplementary

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action necessary, &c. Therefore, in the event of our said Lords not reducing, decerning, and declaring in terms of the conclusions of the original summons, it ought and should" be declared that the disposition was a trust-right for behoof of the pursuer, &c. Murdoch put in defences, pleading, inter alia, as a dilator, that the conclusions of this summons being made contingent on the issue of the first, the process should be sisted until then. Howatson having moved that the second process should be conjoined with the first, the Lord Ordinary "refused to conjoin the said processes, and, on the motion of the defender, sisted this action till the issue of the said action of reduction; and in respect the pursuer intimates his intention to submit this interlocutor to the review of the Court, found him liable in the expenses incurred by the defender in discussing the preliminary defences," &c.

Howatson reclaimed; and the Court, holding that as the two actions related to the same subject-matter, and their conjunction would place the question on the same footing as if the first summons had libelled alternatively a reduction ex capite fraudis, or a declarator of trust, except as to the point of expenses, recalled the interlocutor complained of, and conjoined the two processes, reserving all questions of expenses; and remitted to the Lord Ordinary to proceed accordingly.

T. Thorburn, W. S.—W. Patrick, W. S.—Agents.

No. 281.

Muir and Co., Suspenders.—*Jameson—J. Paterson.*
M'Donald and M'Nab, Chargers.—*Maitland—Shaw.*

Bill of Exchange—Proof.—Held, in a question between the drawers and holders of a bill, that although the holders admitted that they were originally no parties to the bill—that they took it up from a bank (with whom it had been discounted) after it was past due, without any indorsation by the Bank—that part of it had been previously paid by the acceptor,—and that he was the brother of one of the chargers (a company),—yet these admissions were not sufficient, per se, to prove mala fides or non-onerosity.

Mar. 4. 1831.

1st Division.
Ld. Corehouse.

Donald M'Donald, a brother of one of the partners of the firm of M'Donald and M'Nab, accepted a bill drawn on him by Muir and Co. for £125. The bill passed, by several blank indorsations, to the Ship Bank. Recently before it fell due, the acceptor paid £90 to account of it, which sum was alleged by Muir and Co. to have been borrowed from them. After the bill fell due, M'Donald and M'Nab (whose names were not upon it) paid the balance of £95 to the Bank, and got up the bill, without any indorsation by the Bank in their favour. In virtue of the indorsation by Muir and Co., they gave that company a charge for the £95. Muir and Co. suspended, alleging that M'Donald and M'Nab were mere trustees of the acceptor, and had paid the bill with his funds. They did not offer to prove these allegations by the writ or oath of M'Donald and M'Nab, nor by any other evidence; but contended that as the bill was past due—as one of the chargers was the brother of the ac-

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ceptor—as they were not parties to the bill, and there was therefore no call upon them to take up the bill, it was plain that they had acted as mere interposed parties to protect the acceptor, and throw the burden of payment on Muir and Co. M'Donald and M'Nab admitted that one of the partners was brother to the acceptor; that they had taken up the bill after it was past due; that part had been previously paid by the acceptor, and that they were not originally parties to the bill; but they denied the allegation of mala fides and non-onerosity.

The Lord Ordinary, "in respect it is not proved that the chargers are not onerous holders of the bill in question, found the letters orderly proceeded," and found Muir and Co. liable in expenses.

They reclaimed; but the Court adhered.*

S. Wordsworth, W. S.—C. Fisher,—Agents.

No. 282.

William Henderson, Pursuer.—*Skene—W. Bell.*

J. Drysdale and J. Campbell, Defenders.—*D. F. Hope—Marshall.*

Public Officer—Reparation.—A Substitute Sheriff Clerk having issued a defective precept, a charge on which was suspended; and the charger having litigated the question for a considerable time, (during which the suspender became insolvent,) without intimating the defect to the Substitute Clerk or his principal; but having at last intimated to the clerk, who thereafter aided in carrying on the suspension to a judgment which found the precept null, and suspended simpliciter—Held, in an action of relief against the clerk, that he was not liable for the debt in the decree, and that he was only liable for such part of the expenses in the suspension as were incurred after intimation to him of the defect.

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2d Division. Lord Medwyn. F.

The defender Drysdale is Sheriff Clerk of the county of Lanark. This county is divided into three wards, for which there are separate Sheriff Substitutes, who hold their Courts at the head town of the several wards,—viz. Glasgow, Hamilton, and Lanark, at each of which separate records are kept. The defender Campbell was, in 1824, interim Substitute Clerk for the middle ward, the Court of which is held at Hamilton, and his commission was limited to that ward. In September of that year, the pursuer Henderson, who is a writer in Hamilton, obtained a decree in the Sheriff Court there against John M'Ghie of Highstonehall

* "Note.—It is not meant by this interlocutor to touch the question whether, when a party whose name is not upon a bill retires it, after the term of payment, from a bank where it has been discounted, a proof prout de jure may not, in some circumstances, be allowed, that he retired it with the acceptor's funds, and as his trustee. But in this case no proof is offered by the suspenders, except the admissions of the chargers in the record. Now the circumstances, as admitted, that the bill was past due—that part of it was paid by the acceptor by means of a sum borrowed from the suspender—that M'Donald, a partner of the charger's firm, was the acceptor's brother, and that no indorsation was taken by the chargers from the bank, do not appear, per se, sufficient to prove that the bill was retired with the acceptor's funds, or that it is now held by the chargers in trust for his benefit."

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for a sum of £52. 1s. 6d., with interest and expenses. On this decree Henderson obtained a precept, signed by Campbell, as Substitute Sheriff Clerk, but bearing to be "given and subscribed by the Clerk of Court *at Glasgow*,"—Glasgow being the seat of the Court for the lower ward. He thereafter charged M'Ghie, who presented a bill of suspension, chiefly on the merits; but also stating, as an objection to the diligence, that the copy-charge served on him bore to be in virtue of a precept or decree from the Sheriff Court books at Glasgow, while no such decree was ever obtained at Glasgow. Along with his answers to this bill, Henderson produced the precept, and maintained that there was no defect in it, or in the charge, which was conformable to it, as a clerk (he alleged) might grant an extract at any place within the county.

The Lord Ordinary refused the bill; but M'Ghie having presented a reclaiming petition, and caution being offered, Henderson consented that it should be passed. The letters were accordingly expede, and came into Court in May 1825, when, agreeably to the then form of procedure, a debate took place, after which memorials were ordered. In these the merits chiefly were discussed; but the objection to the diligence was repeated, though with scarcely any argument. The Lord Ordinary, on advising the memorials, issued a note, stating his views of the case, and, inter alia, as to this objection, that it had "no force in it;" and he, at the same time, appointed parties to be heard before pronouncing judgment. In consequence of the debate which followed, his Lordship took a different view of the objection, and, on the 22d of December 1825, appointed a condescendence by M'Ghie of his objections to the precept. Henderson, then, on the 23d of December, wrote to Campbell, intimating the defect, and the Lord Ordinary's views on it, and desiring Campbell to communicate the information to Drysdale; and he added, "If the error is a fatal one, the loss will be great. Not only the expense incurred by M'Ghie and my agents will fall to be paid, but the debt also. M'Ghie, since the suspension was brought, has become unable to pay the debt, which amounts to £70." This letter was communicated to Drysdale, against whom a formal protest was shortly afterwards executed. The suspension, however, was still proceeded with,—Drysdale giving all the information in his power to assist in opposing M'Ghie's plea on the defect in the diligence; but, in December 1827, the Court finally found that the precept was null, and suspended simpliciter, finding M'Ghie entitled to his expenses, as mentioned ante, VI. 248. Shortly prior to this judgment John M'Ghie had died, and his son James M'Ghie had sisted himself as a party. He did not, however, take out decree for that part of the expenses disbursed by his father, amounting to £77, which still remained unpaid in the hands of Henderson. On this decision being pronounced, Henderson raised the present action against Drysdale and Campbell, concluding for payment of the sums contained in the decree against M'Ghie,—of the expenses awarded to M'Ghie,—and of the expenses incurred by Henderson himself. The

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Lord Ordinary having decerned in his favour for payment of these several sums, under the condition of his assigning the amount of his claim in the original Sheriff Court decree, against M'Ghie, Drysdale (who took on himself the whole burden of the litigation) reclaimed. The Court ordered Cases, and thereafter minutes of debate.

Pleaded for Henderson—

1. Drysdale, as a public officer, is undoubtedly liable for any loss arising from errors committed by himself or substitutes in the execution of his office. Here the error in the precept has occasioned the loss of the debt itself, because pending the discussion the debtor became insolvent; and it is no answer to allege that he could not have paid previously, as the law presumes that if the diligence could have been enforced, the debt might have been recovered.

2. It has occasioned to Henderson the loss of the whole expenses on both sides in the suspension; and although no intimation of the defect was made to Drysdale till part of these expenses had been incurred, it is clear from his conduct after the intimation, that he would have maintained the correctness of the precept; and so no expense has been sustained, which he would not have incurred, even if he had received the intimation sooner. Besides, Henderson was not bound to intimate the alleged defect, but was entitled to rely on the precept being correct,—the more especially as the objection was not seriously insisted in by the party, nor considered of any weight by the Lord Ordinary till the time when intimation was made.

Pleaded for Drysdale—

1. Henderson being a law-agent, and a practitioner before the Court at Hamilton, must have noticed the defect when he got the precept, and ought then to have asked for a new precept without incurring any expense. At all events, as soon as the objection was stated, he should have done this, or have got the charge turned into a libel, or have intimated the defect to Drysdale, who, at a time when no expense had been incurred, would undoubtedly have avoided all risk by giving a new precept; at least he was entitled to have had the option of doing so. It is clear, therefore, that as to the expenses incurred prior to the intimation, Henderson has no claim.

2. As to the debt, it appears from Henderson's own letter intimating the error, that M'Ghie had already become insolvent, and unable to pay. All the injury in this respect consequently had already been suffered; and as this injury arose from the lapse of time occasioned by Henderson's disputing the point, instead of intimating the defect and getting a new precept, and not necessarily from the error, the loss ought to be borne by himself. Besides, the balance of expenses awarded to M'Ghie, still in Henderson's hands, amounts nearly to the same sum with that contained in the decree, and so may be set off by Henderson against any demand by M'Ghie.

The Court, having previously recalled the Lord Ordinary's interlocutor, pronounced as follows:—"Find that the defenders are, conjunctly

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and severally, liable to the pursuer for the expenses incurred by him in the process of suspension with John and James M'Ghie from and after the 23d day of December 1825, when intimation of the said process was made to the defender Campbell;—that the expenses decerned for and incurred against the pursuer in the said process amount to the sum of £57. 2s., and for payment of this sum accordingly decern against the said defenders, conjunctly and severally, with interest thereof from and after the 18th day of March 1828, when the same was paid, and until payment;—find the defenders, conjunctly and severally, liable to relieve the pursuer of the expenses incurred by him to his own agent in the foresaid process of suspension, as between agent and client, from and after the said 23d December 1825, with interest from one year after the date of the last article in the account thereof, and remit to the Auditor to tax the account of said expenses when lodged, and report;—find the pursuer entitled to the expenses incurred by him in this process, subject to modification, &c.; and, quoad ultra, assoilzie the defenders from all the conclusions of the libel, and decern,—reserving always to the defenders their mutual claims against each other, as accords."

As to the Expenses of the Suspension—

Lord Cringletie.—Henderson is himself a practitioner at Hamilton, and if he ever looked at the precept, he must have known that he never got a decree from the Sheriff Court at Glasgow, but at Hamilton. He should have stopped short whenever the objection was stated, and not gone on discussing the merits. Notification of the defect was not, however, made to Drysdale for a long period; and although, after notice, Drysdale was liable, I think he was not liable till then.

Lord Glenlee.—When a party trusts to the warrandice of another, he must always notify a fault—for this, among other reasons, that the party bound in warrandice may settle the claim without further expense. It is impossible to say that Henderson was not culpable in not adverting to the defect. Suppose he had been acting for a client, would he not have been liable to the client? He might, no doubt, have had relief against the clerk; but still there is a fault on his part, or he would not be liable at all. The very thing the Lord Ordinary has found is, that the precept was palpably and ex facie void and null, bearing to be a decree of the Court at Glasgow, instead of Hamilton. It appears plain that, in not intimating the defect whenever it was stated, he failed in a duty, and therefore great part of the expense must fall on himself. I think the modification hinted at by Lord Cringletie quite proper.

Lord Justice-Clerk.—I am not able to arrive at the conclusion of the Lord Ordinary, that the claim should be sustained in toto. If Henderson had been acting for a client, I agree with Lord Glenlee that he would have been responsible for taking such a blundered precept; but there remains behind the extent of the liability of an official person, and from the time of intimation I can have no doubt he is liable. But, further than that, I do not think he is; and we cannot subject him in the expense of the discussion on the merits. I

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therefore agree with your Lordships that we should find him liable only for the expenses incurred after intimation.

Lord Meadowbank. — I do not differ. The only doubt I had, was from the circumstance that Drysdale's letters show he would have followed the same course which was adopted by Henderson.

As to the Principal Debt—

Lord Justice-Clerk. — A good deal depends on the fact whether M'Ghie was insolvent before the intimation to Drysdale; and as to this, we see that Henderson, in his letter making the intimation, states that M'Ghie had previously become unable to pay. Then if so, the injury was done during the period when we hold that liability did not attach to Drysdale. If the fact be not held sufficiently established, we must have an investigation; for if M'Ghie had become unable to pay previous to the date of the intimation, this would, I think, relieve Drysdale from responsibility.

Lord Cringletie. — This appeared to me a difficult point, though I incline to think Drysdale liable on this principle: A decree was obtained, and a suspension brought, in which good caution was found. If the letters had been found orderly proceeded, the debt must have been recovered. The error in the decree has prevented this; and as, by the defect, Henderson has lost his caution, Drysdale must stand in place of the cautioner, and should be liable, if the debt be truly due. Henderson, however, is still bound to prove the validity of the decree, just as if the objection to the precept had been repelled; and he must constitute the debt against young M'Ghie.

Lord Meadowbank. — I do not understand that Drysdale disputes that the debt is a good one.

Skene. — Henderson will give warrandice that it is so.

Marshall. — This would throw on Drysdale the burden of constituting the claim; and besides, there is in Henderson's hands an amount due to M'Ghie under the decree for expenses, sufficient to satisfy the debt.

Lord Justice-Clerk. — We certainly can never order double payment; and, on the whole, I am for assoilzieing from the claim for the principal debt.

Lords Glenlee and Meadowbank concurred.

Hunter and Whitehead, W. S. — A. Fleming, W. S. — Agents.

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Alex. Duncan and Others, Suspenders. — *Cuninghame — Hopkirk.*
John Forbes, Charger. — *H. Bruce.*

Prescription, Triennial — Oath on Reference. — A prescribed debt for furnishings to a ship, alleged to have been contracted by the ship's-husband, who was also a joint owner, being referred to the oath of all the joint owners; and the ship's-husband having deponed affirmative, but the others that they never knew that the furnishings had been made — The latter assoilzied.

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1st Division. Admiralty. D.

In November 1827, John Forbes, ropemaker in Buckie, pursued Alexander Duncan and others, before the Judge Admiral, as joint owners of a sloop, for an account of £71 of alleged furnishings to the vessel. Jamieson, who had been ship's-husband at the time when the account was said to have been incurred, put in no defences. Duncan and the other de-

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fenders pleaded the triennial prescription. The Judge Admiral repelled the plea, and decerned in terms of the libel. Duncan and others presented a bill of suspension; and the Court, on the 2d of July 1829, "recalled the interlocutors of the Judge Admiral, and sustained the plea of prescription; but remitted the process to the Judge Admiral to allow the pursuer still to prove resting-owing by a reference to the oaths of all the defenders in common form; and to proceed," &c. [1]

Under the reference, Jamieson deponed that the furnishings were made by Forbes, and were unpaid, except to the amount of £15. Each of the other defenders deponed that 'he never knew' that the furnishings charged were made. The Judge Admiral decerned in terms of the libel. The defenders (except Jamieson) again presented a bill of suspension, pleading, inter alia, that it was not to Jamieson as ship's-husband, but only as joint owner of the vessel, and a party in the cause, that reference to oath had been found competent; that although a ship's-husband has power by his contracts to bind all his owners, he has no power, after prescription has run, to deprive all the owners of the benefit of that plea by his single deposition; that the statute limits the reference to the oath of party; and though Jamieson, as one of several co-owners, might bind himself by his oath, he could not affect the defence arising to the others from the terms of their own oaths, which were conclusive of the cause in their favour.

Forbes answered, that in many cases of præpositura, the oath of the præpositus elided prescription, when pleaded by the constituents. Thus the oath of a wife as to house-furnishings within her own province proved the debt against the husband, and so also as to various other managers. The ship's-husband could bind his owners by his contract. His writ of constitution of the debt would be probative against them, had it been granted; and, by the statute, 'the writ or oath' was put on the same footing, so that his oath ought to elide prescription.

Lord President.—When the case was formerly before us, we remitted to the Judge Admiral to allow the oaths of "all the defenders." These oaths are now before us, and each of them is negative, except the oath of a single party. He is ship's-husband, as well as co-defender; but if his single oath were to decide the whole question, the reference to the others would have been superfluous. The oath of that individual on the reference may bind himself: but, under the judicial contract implied in every such oath, each of the other defenders who deponed negative must be free.

Lord Gillies.—It is true that a written obligation granted by the ship's-husband, if made at the time, might be evidence against owners. But it is another thing to hold that the owners are bound by his oath after prescription has run. The Act of Parliament establishing the triennial prescription allows the debt to be proved by the writ or oath of party only—by the writ or oath

[1] Ante, VII. 821.

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of him who is owing and liable for the debt. The oath of a wife, as præposita rebus domesticis, does indeed bind her husband; but she is, juris fictione, considered to be the same person with him. Reference cannot be made to the oath of a party not liable for the debt. In this case reference was not made, and could not be made, to the oath of Jamieson as ship's-husband. It was only to him as joint owner and defender, along with "all the defenders," parties and co-owners, that reference was allowed by our interlocutor. The oath emitted by him is therefore good against himself, but against himself alone.

Lord Balgray assented.

Lord Craigie was understood to dissent, and to observe that, by the statute, writ and oath were in so far placed on the same footing, that as the writ of the ship's-husband might have proved the alleged debt against the owners, and saved it from prescription, so might his oath also.

The Court suspended the letters, and assoilzied with expenses.

Suspenders' Authorities.—Campbell, Nov. 23. 1813, (F. C.); Bell, Nov. 23. 1619, (12477); Monteith, June 19. 1624, (12477); Ker, March 13. 1627, (12478); 4. Erak. 2. 10; Macindoe, Nov. 18. 1824, (ante, III. 295); 1. Bell, 334; Mein, July 11. 1829, (ante, VII. 902.)

Charger's Authorities.—Cochrane, July 22. 1740, (6018); Paterson, Jan. 23. 1771, (12485); Young, Trotter, and Co., Dec. 2. 1802, (12486); Tait on Evid. 271; Syme, Jan. 15. 1789, (5354); Buchanan and Paterson, Nov. 20. 1828, (ante, VII. 35); Leslie, Nov. 15. 1808, (F. C.)

A. Duff, W. S.—R. White, W. S.—Agents.

No. 284.

John Miller and Others, Pursuers.—*Jameson—Coventry.*
Tutor of John Anderson, Compearer.—*Skene.*
Mrs. Amelia Moodie or Anderson, Defender.—*D. F Hope—More.*

Obligation—Error.—Circumstances in which a party, who, in the erroneous belief that she was fiar, received payment of the contents of an heritable bond, and bound herself to grant a discharge, was allowed to repay the money, and to relieve herself from the obligation to discharge the bond.

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1st Division. Lord Meadowbank. D.

This was an action, concluding to have the defender Mrs. Moodie ordained to make up a title in the person of another party, and, along with him, to execute and deliver a discharge of an heritable bond taken in favour of her in liferent, and her children, and their heirs or assignees, in fee; and the contents of which had been paid to her after her children's death. In support of the demand, a letter by her, binding herself to grant a discharge, was founded on. In defence she stated, that she had granted the letter under the idea that, being left childless, she was the fiar, and not merely liferentrix; and that, though she found herself unable to discharge the fee, she was ready to repay the money. She refused to make up a title in the person of her children's heir. The Lord Ordinary decerned against her; but the Court recalled the interlocutor, of consent decerned against her for the amount of the sum received by her, and found her entitled to modified expenses.

R. Wilson, MacRitchie, Bayley, and Henderson, W. S.—Agents.

JAMES SMITH, Suspender.—*Thomson.*
JAMES SKINNER, Charger.—*Milne.*

No. 285.

Mar. 4. 1831.
Smith v. Skinner.

Diligence.—Question as to the competency of charging in one county under the decree of the Sheriff of another.

SKINNER, as drawer of a bill for £1. 2s. 10d., charged Smith, one of the acceptors, residing in Banffshire, by virtue of an extract registered protest from the books of the Sheriff of Aberdeen. Of this charge he presented a bill of suspension on various grounds, but particularly on its incompetency. Two days prior to the presenting of the suspension, Skinner gave a new and unexceptionable charge on letters of horning, and thereafter the debt was paid. The Lord Ordinary refused the bill, with expenses.

Smith reclaimed; and the question now being confined to that of expenses, the Court passed the bill.

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Bill-Chamber.
Ld. Moncreiff.
F.

J. M'COOK, W. S.—J. MARSHALL, S. S. C.—Agents.

MRS. GRAHAM and MANDATORY, Pursuers.—*Skene—Christison.*
HUNTER'S TRUSTEES, Defenders.—*Keay.*
ROBERT STEWART, and STEWART, CRAWFORD, and CURRIE, Defenders.—*D. F. Hope—Shaw Stewart.*

No. 286.

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Graham &c. v. Hunter's Trustees &c.

Title to Pursue—Husband and Wife—Trust—Agent and Client—Reparation—Interest.

1. Trustees acting for behoof of a married lady and her children, having employed a law-agent to secure a sum heritably, and take the liferent to the lady, secluding the jus mariti, and the fee to her children; and loss having arisen from the error of the trustees or the agent—Found that she was entitled to sue in her own name, and for her own interest.

2. Trustees who were exempted from responsibility for omissions and sufficiency of security, and empowered to lend on personal security—Held not liable for loss arising from prior burdens over lands on which the trust-money was lent.

3. Law-agents, in preparing an heritable security, having omitted to search the records, and the security being thereby eventually ineffectual—Held liable in reparation, notwithstanding the loan was effected among relations and co-trustees, and with every reason to confide that the lands of the borrower were not encumbered.

4. Where the agent's liability in reparation arose from an omission to search the records, and a search, if made, would have prevented the loan from being effected, he is only bound to replace the principal sum, with bank interest from the date when the loan was made.

5. Agent entitled, on making such payment, to an assignation to the heritable security; and claim of damages at his instance reserved against the party who had concealed the burdens, and represented the lands as a good security.

THE late Mrs. Rosine Hunter, by trust-settlement, divided her estate equally among seven children, of whom Mrs. Hunter or Graham, spouse of Mr. Graham of Gartmore, was one. The trustees named were Messrs. James Hunter, T. D. Douglas, W. C. C. Graham of Gartmore, Robert Stewart of Stewarthall, writer in Greenock, &c. The greater number of

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them were sons or sons-in-law of Mrs. Hunter; but Mr. Stewart was not so. The trustees were originally directed to lay out the share of each daughter on undoubted heritable security, secluding the jus mariti, and taking the liferent payable to the daughter, and the fee to the daughter's children; but it was provided "that none of the trustees shall be liable for any omission or error in judgment in carrying the trust hereby committed to them into execution, nor the one for the other, but each for his own actual intromissions allenarly." By a subsequent codicil, the restriction of the security to heritage was recalled, and the trustees were authorized "to lend out the said various sums, either on heritable or good personal security,—declaring that the trustees shall not be liable the one for the other, nor for omissions or sufficiency of the securities, but each only liable for their own actual intromissions."

Mrs. Hunter died in February 1826. Recently before that period, her son-in-law Mr. Graham, as heir of entail of Finlaystone, had apparently acquired a considerable accession to his income by the death of Lady Glencairn, who was infeft in part of that estate as her locality lands. In April 1826, he addressed the following letter to his co-trustees:—"Gentlemen, By the late Mrs. Hunter's settlement, the share left to my wife is vested in you, to be lent out on good security, the liferent for her use, and the fee for her children. As I require about that sum at Whitsunday next, I will grant an heritable bond over the farms in the locality lands of Finlaystone, rented at a sufficient sum to cover the interest at five per cent., and to pay a policy of insurance on my life, to repay the principal at my death, which you will hold as security. I have left it to Mr. Stewart to select the farms, so as the rents may cover the necessary amount," &c. To this letter Mrs. Graham subjoined the following words:—"I approve of the above." Messrs. Hunter, Douglas, and Stewart, being a quorum of the trustees, agreed to the proposal of Graham by the following minute:—"We, the trustees of the late Mrs. Hunter, agree to the terms within mentioned of Mrs. Graham's share of the funds, and authorize the necessary deeds to be made out, and the insurance on Mr. Graham's life effected."

Mr. Stewart (who was the only acting trustee that possessed no interest in the trust-funds) then selected certain farms of the locality lands of Finlaystone, yielding a rent of £327 per annum; and thereupon an heritable bond of annuity over these lands was prepared by Messrs. Stewart, Crawford, and Currie, writers in Greenock, of whose firm Mr. Stewart was the senior partner. The deed narrated the loan of £2800 by the trustees to Graham; that Graham was an heir of entail; and that the trustees had effected a policy of insurance on his life, which required a premium of £130. 18s. annually. The farms were then conveyed in security of £270. 18s., being the interest of the borrowed money at five per cent., and the premium of insurance. No search for incumbrances was made. Infeftment passed on it; and, in August following, Mr. Graham left the country bankrupt, and it was discovered that his lands of Finlaystone,

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including the farms above mentioned, were so burdened with prior securities, as to leave no annual rent equal to the payment of the yearly sum of £270. 18s.

Mrs. Graham left the country along with her husband, and continued to reside with him; and in 1829 she raised an action, in her own name, and in that of a mandatory, against the trustees, Mr. Stewart, and Stewart, Crawford, and Currie, libelling "that the whole of this transaction was, on the part of the whole of the defenders, manifestly and grossly negligent and improvident; no search was made in the public records;" and therefore that the trustees were liable, conjunctly and severally, in respect of such negligence; that Mr. Stewart was liable, not only as an acting trustee, but also as having "acted in the professional and responsible character and capacity of law-agent or conveyancer of the trustees," and taken payment for his professional employment; and that the firm of Stewart, Crawford, and Currie were liable as the conveyancers employed to prepare a sufficient heritable security, and having been paid the usual charges. She concluded alternatively for payment of £140 sterling per annum, as the interest of £2800 from May 1826, when it was lent, and in future during her life, and for interest on the arrears of this annuity up to the date of decree in the action; or otherwise for payment of the principal sum, or of such other sum as would buy her a life annuity of £140.

The Trustees stated in defence, that Mr. Stewart was the only professional conveyancer amongst them, and that they had relied on him and his partners for the preparation of a valid security for the loan. The mode of security proposed in Mr. Graham's letter was that to which they had agreed. They were justified in doing so, as it was quite unexceptionable, supposing the lands to be free; and the supervenient loss had arisen in consequence of the law-agents having omitted the indispensable precaution of searching the records. The trustees had never authorized these gentlemen to omit any of the usual and necessary precautions at taking the security. Any liability arising from the omission to search must therefore attach to them only, and could not affect the trustees, especially when regard was had to the clause inserted in the trust-deed for their protection, which exempted them from liability "for omissions, or sufficiency of the securities;" or for any "error in judgment in carrying the trust into execution," or for any thing beyond their own actual intromissions.

Mr. Stewart pleaded separately that no part of his actings as trustee could subject him as such, any more than his co-trustees. The exempting clause applied to the whole, and he had only concurred with the others.

Stewart, Crawford, and Currie, pleaded—

1. The pursuer was barred from insisting in the action by her privity to the fraudulent concealment of the burdened state of the lands of Finlaystone when she concurred in her husband's letter of April; or at least

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by her assisting him clandestinely to withdraw his person and valuable personal effects from diligence when he left the country in August 1826.

2. As the pursuer was living in family with her husband, the raising of this action must be presumed to be with his concurrence, and at his instigation; and as the annual rent of any sums recovered under it would truly be for his behoof, and as the loss was occasioned by his fraud, restitution could not be claimed.

3. The responsibility arising from not searching the records lay solely with the trustees. They possessed the most ample discretionary powers to lend as they thought fit, even on mere personal security, and much more upon combined personal and heritable security, under such precautions as they judged requisite. They accepted of the lands, without inquiry except as to their rental, as "good security;" and they remitted to the law-agents merely to prepare the "necessary deeds." These deeds had been prepared in an unexceptionable form; and, under the circumstances, it would have been most unwarrantable in the agents to have even proposed a search of the records. If Graham's co-trustees were satisfied of his honesty, (as their minute of agreement implied,) it did not belong to the agents to impeach it.

They also stated that the sum of £2700 only had been paid by the trustees to them.

The pursuer answered—

1. That as her annuity was exempted from the jus mariti, her right to pursue and recover was not affected by the circumstance of her living in family with her husband.

2. That to lend money on heritable security, without making a search for incumbrances, was so rash or so negligent a departure from the ordinary rules of business, as to subject personally all the parties who committed it.

3. That even the trustees were liable personally, if the act were theirs, notwithstanding the clauses of protection in the trust-deed; and

4. That although it was true that under her husband's influence she had approved of the proposal, yet her approval had reference to, and she only contemplated a loan upon, sufficient heritable security.

The Lord Ordinary "found that the defenders, Messrs. Stewart, Crawford, and Currie, having been employed to prepare the security mentioned in the libel and record by the other defenders, trustees of the late Mrs. Rosina Hunter, as acting for behoof of the pursuer and her children, she is entitled to pursue the action in her own name, and for her own interest; and in respect the summons contains separate and distinct conclusions against the said trustees, and against the said Messrs. Stewart, Crawford, and Currie as a company, and as individuals, sustained the action; repelled the defences for the said Messrs. Stewart, Crawford, and Currie, and decerned against them, as a company and individually, conform to the conclusions of the libel against them;—found

them liable to the pursuers in such part of the expenses of process as relates to them; sustained the defences for the other defenders, the trustees; assoilzied &c., but found no expenses due to them; and in respect it is alleged by Messrs. Stewart, Crawford, and Currie that the sum of £2700 only was paid by the trustees, reserved to them their claim against the trustees for the remaining principal sum of £100 sterling, and interest thereof, in so far as the same has not been paid by the trustees."

Stewart, Crawford, and Currie reclaimed.

LORD BALGRAY.—This is a case of extreme hardship on Mr. Stewart, who undoubtedly acted on the strongest conviction that all parties were dealing in good faith with each other, and who used all the diligence, which it was natural for him to exercise, in the peculiar circumstances of this employment. But on looking to the offer by Graham, and the acceptance by the trustees, they just amount to an agreement to the loan being made on heritable security. That being the case, the employment of the agents certainly implied that the loan was meant to be on good security, and imposed on them the professional duty of using the ordinary skill and precaution to effect this. It is not the sort of security, as being over an entailed estate, which is objectionable. The responsibility of adopting that, lay with the trustees; and they were quite justified in doing so, as repeated decisions of this Court have sustained similar securities as effectual. But to make this, or any other heritable security, sufficient in substance as well as in form, it is necessary to search the records. I cannot conceive that the agents were authorized to dispense with that precaution in this instance; and however hard it may be for them, the consequences of that omission must fall on themselves. They are entitled, however, to an assignation to the heritable security on making payment of the sum concluded for; and I am clearly of opinion that their utmost liability is merely to make restitution to Mrs. Graham, to the effect of indemnifying her for this deficient security having been taken. I would therefore alter the Lord Ordinary's interlocutor in so far as it decerns for interest at five per cent, and merely allow bank interest from the date of the transaction, so as to place the pursuer in the same situation as if the loan had never been effected. I would also reserve a claim of damages against Mr. Graham. Looking to the whole complexion of the case, I would not allow expenses to the pursuer.

LORD CRAIGIE was understood to say that the trustees were entitled to devolve the management of this loan on Mr. Stewart, who was the only conveyancer among them; that it was agreed to make the loan on heritable security, and the law-agents employed to prepare the requisite deeds were recurred to for the very purpose of having an effectual security prepared, and were paid accordingly; that they acted, therefore, under the usual professional responsibility, and as they omitted to search the records, they were liable for the consequences. His Lordship concurred with the Lord Ordinary in holding them bound to place Mrs. Graham in the same situation as if this security had been effectual from the first, and he therefore held them liable for interest at the rate of five per cent. from the date of the loan.

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Lord Gillies.—I concur in opinion with Lord Balgray. The neglect of the ordinary professional precautions in preparing this security lies with the law-agents, and the responsibility for the consequences must fall upon them. It is a case of such hardship against Mr. Stewart, that I regret being obliged to come to this conclusion; but I cannot go so far as Lord Craigie. All that the pursuer can ask, is restitution against this omission of the law-agents. Now, if they had not made the omission, but had searched the records, it is clear that no loan could have been effected, the lands being already so much burdened. The pursuer must therefore be restored to the same situation as if a search had been made, and no loan taken place; and therefore I would allow bank interest only from the date of the transaction till the due replacement of the money by the defenders in terms of our decree.

Lord President.—I regret to feel myself constrained to concur. At one time I doubted whether the employment of the agents to prepare the "necessary deeds" did not limit them solely to the function of executing a bond and infeftment. But the fair import of their employment certainly was to make an effectual security. I do not, however, conceive that any interest is due beyond what is proposed by the majority of your Lordships.

The Court then pronounced this judgment:—"The Lords having considered this reclaiming note, and heard the counsel for the parties—Adhere to the interlocutor reclaimed against, in so far as it finds that the pursuer is entitled to pursue the action in her own name and for her own interest, in so far as it sustains the action; and also in so far as it sustains the defences for the trustees, assoilzies them from the action, and finds no expenses due to them; but, quoad ultra, the Lords alter the said interlocutor, and find that, in the circumstances of this case, the defenders Robert Stewart, and Stewart, Crawford, and Currie, are only liable in payment to the pursuer of bank interest at the rate allowed by the British Linen Company, upon the principal sum of £2800 mentioned in the libel, from the period concluded for, until the said principal sum shall be replaced in the hands of the said trustees for behoof of the pursuer and her family, in terms of Mrs. Rosina Hunter's deed of trust; and decern against the said Robert Stewart, and Stewart, Crawford, and Currie, for payment of the interest at the rate aforesaid accordingly;—find that the said Robert Stewart, and Stewart, Crawford, and Currie, are bound to replace the foresaid sum of £2800 in the hands of the said trustees; and decern him, and the said Stewart, Crawford, and Currie, as a company, and as individuals, to make payment thereof to the said trustees at the term of Martinmas first, with legal interest thereof thereafter during the not-payment,—the said trustees, on such payment, being bound to grant a disposition and assignation of the heritable security libelled in favour of the said Robert Stewart, or Stewart, Crawford, and Currie, at his or their expense, with no warrandice except from fact and deed,—reserving to them to have imputed, in part of the foresaid principal sum, the sum of £100, with bank interest, in so far as the same has not been paid by the trustees;—find the

said Robert Stewart, and Stewart Crawford, and Currie, are not liable to the pursuer in the expenses of this action, and decern;—and the Lords further reserve to them their claims against W. C. C. Graham of Gartmore for all damages sustained by them, and for their trouble and expense in consequence of his having concealed, at the time he proposed and granted the foresaid heritable security, that he had granted previously heritable bonds of annuity over the property foresaid, which exhausted, or nearly exhausted, the rental."

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Batchelor v. Dundee Commercial Society.

E. M'Millan, S. S. C.—W. Patrick, W. S.—Macmillan and Grant, W. S.—Agents.

Dr. Batchelor, Advocator.—*D. F. Hope—Fergusson—Milne.*
John M'Gilvray (for Dundee Commercial Society), Respondent.
—*Deas.*

No. 287.

Partnership—Master and Servant.—1.—Articles of a partnership by which the committee of a trading society was found to have sufficient powers to hire a salesman for a twelvemonth.—2.—The Society found liable in wages, having unjustly dismissed the salesman during that period.

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1st Division. Lord Newton. S.

A person called Dr. Batchelor raised an action before the Sheriff of Forfarshire against the Dundee Commercial Society, alleging that he had been hired to act as their salesman, from the 7th of March 1828 to the 7th of March 1829, at the wages of 16s. a week; but that they had, without proper cause, dismissed him on the 21st of June 1828, and therefore concluding for payment of wages at the above rate till the expiration of the contract.

In defence, the company alleged, inter alia, that he had been hired by a committee, who had no power to do so, and that at all events their choice required to be confirmed by a general meeting of the society; that Batchelor's misconduct justified his dismissal; that he had homologated the act dismissing him; that it was necessary for the salesman to find security to the extent of £100, and although the committee had subscribed an obligation for £50 to that effect, yet this had been rejected by the general meeting, in respect that the committee were the superintendents of Batchelor, and ought not to be cautioners for a party over whom they were bound to watch; that the obligation was improbative, and several of the committee had resiled; and that as Batchelor had been unable to find other caution, he was properly dismissed.

Batchelor denied the imputed misconduct, and stated that he had found sufficient caution at the date of his election.

By the contract of the company, it was provided (Art. 7.) "that the whole business and concerns of the company shall be intrusted to a committee of management consisting of thirteen partners, to be elected half-yearly at the stated general meetings," &c. "(Art. 8.) The committee shall meet regularly once every week at least, for the purpose of

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general superintendence, &c. They shall have power to enter into all such contracts, bargains, agreements and transactions, as may be necessary for the right conducting of the business of the company." Nothing was said in the contract as to the necessity of the appointment of a salesman being sanctioned by a general meeting, nor as to the kind of caution to be found by him.

The Sheriff, after a proof, "found that the defenders were justified in dismissing the pursuer from their service, in respect that he had not found proper security for his faithful conduct and intromissions to the extent of £100 sterling; therefore assoilzied &c., but found no expenses due."

Batchelor brought an advocation; and the Lord Ordinary "repelled the reasons, remitted the cause simpliciter," &c. This interlocutor was brought under review on the 25th of January 1831; but as the advocation involved the judgment of an Inferior Court proceeding on a proof, the Court, "before answer, remitted to the Lord Ordinary to specify in his interlocutor the facts that he finds proved," &c. The Lord Ordinary, then, in terms of the remit to him by the First Division of the Court, substituted the following interlocutor in place of that pronounced by him:—"The Lord Ordinary having heard counsel for the parties on the closed record, and whole process, finds it proved that, at the time of the pursuer's appointment by the committee as salesman, it was understood that he should find caution for his faithful discharge of the office, and that the members of the committee, with this view, subscribed an informal and improbative writing, binding themselves as security for him to the extent of £50;—that this security was objected to by some of the members of the society on what appears to the Lord Ordinary to be a reasonable ground—namely, that it was improper for the committee, whose business it was to watch over the conduct of the society's officers, to be themselves the cautioners;—that, at a general meeting called to consider of the matter, several if not the whole of the subscribers of the improbative writing declared that they withdrew their security, and the pursuer being unable to procure other caution, a new election was ordered;—finds it proved that the pursuer attended the adjourned general meeting held for this purpose on the 29th of May 1828, making no objection to the election proceeding; and, when asked to become a candidate, stated that he had no means of finding the required caution, unless some of the members present would become his security; that he retired with the candidates when the election took place, and finding, on his return, that another had been chosen, asked and accepted of a fortnight's wages in addition to those due for the time he had served;—finds that, in these circumstances, the pursuer is not entitled to any further

[1] Ante, p. 330.

sum in name of wages; repels the reasons of advocation, remits simpliciter to the Sheriff, but finds no expenses due, and decerns."*

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Batchelor reclaimed.

The Court, after calling on the respondents' counsel to support the interlocutor, "altered the interlocutor; found that the advocator, during the time he was in the employment of the Dundee Commercial Society as salesman, conducted himself with perfect propriety in the discharge of his said office; — that the committee of the society, by whom he was elected, were authorized to elect a salesman for the year, in virtue of the general powers vested in them by the rules of the society; — that sufficient caution had been found by the advocator, to the satisfaction of the said committee, at the date of his re-election, and that no facts have been established to justify his dismissal; — therefore advocated the cause, and found him entitled to the sums concluded for in the original summons in the Inferior Court, for which allowed interim decree to go out and be extracted, &c.; — found the respondents liable in expenses, both in this Court and the Inferior Court," &c.

J. Jameson, — Brown and Miller, W. S. — Agents.

Thomas M'Millan and Others, Pursuers. — *Baird — Keay.*
Charles Campbell and Others, Defenders. — *Skene — M'Neill.*

No. 288.

Trust — Entail — Writ. — 1. — A trust-disposition of an estate for behoof of creditors, with powers of sale, subject to an obligation on the trustee to reconvey the remainder, (if any) although followed by infeftment, does not divest the truster of his radical right to the lands; and therefore held, that although a reconveyance by the trustee was informal, yet the truster could, in virtue of his radical right, execute an effectual entail by procuratory of resignation. — 2. — Opinion expressed by the Lord Ordinary, (1.) That an instrument of resignation, referring to a procuratory as dated 25th March last, and the word 'last' being written on an erasure, was no evidence that a procuratory dated 24th March 1808 was ever executed; and, (2.) That the discrepancy in the day of the month would alone have been fatal.

The late David Campbell of Combie was proprietor in fee-simple of, and feudally infeft in, the lands of Auchnonard and others. In 1797 he executed a disposition of them, and of his whole effects, in trust for behoof of his creditors, to the late Mr. James Ferrier, W. S., whom failing,

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* "Note. — The Lord Ordinary's opinion is founded chiefly on the pursuer's failure to find caution. Whether the committee were proper cautioners or not, they were only so by an improbative writing, which left them the power to resile; and they did resile when they saw the impropriety of their being the security. The Lord Ordinary sees no evidence of the respondent's allegation, that, by the regulations of the society, the committee had no power to appoint the salesman for any longer time than till the general meeting should take place; but he thinks it very questionable if they had the power to appoint for any longer time than their own office continued, which could in no case exceed six months."

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"to such other person as may hereafter be named and appointed by my said creditors," &c., with power, "without any further advice or consent of me or my creditors, to sell and dispose of the lands," &c., privately or publicly, on such terms as he thought fit, after advertisements; to receive payment of the price, and "to grant dispositions, discharges, and other writings necessary, with all clauses needful, to the purchasers of the said lands, &c; and that simply, so as that the said purchasers shall be nowise concerned with the application of the prices thereof, nor be burdened or affected with any of the provisions or conditions herein contained, but shall only be subject to pay their respective prices to the said trustee, or to any factor or cashier nominated by him, or to my said creditors, as the acting trustee shall direct." The deed then declared, that, "after deduction and payment of my debts, the trustee shall make payment to me, my heirs or assignees, or to any person or persons to whom I shall direct the same to be paid by a writing under my hand, at any time in my life, (secluding executors,) of the residue of my said funds, if any shall remain, and shall convey and redispone to me and my foresaids the remainder of my said lands and estate, in case any part thereof shall remain unsold," &c. It contained procuratory and precept, and Mr. Ferrier took infeftment under the precept.

Mr. Ferrier sold a considerable part of the lands, and granted dispositions to the purchasers. When the debts were thus very much reduced, he executed, on the 24th of March 1808, a disposition, reconveying the unsold lands to Mr. Campbell, under burden of the remaining debts. This deed contained only a procuratory of resignation ad remanentiam.

On the 21st of May 1808, Mr Campbell expede an instrument of resignation, which set forth that it proceeded in virtue of a procuratory contained in a disposition of the lands, 'dated the 25th of March last, executed' by Mr. Ferrier in his favour. The words 'last' and 'executed' were written on an erasure, of which no notice was taken in the deed. Thereafter Mr. Campbell executed an entail, in the form of a procuratory of resignation, of the above lands in favour of himself in liferent, and his eldest son Charles Campbell in fee. The procuratory was recorded in the Register of Tailzies in 1814; and after Mr. Campbell's death, his son Charles obtained, in virtue of the procuratory, charters of resignation from the several superiors of the lands, on which he was infeft.

Charles Campbell having subsequently contracted several debts to the pursuers Thomas M'Millan and others, they raised a reduction of the instrument of resignation ad remanentiam expede on the procuratory of Mr. Ferrier, and also of the procuratory of resignation in favorem containing the entail, with the charters and infeftments following thereon. In support of this, they contended that David Campbell was, by the infeftment of Ferrier under his disposition, divested, except as to a bare mid superiority; that he was never feudally re-invested, as the instrument

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of resignation, from its erasures, and the discrepancy in the day of the month, did not prove Ferrier's procuratory to have been executed; that David Campbell, therefore, could not validly grant the procuratory containing the entail; and consequently the pursuers, as creditors of his son, were entitled to charge him to enter heir in fee-simple, and thereupon to adjudge the lands.

To this it was answered, 1. That the radical right to the lands remained in David Campbell, notwithstanding the trust-conveyance to Mr. Ferrier; that in virtue thereof he had power to execute a procuratory resigning and entailing the lands, and consequently it was of no importance whether Mr. Ferrier's procuratory was previously expede or not. And, 2. That the erasure of the word 'last,' and the blunder in stating 25th instead of 24th March, were unimportant, as these dates were only requisite to identify the procuratory, which was sufficiently done by the names of the parties and of the lands, and a reference to the previous trust, and by there being no allegation that any procuratory, except that of 24th March, was granted by Mr. Ferrier.

The Lord Ordinary ordered Cases, in which all these points were argued; but the only one decided was that relative to the effect of the trust-deed in divesting David Campbell, so as to take the radical right out of his person. In reference to this point—

Pleaded by the Pursuers—

A disposition to a trustee for behoof of creditors, containing unlimited powers of sale, and a disposition which impledges land to a heritable creditor, are essentially different. The first is a disposition in payment,—the second in security. Accordingly a renunciation by the heritable creditor, or the fact of his recovering payment, operates the extinction of his heritable right; but a disposition in payment, and the infeftment of the disponee, have the effect entirely to divest the disponer, and to vest the feudal right in the disponee. Neither is its nature affected by the stipulation that any reversion or remainder (if such a contingency should occur) shall be reconveyed, as that merely creates a contingent jus crediti to the disponer. The case of Munro in 1756 showed that the infeftment of a trustee for creditors left only a jus crediti in the granter. In that case, a creditor having adjudged and been infeft, four other creditors adjudged after year and day, but without infeftment;—a fifth then adjudged, and was infeft; but he was postponed to the other four, "upon the single medium that nothing was left with the common debtor but a personal reversion." An adjudication, however, by a creditor is just a trust-conveyance to him by the law in payment of his debt, redeemable, suâ naturâ, for a certain term. In the case of Edderline, founded on by the defender, the question merely was, whether an adjudication should be directed against the trustees infeft, or against the heir of the truster, who was dead. The Court there held that as the jus crediti remained in the granter, and so lay in his hæreditas jacens, and never was nor could be in the trustees, no ad-

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judication could take it out of them; and therefore an adjudication, unless directed against the heir of the granter, was inept to carry the jus crediti or exigendi.

Pleaded by the Defenders—

A disposition in trust for behoof of creditors, though containing powers of sale, is essentially different from a disposition and sale of lands. The powers of sale are merely granted in explication of the trust, and do not alter the nature of the disposition. There is no animus on the part of the disponer to convey, or of the disponee to accept, the lands in absolute satisfaction of the whole debts, or of any definite part of them. On the contrary, the lands are merely placed under a certain control, for the immediate security and ultimate payment of the creditors. Though different in form, it is substantially the same as a disposition in security, with a power of sale. But the question is no longer open for argument, as the point was decided in the case of Edderline in 1801, and that judgment has been acted on ever since.

The Lord Ordinary having reported the Cases to the Court, with the subjoined Note, * the Court found "that David Campbell, not having

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* "NOTE.—As this case involves important questions, and is prepared on Cases, it appears to the Lord Ordinary that it may be most convenient for the parties and the Court that it should be reported without a judgment; but he shall state the views which occur to him on the points of law raised.

"1. He is inclined to think that the objection stated against the validity of the instrument of resignation ad remanentiam is a good objection. There can be no doubt that the date of the disposition containing the procuratory in virtue of which the resignation had been made, is an important and essential part of the instrument. The instrument clearly bears two erasures in the date; and whatever ingenious reasonings may be used as to the words which could or did stand in the deed before the erasures were made, the Lord Ordinary apprehends that the legal rule is, that the words must be taken pro non scriptis, in which case the instrument is blank as to the year in which the disposition was executed. The case of Maxwell v. Houston, quoted by the defender, was different in this respect, the import of the clause being the same in law, with or without the word written on erasure. There is further, in the present case, a discrepancy in the day of the month, the instrument bearing that the disposition was dated on the 25th of March, whereas the disposition founded on is dated the 24th of March. The Lord Ordinary thinks this alone fatal, because, on the face of these title-deeds, non constat that there may not have been another disposition and procuratory bearing the date of 25th March.

"2. If the instrument of resignation ad remanentiam is held to be invalid, the consequence is, that David Campbell, the maker of the entail, had no feudal title under the disposition in his favour by Mr. Ferrier. His titles then stood thus:—He originally stood fully invested under his original titles to the estate, before he conveyed it to Mr. Ferrier;—he had disponed it to Mr. Ferrier in trust for the payment of his debts, and with a power of sale, under an obligation to reconvey the residue to himself, or his heirs or assignees; and on this conveyance Mr. Ferrier stood infeft. And by Mr. Ferrier's disposition to David Campbell there was a personal right vested in him, with an unexecuted procuratory of resignation. The question between the parties is, whether, under any of these titles, David Campbell had power to execute a

been divested by the trust-deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and feudally made up; and therefore assoilzied the defenders from the conclusions of this action."

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deed of strict entail in the form of a procuratory of resignation, to the effect that, when the title was completed by charter and sasine, the entail should be effectual against the creditors of his immediate heir.

"3. It is maintained that David Campbell had power to execute the entail, 1. In virtue of his original radical title, preceding the trust-conveyance to Mr. Ferrier; and, 2. In virtue of the personal right which stood in him under Mr. Ferrier's disposition. The first of these points appears to the Lord Ordinary to be the most important; and he thinks that it is ruled by the principle first settled in the case of the creditors of Campbell of Edderline, 14th January 1801. It seems to be impossible to explain away the doctrine of that case in the manner attempted by the pursuers. The facts are simple:—Dugald Campbell stood infeft in the estate;—he conveyed his estate, heritably and irredeemably, to trustees, expressly for payment of his debts, with power to sell, and under an obligation to reconvey any residue under a strict entail. The trustees were infeft. Mr. Campbell died, and a competition arose between adjudgers from the trustees, and prior adjudgers who had proceeded directly against the estate, as in hæreditate jacente of him, by charging his heir to enter. There could not be a more perfect state of the case for trying the question whether the feudal title subsisted in the truster. The creditors who adjudged the hæreditas jacens, did not adjudge any mere jus crediti;—they adjudged the estate itself by charging the heir to enter, which charge necessarily implied that it was competent for the heir to be served in special as heir of the investiture; and accordingly the interlocutor of Lord Eskgrove, adhered to by the Court, expressly found that Dugald Campbell 'was not completely divested of the real right and property of his estate by the trust-right and infeftment thereon founded on by the objectors,—the same having been a trust for the granter's behoof, though it contained a power to the trustees of selling the lands,' &c. The Lord Ordinary is of opinion, that whenever an estate can be adjudged as in hæreditate jacente, to the effect of carrying a feudal title by charter of adjudication, it must be equally competent to the heir to be served and infeft; and he thinks it a self-evident proposition, that whenever a man's title so stands by his investiture, that upon his death his heir might be served, and get a feudal title directly as heir, he himself must be in titulo, while alive, to convey the estate, subject to all existing burdens; because, if his investiture subsist to the effect of the estate being carried by the service of his heir, he must have, by his sasine, the powers of an undivested fiar to convey, however he may be restrained by conditions, or affected by burdens. The case of Edderline settles the point that a trust-conveyance almost identical with the trust in the present case does not divest the granter of his feudal title, and is only to be considered as a burden on that title. The form of the question in that case appears to have been very favourable for bringing out the point. But it occurred much more lately in a case not adverted to in the papers—the case of W. Bellenden Ker against the Trustees of Lady Essex Ker. John Duke of Roxburghe conveyed his whole unentailed estates to trustees for payment of his debts, and then for purposes to be appointed by him. On his death, the trustees were infeft in his estate. The heirs at law, Lady Essex and Lady Mary Kers, challenged the deed by which the residue was settled; and having succeeded, they obtained a conveyance from the trustees, and completed their title. But afterwards a defect occurred in regard to the transmission of a part of the estate from Lady Mary to Lady Essex, in consequence of which

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Pursuers' Authorities. — (2.) — 2. Stair, 11. 6; 2. Bell, 291-3; Munro, Jan. 27. 1756, (Supp. V. 310); 2. Bell, 496, and Note; Fairley, July 11. 1827, (ante, V. 937.)—(3.)—Douglas, Feb. 22. 1765, (15616); Russell &c., Jan. 31. 1792, (10300.)

Defenders' Authorities. — (1.) — Maxwell, April 30. 1725; Robertson's App. Cases, 539. —(2.)—Campbell, Jan. 14. 1801, (Dict. v. Adjud. App. 11); Fairley, July 11. 1827, (ante, V. 937); Napier, March 3. 1762, (15418), and July 20. 1762, (Supp. V. 888); Carmichael, Nov. 15. 1810, (F. C.); Paul, May 28. 1828, (ante, VI. 826.)

H. Graham, W. S.—C. C. Stewart, W. S.—Agents.

Mr. Bellenden Ker and others, as heirs at law, claimed those lands, as not having been so vested in Lady Essex as to warrant her conveyance of them. In order to obviate this plea, it was maintained that Lady Essex and Lady Mary Kers, before getting the title from the trustees, had made up a title by adjudication upon a trust-bond directed against the estate, as in hæreditate jacente of Duke John himself; and as Lady Essex had a general service to Lady Mary, it was maintained that this title by adjudication, which had remained personal, was sufficient to vest a personal right in her, which she could convey. The Court had no doubt that that adjudication by trust-bond was a valid title, clearly assuming that a feudal title remained in Duke John and in his hæreditas, notwithstanding the trust-deed and the infeftment on it. It was found, indeed, to have been superseded by the complete feudal title established under the conveyance of the trustee. But there was no doubt entertained that it was a valid form of obtaining a feudal title in the estate, subject to the burden of the trust. In the case of Sir James Fergusson, the conveyance to Lord Hermand was ex facie absolute and unconditional.

"The Lord Ordinary therefore thinks the point quite settled; and as he cannot enter into the idea that these cases suppose merely the competency of adjudging a jus crediti or personal claim to be made effectual through the trust, but, on the contrary, thinks that they necessarily import that a direct feudal title might be taken as remaining in the truster, he is of opinion that the plea of the pursuers is thereby met by a conclusive answer.

"4. The separate ground taken by the defender, that the entail was effectual under the personal right vested by Mr. Ferrier's disposition, appears to the Lord Ordinary to be very doubtful. The title by infeftment completed in the defender's person depended on the resignation ad remanentiam by David, and must therefore be laid aside; for though it might have been made effectual in another manner, this was not done. Then, although it was held in the case of Livingston against Lord Napier that a personal right might be entailed even against creditors, it is to be observed that James Livingston, the institute or first substitute in that case was not the heir even of the personal right, and far less heir of any investiture. He had therefore no other title. But, in the present case, the defender was the heir-apparent under Mr. Ferrier's disposition, and in the reversionary right, under every view of his father's title. It would be at least a very difficult matter to establish that his creditors are affected by such a personal entail, consistently with the decisions in the case of Denholm of Westshiell, and other similar cases; yet the Lord Ordinary is sensible that there is considerable difficulty in this question. The procuratory of resignation creating the entail simply designs the granter as heritable proprietor, without reference to any particular title.

"If the Lord Ordinary were to pronounce a judgment, he would adopt nearly the words of the first part of Lord Eskgrove's judgment in the case of Edderline, and then find that David Campbell, not having been divested by the trust-deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and effectually made up, and on this ground assoilzie the defender."

ANDREW BUCHANAN, Pursuer.—*D. F. Hope—Jameson.*
G. and R. DENNISTOUN and Co., and TRUSTEES, Defenders.—*Skene—Speirs.*

No. 289.
Mar. 4. 1831.
Buchanan v. Dennistouns and Co. &c.

Cautioner—Partnership—Writ.—1.—An obligation of guarantee by a company, holograph of the acting partner, held probative, though not tested, nor in re mercatoria. —2.—An obligation being acknowledged by the principal debtor in a letter, subjoined to which a guarantee was granted, and being also admitted in the guarantee, no further constitution against the principal debtor necessary in a question with the cautioner.

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2D DIVISION.
Ld. Mackenzie.
F.

ON the 12th of December 1820, James Buchanan, partner of the company of George and Robert Dennistoun of Glasgow, addressed to the company the following letter:—"Gentlemen, I beg you will do me the favour to pay to my father, Andrew Buchanan of Ardenconnal, during the currency of our contract of copartnership, which will expire in May 1827, the sum of £250 annually, (should you be called upon to do so,) or to my mother, Mrs. Jean Dennistoun, in the event of his predeceasing her, and that you will address a letter to them to that effect. It is not wished that this obligation shall be retrospective, the payment being held to be made, if not demanded previous to the 1st of May each year, commencing with the year 1821. In the event of such payments being made by you, I shall consider them as payments to account of interest on my stock in your concern. I remain," &c. The company, in consequence of this request, granted to Mr. and Mrs. Buchanan the following obligation, which was subjoined to the above letter, and was in the handwriting of the acting partner of the company, but without the solemnities of the act 1681:—"We hereby guarantee to you, for six years after the 1st day of May next, on account of our partner Mr. James Buchanan, the payment of the annuities referred to in the foregoing letter, upon the terms and conditions therein stated. We are, &c. (signed) Geo. and Rob. Dennistoun and Co."

There was no sufficient evidence that any demand, in terms of the letters, had been made on the company for the annuity for the year 1823. For that of 1824 a demand was made, but withdrawn; and for that of 1825 a demand was also made, but afterwards limited to £100. Demands were duly made for the annuities of 1826 and 1827. In the end of this latter year the company became insolvent, and conveyed their property to trustees; and the estates of James Buchanan, as an individual, were sequestrated. Thereupon Andrew Buchanan raised an action, concluding against James, and also against the company on their guarantee, for payment of the annuities for the years 1823 to 1827.

The Company pleaded in defence—

1. The guarantee, which is not in re mercatoriâ, is not probative in terms of the act 1681.

2. Being merely a cautionary obligation, it requires that a primary obligation shall be established; but the pursuer has produced no evidence of

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his claim of annuity against his son, nor has he constituted it against his son's estate.

3. At all events, he can only claim those annuities for which a demand was duly made in terms of the letters.

Answered for Buchanan—

1. The guarantee, being holograph of the acting partner of the company, is a probative writ, though not in re mercatoriâ.

2. The obligation to pay the annuity being admitted in the letter of guarantee, and acknowledged by James Buchanan in his letter, with reference to which the guarantee was granted, no further constitution is necessary in a question with Dennistoun and Co.; and the sequestration of James Buchanan supersedes any necessity for discussion.

3. Demands were duly made for all the annuities.

The Lord Ordinary, after finding the facts as to the alleged demands as above stated, decerned for £100 of the annuity for 1825, and for the annuities of 1826 and 1827; allowed a reference to oath as to that for 1823, and quoad ultra assoilzied.

Dennistoun and Co. reclaimed; but the Court adhered.

D. Cleghorn, W.S.—R. Welsh, S.S.C.—Agents.

No. 290.

Robert Sclater and Others, Petitioners.—*A. Dunlop.*
David Clyne, S.S.C., Respondent.—*More.*

Mar. 5. 1831.

2d Division. F.

Execution pending Appeal.—An application for execution pending appeal of the judgment mentioned ante, p. 248, having been presented by Sclater &c., it was opposed by Clyne, on the same grounds on which he had defended himself in the action. The Court granted execution in common form.

J. Kennedy, W.S.—D. Clyne, S.S.C.—Agents.

No. 291.

W. Balfour, W.S., and J. Hamilton, W.S.—*Keay—Ivory.*
William Ewing, (Buchan's Executor.)—*More.*
William Laing.—*Brown.*
Lady Strathmore's Trustees.—*Jameson.*

Competing.

Husband and Wife—Writ.—1.—A bill granted by a woman before marriage having been discharged and renewed by another bill after marriage—Held that the renewed bill was not effectual against her.—2.—A decree of constitution against a married woman having proceeded on a docqueted account, dated on the day of her marriage, but the date appearing to be false, the paper having a water-mark of two years later date—Held not capable of supporting a claim in a multiplepoinding regarding the separate state of the lady.

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2d Division. Ld. Mackenzie. F.

This was a multiplepoinding as to the distribution of the amount of certain annuities forming the separate estate of the Countess of Strathmore, among parties alleging themselves to have been creditors of her Ladyship prior to her marriage, which took place in December 1817.

1. The Trustees of Lady Strathmore claimed under a general trust-con-

veyance by Lord and Lady Strathmore for their own behoof, and not completed by infeftment or intimation.

2. Laing claimed on a bill granted prior to the marriage, whereon the first adjudication had been obtained.

2. Ewing, as executor of the late Mr. Buchan, W. S., (between whom and the Countess a process of accounting was in dependence,) founded, inter alia, on two bills granted by her—one for £615, dated prior to her marriage, and another, which was dated subsequent, for £643, stated to have been a renewal, with interest and expenses, of the prior bill; and on a decree of adjudication obtained under reservation of objections contra executionem founded upon both bills, but the decree being for the amount of the bill for £643 only.

4. Hamilton, W. S., and Balfour, W. S., as his trustee, claimed a sum of £1501 contained in a decree of constitution founded on an account bearing to have been docqueted by Lady Strathmore on the day of her marriage, and signed by the name borne by her before marriage.

To the Trustees' claim it was objected that their title had never been completed, so as to compete with the diligence of other creditors; and also that the trust being for behoof of the debtors themselves, it could not preclude the creditors from recovering their debts out of the funds conveyed.

To Laing's claim there was no feasible objection.

To Ewing's claim it was objected, that the first bill granted before marriage was discharged; and that the second, (even if it were true that it was a renewal of the former,) being granted after marriage, could create no obligation against Lady Strathmore; and

To Hamilton and Balfour's claim it was objected, that the docqueted account on which the decree of constitution had proceeded, was fabricated and false in the date, the paper on which it was written having ben made in 1819, (as proved by the water-mark,) whereas the docquet bore to be dated on the 12th of December 1817; and in 1819 she was married, and incapable of granting such an obligation.

The Lord Ordinary pronounced this interlocutor:—"1. Sustains the claims for the trustees of the Countess of Strathmore to so much of the fund in medio as shall remain after satisfying the claims of the other claimants, in so far as the same shall be found to be valid. 2. Sustains the claim for William Laing, and repels the objections to the same. 3. Sustains the objections to the claim for William Ewing, in so far as the same is founded on two bills of exchange for the sums of £615 and £643. 18s., and repels the said claim to that extent;—sustains the said claim quoad ultra, and finds that the same has a pari passu preference with the claim upon the adjudication of William Laing; but this under the qualification and provision that Mr. Ewing, before drawing any share of the fund in medio, shall be able to show that his said claim is not affected by the result of the general accounting between the estates of the Countess of Strathmore and the late Mr. Buchan. 4. Sustains the objec-

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tions to the claim for William Balfour, W. S., and his cedent Mr. James Hamilton; and decerns in the preference accordingly."

The several parties affected thereby reclaimed; but the Court adhered.

A. Forsyth,—G. Hogarth, W. S.—W., A. G., and R. Ellis, W. S.—A. Clason, W. S.—Agents.

No. 292.

Robert Houstoun, Suspender.—*Milne.*

Mr. and Mrs. Harvey, Chargers.—*More—Penney.*

Landlord and Tenant.—The tenant of a mill, who alleged that he had suffered damage by the act of a third party claiming right to and taking possession of the mill-dam, having been charged by the landlord for payment of rent, the Court refused to pass a bill of suspension without caution or consignation, except to the extent of damage of which he produced prima facie evidence.

Mar. 8. 1831.

1st Division.
Bill-Chamber.
Lord Gillies.
D.

Robert Houstoun took the Calder-mill from Mr. and Mrs. Harvey of Castlesemple, on a lease of ten years from Whitsunday 1825, at a rent of £50. An adjacent Cotton Work Company having interfered with the use of a dam which furnished part of the supply of his mill-stream, Houstoun, with the sanction of Mr. and Mrs. Harvey, applied to the Sheriff for an interdict against the proceedings of the company. This process issued in a reference to arbitration between Mr. and Mrs. Harvey and the company. In 1827, Houstoun fell into an arrear of rent, and Mr. and Mrs. Harvey executed sequestration against him. On the other hand, Houstoun, founding on the circumstance that he was deprived of the use of the mill-dam, raised a counter action of damages, which was conjoined with the sequestration. The Sheriff found that Houstoun had sustained damage during a period of nine months prior to the date of his action, and modified this to £10, for which, and expenses of process, he allowed a deduction of rent.

In May 1828, Mr. and Mrs. Harvey again executed sequestration for the rent of Whitsunday 1828; and this process was met by similar pleas with the former on the part of Houstoun, and a proof was allowed.

In September 1830, (none of the intervening rents having been paid, and the processes above mentioned being in dependence,) Mr. and Mrs. Harvey gave a charge of horning on the tack for the rent due from Martinmas 1828 to Whitsunday 1830 inclusive; against which Houstoun offered a bill of suspension without caution or consignation, founding on the injury he had sustained by being deprived of the water supplied from the dam. Lord Cringletie refused the bill, "considering it out of the question to pass this bill without caution or consignation." A second bill was offered on juratory caution to Lord Gillies, who, "in respect of the interlocutor of the Sheriff of the 4th of June 1829, whereby he modified £10 of damages to the complainer for a period of nine months, passed the bill to the extent of £40, and refused it quoad ultra."

Houstoun reclaimed; but the Court adhered.

Suspender's Authorities.— 1. Bell on Leases. 421, 427, and 323, foot note; 1. Bell, 72; Hamilton, Jan. 2. 1667, (10121); Deans, Dec. 15. 1681, (10122); Wilson, June 16. 1699, (10125); Brown, Feb. 23. 1826, (ante, IV. 489.)

Chargers' Authorities.— Dunn, Nov. 12. 1824, (ante, III. 274); Fisher, June 5. 1829, (ante, VII. 704); Scott, Nov. 19. 1829, (ante, VIII. 77); Thomson, Dec. 18. 1829, (ante, VIII. 156); M'Kenzie, Feb. 4. 1830, (ante, VIII. 436); Burns and Grier, March 5. 1830, (ante, VIII. 641.)

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Houston v. Harveys.

Cook &c. v. Stirling and Co.

BOWIE and CAMPBELL, W. S.—J. MORISON, W. S.—Agents.

ROBERT COOK and JOHN CROSBIE, Suspenders.—*Houston.*
STIRLING and Co., Chargers.—*Anderson.*

No. 293.

Bill of Exchange—Oath on Reference.—The holder of a bill claiming against a drawer, as having obtained it from a party now dead, having, on a reference to oath, admitted that he himself gave no value for the bill, and left it doubtful whether any value was given for it—Bill passed without caution or consignation.

Mar. 8. 1831.

1ST DIVISION. Bill-Chamber. Ld. Moncreiff. S.

STIRLING and Co. charged Cook and Crosbie, drawers and indorsers of a bill, who presented a bill of suspension without caution or consignation, alleging that they had left it in the hands of the late Mr. Muirhead to be discounted, but he had died without giving value for it, and that the chargers had found it lying in his repositories. On a reference to oath, Stirling deponed that he obtained the bill without any indorsation from Muirhead; that he himself gave no value for it; that when his father died in 1822, Muirhead undertook the management of the shop left by the deponent's father for behoof of the deponent and his brothers and sisters, then all minors; and that he intromitted with the funds in the shop. "Interrogated whether he knows that money was taken from the funds of Stirling and Co. by Mr. Muirhead to cash the bill in question? depones and answers, That he is sure that he did. Depones that Mr. Muirhead, immediately before getting the money, spoke to Cook and Crosbie, who immediately went to Smith's tavern, adjoining Stirling and Co.'s shop; that Mr. Muirhead then took the money from the safe in the shop of Stirling and Co. in presence of the deponent, and carried it to the said tavern; and further depones, that when Mr. Muirhead took the money as aforesaid, he stated to the deponent that it was for the special purpose of being paid to Cook on account of said bill, &c. Interrogated whether the bill in question was delivered to Mr. Muirhead in the deponent's presence in the shop of Stirling and Co.? depones and answers, That it was not delivered in his presence. Interrogated whether the deponent was present in the tavern when Mr. Muirhead paid the money to Robert Cook? depones and answers, That he was not present on that occasion."

The Lord Ordinary, "in respect that it is proved by the deposition that the charger did not himself pay value for the bill charged on, and that it is left in a state of doubt whether Muirhead paid value for it or not, passed the bill."

The chargers reclaimed; but the Court refused the bill, and allowed the expense of opposing it.

A. CLASON, W. S.—R. BURN, W. S.—Agents.

No. 294.

Mar. 8. 1831.
Stirling
v. Dunn.

W. C. STIRLING, Pursuer.—*A. Dunlop.*
W. DUNN, Defender.—*More.*

Expenses—Auditor.—1.—Expenses of a diligence allowed, though the documents recovered did not establish the allegations sought to be proved.—2.—Charges for an agent going to a distance to precognosce and examine havers disallowed.

Mar. 8. 1831.
2D DIVISION.
F.

IN auditing the account of expenses awarded to the pursuer in the case mentioned ante, p. 276, the defender objected to a charge for executing a diligence, with a view to recover evidence of grassum having been paid, on the ground that the documents recovered had not established the allegation. The Auditor reserved the objection for the Court, who allowed the charge, with the exception of a portion of it consisting of the expense of an agent proceeding from Glasgow to Greenock and Belfast to precognosce the havers, and thereafter to conduct the examination.

J. and W. FERRIER, W.S.—W., A. G., and R. ELLIS, W.S.—Agents.

No. 295.

Mar. 8. 1831.
Gardner v.
Hunter.

GEORGE GARDNER, Pursuer.—*Anderson.*
JOHN HUNTER, Defender.—*D. F. Hope—G. Napier.*

Cessio Bonorum.—1.—The objection that all creditors are not called being once taken, and those alleged to be omitted cited, the objection not allowed to be repeated by another creditor cited in the original summons.—2.—Not a sufficient objection to a certificate of imprisonment, that it merely bore the incarceration to be of a certain date, and the being in custody at the date of the certificate a month thereafter, without specially setting forth that the party remained in prison during the intervening period, it not being averred that in point of fact he had not.—3.—Averments which were held not relevant to warrant refusal or delay to grant the benefit of cessio.

Mar. 8. 1831.
2D DIVISION.
T.

THE pursuer Gardner is Comptroller-General of the Customs for Scotland, in respect of which office he is entitled to a salary of £580 per annum. Having fallen into difficulties, he called a meeting of his creditors, to whom he exhibited a state showing his debts to be £2080, together with an annuity of £75 to his sisters, the value of which was not brought out. Almost all the creditors agreed, that if £300 per annum of his salary were appropriated to the gradual extinction of the debts, Gardner should retain the remainder without being subjected to diligence, the necessary consequence of which, if followed by imprisonment, so as to prevent him from executing the duties of his office, would be the loss to him of the office, and to his creditors their only chance of pay-

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Single Bills, &c.

SASSEN v. CAMPBELL.

Mar. 8. 1831.
2D DIVISION.

Process.—The Court refused to receive an incidental petition signed by the party without the signature of counsel.

No. 295.

Mar. 8. 1831. Gardner v. Hunter.

ment. The defender Hunter, however, having refused to concur in this arrangement, and Gardner having been imprisoned, he brought a process of cessio, to which, among others, he cited Hunter. In his condescendence Gardner stated the debts formerly given up, together with £1875 as the value of the annuity mentioned but not valued in his state, and £1160 as the amount of a cautionary obligation, making in all £5115. When the cessio was moved, a creditor objected that all the creditors had not been called, and gave in a list of those alleged to be omitted, who were thereafter cited by a supplementary summons. On the process being again moved, Hunter, (who had not formerly appeared,) objected that some other creditors had not been called; but the Court refused to listen a second time to this objection on the part of a creditor called in the original summons. Hunter then objected to the terms of the certificate of imprisonment, that it merely bore that Gardner had been imprisoned on the 14th of May 1830, and that he was in custody on the 14th of June thereafter, without specially setting forth that he had remained in jail between these two dates; but having admitted the statement of the other party, on their assurance of its being correct, that Gardner had de facto been in jail the whole time, the Court repelled this objection also. Hunter now contended on the merits, that Gardner having at first stated his debts at a comparatively small amount (£2080), and then increased them to more than double the sum first stated, he ought not to have the benefit of cessio. To this it was answered, that the state exhibited to the creditors set forth debts to the amount of £2080, and mentioned the annuity to his sisters, which, being since valued at £1875, made the debts, as originally given up, £3955; and that the balance between that and the amount stated in the condescendence (£5115) consisted of a cautionary obligation, which had subsequently emerged. It was also contended, that as there was no averment of concealment of funds or fraud, a mere discrepancy of this kind in different statements, even if it existed, was no reason for refusing a cessio, particularly when the granting of it was so clearly the interest of the creditors themselves, that none of them could possibly oppose it for a fair object.

The Court holding that Hunter's averments afforded no relevant ground for refusing the cessio, granted Gardner the benefit thereof accordingly, on his assigning £300 a year out of his salary.*

JAMES BURNESS, S. S. C.—DEUCHAR and KNOX, S. S. C.—Agents.

* The Court at the same time refused a bill of suspension for Gardner of a charge by Hunter on a bill of exchange, without prejudice to a reference to oath of an averment that Hunter had agreed not to do diligence upon it.

No. 296.

Mar. 9. 1831.
Anderson &c. v. Saunders.

J. ANDERSON and Others, Suspenders.—*D. F. Hope—Whigham.*
R. SAUNDERS, Respondent.—*Skene—Dick.*

Servitude—Property.—Held, in a question between the proprietors of the upper storeys of a tenement, who had access to their cellars situated in the sunk storey by a lower stair leading from the common stair, but no exclusive right to the lower stair, and the proprietor of the shop and sunk storeys, that he was entitled to let the sunk storey as a separate dwelling, with access by the lower stair, although the shops and sunk storeys communicated with each other by an inside stair.

Mar. 9. 1831.

2D DIVISION.
Bill-Chamber.
Ld. Moncreiff.
R.

THE respondent Saunders purchased, in June 1825, the lower and the sunk storeys of a tenement in Elm row, consisting of five storeys. The three upper storeys belonged to separate proprietors, the suspenders Anderson &c. The common stair leading from the passage to the upper storeys was prolonged to the sunk one, so as to give access to the occupiers of the upper to the back area, and certain cellars appropriated to their respective houses. This lower stair was separated from the common entry by a spar door fastened by a check lock, and a communication opened into it from the sunk floor, to which there was also access by an inside stair from the shop above. For some time the shop and sunk floors were occupied as one tenement; but on Saunders becoming proprietor of it in 1825, he let the sunk floor as a separate dwelling, for access to which his tenants used the low stair above mentioned, the lock being for this purpose removed from the spar door. On this, Anderson &c., proprietors of the upper storeys, presented a bill of suspension and interdict, maintaining that the stair could only be used by the various proprietors as an access to the cellars belonging to each; that the proper access to the sunk storey was through the shop above; and that the stair could not be made use of as a separate entry to that storey. Saunders, on the other hand, founded on his title, by which he had acquired "all and whole the shop storey and sunk storey immediately below the same, &c., with the cellars below, the common stair leading to the said sunk floor," &c.; and he maintained that the stair formed an essential part of the sunk storey thereby conveyed.

The Lord Ordinary granted interdict as craved; but the Court, after ordering Cases, altered, and recalled the interdict.

LORD JUSTICE-CLERK.—After reading these Cases, I have no doubt that Mr. Saunders had a right to use this property as he has done; for the words of his title are clear; and the only question is, whether he has made a proper use of his right. This was a stair common to all the proprietors; and the suspenders have not proved any exclusive right to it in their own titles. I went to view the premises, and particularly the sunk storey, and I found a passage, with small dwellings on each side, inhabited. The door at the top of the stair in question may have been an extremely proper precaution for the safety of the lieges; but there is no proof of exclusive appropriation on the part of the suspenders. This thoroughfare may diminish the comfort of the upper proprietors, but they are not protected in their titles.

The other Judges concurred.

ALLAN and BRUCE, W. S.—J. PEDDIE Jun., W. S.—Agents.

W. and E. DONALDSON, Pursuers.—*Sol.-Gen. Cockburn—Cuninghame.*
DONALDSON'S TRUSTEES, Defenders.—*D. F. Hope—Greenshields.*

No. 297.
Mar. 8. 1831.
Donaldsons v. Donaldson's Trustees.

Process—Reduction—Issue.—Under a summons of reduction, calling for a deed of settlement described as having two codicils attached thereto, specially set forth, 'all &c. to be seen &c., and reduced,' for reasons (chiefly founded on the allegation that the deceased was not of a disposing mind) which only mentioned the 'foresaid disposition and settlement,' without specially referring to the codicils—Held competent to take an issue as to the codicils, as well as to the principal deed.

Mar. 8. 1831.
2D DIVISION.
Ld. Moncreiff.

BY deed of settlement, dated 29th November 1826, the late Robert Donaldson conveyed his property to trustees for the purposes therein set forth. To this deed he subjoined two codicils, dated 27th June and 24th July 1827 respectively, by the former of which he appointed a new trustee in the place of one named in the deed who had died; and by the latter of which he recalled the nomination of two others, and declared the survivors and survivor of those remaining to be his sole trustees. On his death, the pursuers, as his representatives, raised a summons of reduction of his trust-deed of settlement, chiefly on the ground that at the date of execution he was not of a sound and disposing mind. The summons called for production of the deed of settlement in the usual form, and described it by its date and contents—adding as follows:—"And to which disposition and settlement there is subjoined two codicils, the one dated the 27th day of June 1827, whereby," &c., (narrating the object of the codicil,) "and the other codicil dated the 24th day of July 1827, whereby," &c., (narrating the object thereof,) "all of the dates, tenor, and contents above written, or of whatever other dates, tenor, and contents the same may be; to be seen and considered by our said Lords, and to see and hear the same, &c., reduced," &c., as in common form. The codicils, however, were not specially mentioned in the reasons in which the general terms "the foresaid disposition and settlement" were alone used, and in which the principal ground of reduction was thus set forth:—"The said Robert Donaldson, at the date of the said pretended disposition and settlement, was not only of a very advanced age, but he was not of a sound and disposing mind, or capable to manage his affairs, or to give intelligible directions for preparing a valid settlement. And if the said deed was signed by him at all, his signature was adhibited without his comprehending the contents of it." Issues having been directed to be sent to a jury, the clerks prepared separate issues, applicable to the deed and to the codicils, whether they were the deeds of the deceased. To the proposed issue regarding the codicils, the trustees objected, on the ground that these were not brought under reduction by the summons; and the Lord Ordinary having repelled the objection, they reclaimed.

LORD JUSTICE-CLERK.—I think this is a narrow and critical objection; and I agree with the Lord Ordinary that there is sufficient in the summons to warrant an issue as to the codicils. The summons sets forth the disposition and

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settlement, and that two codicils were attached, and they are specifically narrated as merely altering the previous will; and the summons then goes on 'all of the dates, &c. to be reduced,' &c. This is not limited to the disposition without the codicils, but includes these. No doubt, the words, 'all that has followed or may follow thereon,' would not do; but the summons otherwise is sufficient to cover the codicils.

LORD CHIEF COMMISSIONER.—My inclination is always to refer questions of this kind back to the Chambers, and I doubt if I understand the whole effect of the summons. It appears to me that the thing intended to be reduced is that which has been done by the testator. The Lord Ordinary's view is, I presume, that the generic term 'disposition and settlement' applies to the whole deed, including the codicils. If that view be right, there should be an issue as to the codicils; but if the generic term do not embrace them, the proposed issue is wrong. I would incline to take a little more time; but my present opinion is, that the issue is a proper one under the summons.

LORD CRINGLETIE.—A codicil might, no doubt, exist independently of the principal deed. Those here, however, are such as could not exist without the deed, but necessarily form a part of it; and I hold them included under the general term 'deed of disposition and settlement,' which is brought under reduction as a complex whole.

LORD GLENLEE concurred.

LORD MEADOWBANK at first took a different view, but ultimately inclined to concur.

THE COURT accordingly adhered.

J. BLAIR, W. S.—GORDON and BURNETT, W. S.—Agents.

No. 298.

JAMES GRAHAM, Suspender.—*Fergusson—Milne.*
A. and D. BOOSIE, Chargers.—*Cuninghame.*

Process—Protestation.—1.—After warrant to extract protestation against a party for not calling has been obtained from the keeper of the minute-book, the party cannot be reponed;—and,—2.—Incompetent, after warrant to extract has been issued, to interdict the extractors from extracting protestation.

Mar. 9. 1831.

2D DIVISION. Bill-Chamber. Ld. Moncreiff. F.

GRAHAM having been unsuccessful in an action before the Sheriff of Clackmannanshire against the chargers David and Andrew Boosie, brought an advocation, in which the letters were duly expede and served, the day of compearance being the 2d of December last. Graham applied for the benefit of the poor's roll, and, in expectation of admission, delayed incurring the expense of calling the letters. In the mean time the chargers, on the 4th of December, put up protestation; and a meeting of the lawyers and agents for the poor, to consider if there were probabilis causa litigandi, being fixed for the 22d, the chargers, on the 21st, obtained from the keeper of the minute-book a warrant for extracting protestation, which was produced to the meeting as a bar to their further procedure. Thereafter, and before protestation was actually extracted, Graham's agent paid the fee-fund dues, and had the letters lodged for calling, and thereupon presented a bill of suspension and interdict, pray-

ing to have the extractors interdicted from extracting the protestation, which, it was contended, might be stopped any time before actual extract.

To this it was answered, That the ten days, within which protestation might have been scored, having been allowed to elapse, and warrant to extract having been obtained, it was impossible now to get the protestation scored; and that the application to interdict the extractors was incompetent.

The Lord Ordinary refused the bill, with expenses; and the Court adhered.

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Lord Cringletie.—All protestations are put up at the minute-book, and at the minute-book they must be removed; and though not extracted, what of that? If the protestation cannot be scored at the minute-book, there is an end of the matter.

Lord Glenlee.—Suppose this bill were passed, it would prevent extract; but it would have no effect whatever in getting the protestation scored.

Lord Meadowbank.—That is also my opinion.

Lord Justice-Clerk.—I am not prepared to take that view. Extract has not gone out, and I do not see that the party is precluded from being reponed.

G. Ritchie, W. S.—T. Paul, W. S.—Agents.

R. and A. Carswell, Pursuers.—*Cuninghame.* Munns Trustees, Defenders.—*Brown.*

No. 299.

Compensation—Trust.—An insolvent debtor having conveyed two ships to two sets of trustees (one trustee only being different) for behoof of creditors specially mentioned, who were not entirely the same in both deeds—Held, in a question with a creditor specially named in one of the trusts, and being also a debtor to the other,—1.—That compensation might be pleaded by the trustees against his claim under the first trust;—and,—2.—That he was entitled to plead recompensation by claiming under the second trust, though not specially mentioned therein.

Munn residing in Canada, and Hunter residing in this country, were partners in a shipbuilding concern which expired in 1816, when a submission was entered into as to a claim of £6000 alleged by Hunter to be due by Munn on a settlement of accounts. In the year 1818, and during the dependence of this submission, a ship belonging to Munn (the Duke of Richmond) arrived in this country. To save expense in attaching her by separate diligences, several of Munn's creditors, (whose claims amounted to about £4000,) agreed with Hunter to have her sold for their joint behoof, it being stipulated that a share of the price proportioned to Hunter's claim should be deposited in a bank in the name of the arbiters, to await the issue of the submission. Instead of following this plan, Munn, (who had in the mean time come to this country, and had become insolvent,) was prevailed on to grant a vendition of the vessel to two persons named M'Arthur and Gordon, and his own brother, as trustees for behoof of certain creditors named in the deed; and by these persons the vessel was sold in the course of the year 1819. Among these creditors Hunter was not included, but, after some discussion, the trus-

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2d Division. Ld. Mackenzie.

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tees agreed to admit Hunter to the benefit of this trust; and Montgomery, their agent, wrote Hunter that he had deposited the price in a bank (not that, however, stipulated in the original agreement) in the name of the trustees, and stating "that he would hold the promissory note till the scheme of division is adjusted among the parties."

In the mean time another vessel (the Prompt), which was the property of the concern of Munn and Hunter, had been sent to this country; and as it had been agreed in the submission that the company property should be placed at the disposal of the arbiters, the certificate of registry of the Prompt was lodged in the submission. Thjs, however, was borrowed up from the clerk, and a vendition was obtained from Munn of his half share in favour of Gordon and M'Arthur, and one Jarvie, in trust for certain of his creditors, excluding Hunter and his own brother, and including certain others not mentioned in the trust-conveyance of the Duke of Richmond, whose claims, however, were of a trifling amount. This half share Hunter, along with a friend, purchased from the trustees on the 30th of June 1820, and granted bills for the price payable on the 30th of March 1821; and he subsequently (June 2. 1821) assigned his claim of £6000, and corresponding share of the price of the Duke of Richmond, to the pursuers R. and A. Carsewell. An award was thereafter, on the 4th of October, pronounced by the arbiters in Hunter's favour for the full claim of £6000, and Carsewells thereupon raised an action for payment against the trustees in the first deed.

Appearance was made for M'Arthur and Gordon, (who were trustees under both deeds,) and also for Jarvie, the joint trustee in the deed relative to the conveyance of the Prompt; and by them it was pleaded, that as trustees generally for behoof of Munn's creditors under both deeds, they were entitled to plead compensation on the bills granted by Hunter (who was now bankrupt) for price of the half share of the Prompt.

To this it was answered—

1. That the trustees in the two deeds were different, as were also the sets of creditors for whose behoof they were granted; so that there was no concursus.

2. That if the trusts were to be considered the same, so as to admit a concursus, then Hunter and his assignees, as creditors, were entitled to a large proportion of the price of the half of the Prompt, which formed a good claim of recompensation.

3. That the sum in dispute was a trust, or deposit, which the trustees were not entitled to retain on the plea of compensation; and,

4. That, at any rate, they had drawn from Hunter and other co-obligants payment of the price of the Prompt.

The Lord Ordinary, in 1824, pronounced an interlocutor finding "that the pursuers, as assignees, can be in no better situation than the assigner was at the date of the assignation, and that the assigner Robert Hunter could not have prevailed in this action while he refused to pay the price of the ship Prompt,"—and therefore assoilzed the trustees.

On a petition by Carsewells, the Court adhered to this interlocutor, "in

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so far as it is thereby found that the pursuers, as assignees, can be in no better situation than the cedent was in at the time of the assignation;" but, quoad ultra, recalled it, and remitted to hear parties further.[1] Thereafter the Lord Ordinary remitted to an accountant, and on his report pronounced an interlocutor which it is unnecessary to quote, as, on reclaiming notes being presented by both parties, the Court, in respect of its not specially deciding the question of compensation, remitted, on the 12th of November 1829, with instructions to the Lord Ordinary "to decide the question whether or not the defenders are entitled to plead compensation against the pursuers, and whether the pursuers are entitled to maintain a plea of recompensation."

His Lordship thereupon ordered Cases; on advising which, he pronounced this interlocutor, adding the subjoined note:*—"Finds that

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[1] See ante, IV. 115.

* "NOTE.—It is fixed by the interlocutor of the Lord Ordinary, in so far adhered to, that the question with the pursuers is to be the same as it would have been with Hunter. Then the view of the Lord Ordinary in regard to compensation is, that David Munn being insolvent, and contemplating his own bankruptcy, made both of these trusts for the interests of his creditors generally, not intending to exclude any; that Hunter was not included like the other creditors in the first, only because David Munn denied his right of credit entirely; and was not included like the other creditors in the second, only because he (Hunter) wholly denied Munn's right to make that trust; but that in both cases a provision was made for Hunter's interest; and that though in the case of the Prompt this provision was too narrowly expressed, submitting only the alleged right of Hunter as a partner to oppose the trust, not his contingent claim as a creditor in case the trust was found good, yet that Hunter could not equitably be excluded from the benefit of his claim as a creditor. As to the other creditors not named in the trust of the Duke of Richmond, the Lord Ordinary thinks these claims so trifling, that it never could be intended to exclude them, so as to bring the trust into question, and he thinks that they cannot equitably be excluded. It is said that these trusts could not be opened to creditors, nor expressly named in them, without reduction; but as there is no denial of the equitable right of these creditors to be admitted to the benefit of these trusts, there seems no occasion for reduction; and if the creditors interested in both trusts come to be the same, the variation in the name of one trustee seems immaterial. In these views, there appears room both for compensation and recompensation. But further, although the Lord Ordinary has decided the questions remitted to him, he does not think the case necessarily depends on them. He thinks there is another view dependent not strictly on compensation, but retention, and wholly independent of the connexion of the two trusts as both trusts for the same creditors. To explain this, it seems best to put an extreme case. Suppose then that A. executes two trusts, one vesting a subject in B. to sell, and pay his (A.'s) creditor C.; the other vesting another subject in D. to sell, and pay E. another creditor—the residue (if any) of course being in himself A. under both trusts. Suppose then that the first creditor C. buys the subject vested in D. for payment of E., the second creditor, and after obtaining the subject, withholds the price of that subject, and, while so withholding, claims the price or payment of his debt out of the price of the other subject vested in trust for payment of himself, C. In such case it appears to the Lord Ordinary that it would be the right and the duty of the trustee B. to withhold that pay-

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Darling &c. v. Adamson &c.

Adam v. Macdougall &c.

the defenders are entitled to plead compensation against the pursuers, and that the pursuers are entitled to maintain a plea of recompensation against the defenders;—that the effect of these pleas, in the circumstances of this case, is, that nothing was due to the pursuers by the defenders at the date of raising the present action, and that even now nothing is due to the pursuers by the defenders;—therefore, and upon the whole circumstances of the case, assoilzies the defenders, and decerns; finds neither party entitled to expenses."

Carsewells having again reclaimed, the Court adhered to the interlocutor so far as it found that compensation and recompensation might be pleaded, and quoad ultra, before further answer, remitted to an accountant to report.

W. Young, W. S.—J. Dunlop, W. S.—Agents.

No. 300.

Mrs. Darling and Others, Pursuers.—*Skene—G. G. Bell.*
J. Adamson and T. Watson, Defenders.—*Forsyth—Neaves.*

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2d Division. Lord Fullerton. R.

Judgment approving of a discharge to be executed by the pursuers in the action mentioned ante, VIII. 595.

J. S. Darling, W. S.—J. Arnott, W. S.—Agents.

No. 301.

George Adam, Pursuer.—*Skene—H. Bruce.*
Duncan Macdougall and Others, Defenders.—*D. F. Hope—Baillie.*

Bankrupt—Composition-Contract—Discharge.—A debtor having obtained a discharge from his creditors of all debts contracted by him previous to the 1st of June 1822, with right to the whole vouchers thereof; and having granted a bill to a creditor, dated the 25th of May 1822, payable nine months after date, upon which the creditor executed diligence several years thereafter—Found that, on a fair construction of the discharge, it included this bill.

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2d Division. Ld. Moncreiff. R.

The pursuer Adam, having become insolvent in May 1822, called a meeting of his creditors, to whom he offered a composition of 5s. in the pound. This having been accepted, a deed of discharge was thereafter, in December 1822, duly executed. This discharge proceeded on the narrative of the composition-contract, and of the creditors having received

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ment from C. till he paid the price of the other subject which he had bought; for C. could not state himself to be a pure creditor of A., and entitled to payment out of A.'s estate as such, while he unjustly withheld in his own hands part of that very estate, or the price of part of it. It does not seem to the Lord Ordinary that it would be a good answer for him to say that this part of the estate had been conveyed by A. in trust for payment of another creditor. A. would still retain sufficient interest in this subject to warrant him or his trustee pleading retention against C. This is an extreme case, and of course the rule must be applicable here a fortiori to the claim of Hunter for payment of a dividend out of the Duke of Richmond, and while he withheld payment of the price of the Prompt."

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from Adam cash or bills for the composition, according to their respective debts; and it discharged Adam of all debts contracted by him to them previous to the 1st of June 1822, the vouchers of which the creditors became bound to deliver up.

Among the creditors who signed the discharge were the company of H. and A. M'Dougall of Perth, who held a bill of Adam's for £71. 14s., dated October 1821, and fallen due prior to the 1st of June; and who further obtained from him another bill for £15, dated the 25th of May 1822, payable nine months after date, which, as he alleged, was in part payment of the former bill. Macdougall and Co. made no separate demand for payment of this bill of £15, which they retained in their hands, until it was nearly prescribed, when they raised diligence against Adam upon it, and thereafter executed a poinding of his furniture in a house at Perth.

The poinded effects having been sold under a warrant from the Magistrates,[1] Adam brought a reduction of the £15 bill, and of the proceedings had thereon, upon the plea that the composition-contract had extinguished all claims against him prior to the 1st of June 1822; and that the bill in question should have been delivered up or cancelled when the composition was paid.

On the other hand, it was alleged by the defenders, who represented the partners of H. and A. Macdougall, that the bill for £15 was a distinct debt; and that not being due for nine months after, it was not included in the discharge.

The Lord Ordinary pronounced the following interlocutor:—"Finds, that previous to the month of May 1822, when a meeting of the pursuer's creditors was held, the pursuer stood indebted to the defenders, by bill, in the sum of £71. 14s., on which bill diligence had been used;—that, by a regular deed of discharge produced, executed by the defenders in December 1822, of which no challenge has been brought, the defenders, and other creditors of the said pursuer, on the narrative that they had agreed to accept of a composition of 5s. in the pound on their several debts, and that the pursuer had made payment of that sum to some of them, and granted bills for the amount to the rest, did absolutely and unconditionally discharge the said pursuer of the "whole debts and sums of money due by him to us severally, or to our said constituents, at and preceding the 1st day of June last, and of all claim and demand we or they have, or can pretend to have, against him thereanent;" and further bound themselves to deliver up the whole bills and vouchers which they held against him on account of the said debts;—that the bill for £15 called for in this action bears date 25th May 1822; and it has not been precisely ascertained whether that was before or after the meeting of the creditors in the said month of May;—that the bill, being made payable at nine months after date, had not become payable either on the 1st of

[1] See ante, VII. 457.

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Adam v. Macdougall &c.

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June 1822, or at the date of the discharge, as signed by the defenders, on the 27th of December 1822;—but finds it distinctly admitted by the defenders (in art. 4. of defenders' statement) that the said bill for £15 was not granted on account of any new debt, but was given solely with reference to the previously existing debt of £71. 14s.; therefore that it must be considered as an additional voucher for a part of that debt, and that whatever doubt there might have been as to the application of the discharge to a bill granted for a new debt posterior to a meeting of creditors, and not payable at the date of the discharge, the discharge must apply to the whole debt of £71. 14s., and to the said bill for £15, as a voucher for a part thereof, if granted for value at all;—that it has not been shown in this process that the said discharge ever was given up, or in any manner become ineffectual;—therefore, and in respect that the said bill ought to have been delivered up to the pursuer in terms of the discharge, reduces, decerns, and declares in terms of the libel, reserving to the defenders any claim they may have for the composition of 5s. in the pound on their full debt of £71. 14s., in so far as it may appear that the same has not been paid;—finds expenses due, allows an account to be lodged, and remits to the Auditor to tax, and to report."

The Court were not satisfied that there was sufficient evidence to warrant the findings of the Lord Ordinary as to the cause of granting the bill of £15; but they considered that, on a fair construction, the discharge included that bill, and therefore unanimously adhered in so far as the interlocutor reduced &c. in terms of the libel.

D. Fisher, S. S. C.—P. Pearson,—Agents.

No. 302.

Reid, Pursuer.—*Boswell.*
His Creditors, Defenders.—*Patton.*

Cessio.—Cessio awarded to a superannuated officer of Excise holding a pension, without any part of it being assigned.

Mar. 10. 1831.

1st Division.

The cessio was granted by the Court to Reid, a superannuated officer of Excise who possessed a retired allowance or pension, without obliging him to assign any part of it to his creditors. The Court intimated that such allowance was of an alimentary nature; and besides, it was protected by the provisions of 7. and 8. Geo. IV. c. 53. § 121, and was neither assignable, nor open to the diligence of creditors.

JAMES BARTON &c., Petitioners.—*Hopkirk.* No. 303.
JOHN EADIE, Respondent.—*J. Paterson.*

Bankrupt—Sequestration—Trustee.—Interim order (on petition and answers) for the removal of a trustee who was confessedly bankrupt, and whose cautioners were also bankrupt; and remit made to the Lord Ordinary to proceed with certain ulterior conclusions of the petition and complaint against him.

Mar. 10. 1831.
1ST DIVISION.
Barton &c. v. Eadie.

J. G. HOPKIRK, W. S.—W. GUTHRIE,—Agents.

MISS ISABELLA BROWN and MANDATORY, Pursuers.—*Brown.* No 304.
CHEYNE and M'KEAN, Defenders.—*Keay—Moir.*

Agent and Client.—Circumstances in which a client was found entitled to obtain full security from her agent for the price and rent of a house purchased for her by him, without getting a title, and which had been brought under a process of ranking and sale by an heritable creditor.

THE defenders Messrs. Cheyne and M'Kean purchased, on behalf of the pursuer Miss Brown, in the year 1824, a house at Stockbridge, over which they knew that there was an heritable security; and they paid £500 of the price out of money in their hands belonging to her, on a personal obligation by the seller that a sufficient title would be produced. No title was delivered to Miss Brown, who entered into civil possession at Whitsunday of that year, and drew the rents. The heritable creditor, having brought an action of mails and duties, entered into possession of the premises in 1828, dispossessing Miss Brown; and he thereafter raised a process of ranking and sale, now in dependence, and which included the house in question.

Mar. 10. 1831.
2D DIVISION.
Lord Medwyn.
R.
Brown &c. v. Cheyne &c.

On the other hand, Miss Brown raised the present action, for the purpose of recovering from Cheyne and M'Kean the £500 advanced, with interest thereon, under deduction of rent already received.

In the process of ranking and sale Cheyne made appearance, and craved to have the subjects purchased by him for Miss Brown struck out of the sale; and he succeeded so far as to have the sale suspended in hoc statu, that he might endeavour to make good her right, (ante, p. 302.)

In the mean while, in Miss Brown's action the Lord Ordinary found her entitled to repayment of the purchase-money advanced, under deduction of rent received, and on her assigning to Cheyne and M'Kean, at their own charges, her right and interest in the subjects. On a reclaiming note, however, being presented, she consented to accept consignation of the price, together with payment of the rent; and the Court pronounced an order accordingly.

J. ARNOTT, W. S.—J. S. DARLING, W. S.—Agents.

No. 305.

Mar. 10. 1831. Young's Trustee &c. v. Paisley Bank.

YOUNG'S TRUSTEES, Pursuers.—*D. F. Hope—A. Wood.*
JOHN SCOTT (for PAISLEY BANK), Defenders.—*Jameson—Penney.*

Also,

JOHN SCOTT, Pursuer.
W. FLEMING and J. LEIPER, Defenders.

Bill of Exchange—Vitiation—Stamp Acts.—A bill having been granted blank in the drawer's name, and thereafter discounted with a Bank agent, who filled it up with his own name as drawer, and indorsed it to the Bank; and this agent having, on the Bank reindorsing it for the purpose of his operating payment, delete his own name, and caused the party to whom it was originally granted to sign as drawer, and also as first indorser—Held, in an action at the instance of the Bank against the acceptors, that the Bank could not recover.

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2D DIVISION. Ld. Cringletie. T.

IN the summer of 1815, John Young, horse-dealer at Strathaven, sold to the defenders, Fleming and Leiper, his lands of East Newton for £2800. Fleming and Leiper were at this time creditors of Young to the extent of £2000, which it was agreed should be imputed pro tanto in payment of the price; for the balance of £800, they paid £40 in cash, and on the 17th of August 1815 granted two bills for £400 and £369. 10s. respectively. These bills were delivered to Young blank in the drawer's name, and they were, with the concurrence of Fleming and Leiper, deposited in the hands of Hamilton, Young's man of business, and agent at Hamilton for the Paisley Union Bank. Young subsequently applied to Hamilton, as Bank agent, to discount the £369. 10s. bill; but as there were several bills with Young's name lying at the Bank at the time, Hamilton (who was unwilling to allow any more such to appear as discounted by him) inserted his own name as drawer; and thereafter, on the 9th of September, the bill was entered as discounted with the Bank. The value of the bill, less discount, was, according to the averment of the Bank, actually paid to Young; while, according to the allegation of the other parties, it was employed to retire two other bills of Young then lying at the branch at Hamilton past due. In conformity with the usage of Bank agents, the bill, on being thus discounted, was indorsed by Hamilton, and transmitted by him to the head office of the Bank at Paisley. When it was about to fall due, it was reindorsed by the Bank, and returned to Hamilton for the purpose of his operating payment. When so returned to him, Hamilton, (without the knowledge of Fleming and Leiper, and also, as the Bank alleged, without their knowledge,) delete his own signature as drawer, and caused Young to sign his name as drawer, and also to insert his name as first indorser, with the view, as he alleged, of obviating some objections to payment, which he apprehended Fleming and Leiper might have, if his name remained as drawer of the bill. Thereafter he charged Fleming and Leiper, who brought a suspension on the ground of vitiation, as annulling the bill both at common law and under the Stamp Acts, in which

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process the Court, on the 1st of July 1823, suspended the letters simpliciter, as mentioned ante, II. 446.

In the mean time Young had become bankrupt, and his estates had been sequestrated within sixty days of the sale of his estate, and of the discounting of the bill. The sale being of course invalid in so far as the debt of £2000 due to Fleming and Leiper was intended to be thereby satisfied, an arrangement was entered into between them and the creditors, by which they were to restore the estate on getting back the balance of the price so far as they had paid it; and as it was doubtful whether payment could be enforced on the £369 bill, the amount was consigned by the creditors to abide the trial of the question. The creditors, further considering that the discounting of the bill with the Bank was in payment of a prior debt of Young's, brought a reduction for setting aside the transaction. Shortly thereafter the Bank raised an ordinary action against Fleming and Leiper, setting forth the circumstances above narrated, and concluding to have it found that the Bank could not be affected by any thing done on the bill by Hamilton; or otherwise, that they were at all events entitled to recover on the bill, or in respect of the whole circumstances, and concluding for payment accordingly. These processes were conjoined, and reported to the Court by the Lord Ordinary. With reference to the question in the reduction, a proof was allowed, and also a judicial examination of Hamilton, the Bank agent; but the creditors having failed to make out that the bill of £369 was truly applied to retire other bills of Young's lying past due at the Bank, decree of absolvitor was pronounced in the reduction. The question in the ordinary action had been allowed to lie over till the reduction was determined; but on absolvitor being pronounced therein, the Court ordered a hearing as to it.

Pleaded for Fleming and Leiper—

The bill having been vitiated by deleting the original drawer's name, and inserting that of Young, without the concurrence of the acceptors, and after it had been put in circulation, no action can lie upon it at the instance of the Bank, by whose agent, as such, the alteration was made. At all events, as the deletion of the one name, and insertion of the other, made an entirely new bill, it is null under the Stamp Acts, which do not admit of the same stamp being used twice; and the objections both at common law and in the Stamp Acts were held to be insuperable when formerly discussed in the suspension. Then, except in virtue of the bill, the Bank have no ground of action as against the acceptors, who had no connexion with them, and incurred no obligation other than that created by granting their bills to Young, whose receiving the value from the Bank cannot bind the acceptors to the Bank. As to the alleged want of interest in the acceptors to resist this demand, although they have secured relief from the creditors of Young, they are still as much entitled to try the question of their primary liability to the Bank, as the Bank, who are secured by having relief against Hamilton their agent, are to sue for payment; independently altogether of their interest as cre-

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ditors on Young's estate, which will be so much increased or diminished, according as the Bank fail or succeed in the action.

Pleaded for the Bank—

Although the bill was formerly held not to afford ground for summary diligence, it is still open whether the Bank may not recover on it in an ordinary action. When it was retransmitted to Hamilton immediately before it fell due, that individual held it merely for the purpose of operating payment; and any alterations made by him can as little affect the Bank, as if they had been made by a messenger to whom it had been intrusted for the purpose of doing diligence. But, besides, there was truly no alteration which affected the acceptors. They had granted the bill to Young, who was intended to have been the drawer, and the alteration merely restored the bill to the state which they had contemplated when they granted it, and in which they must have supposed it all along to have been. The case is therefore totally different from any of those where vitiation has been held fatal, as in all of these the vitiation really affected the interest of the parties, and altered the situation in which they previously stood. Then as to the objection on the Stamp Acts, unless the alteration made a new transaction, therewas no necessity for a new stamp. The original transaction, however, was, that Young should be drawer of the bill; and in substance he was so, as it was discounted for his behoof, and the proceeds paid to him, so that he would have been liable to the Bank, even had he not signed as drawer and indorser, (Thistle Bank, Dec. 20. 1774, Mor. 1599.) His afterwards signing, therefore, instead of Hamilton, did not make a new transaction or a new bill, but merely put it in the shape which it was originally intended to bear, without creating any obligation not previously subsisting against him. But further, Young received money for the bill from the Bank, and this was truly the means whereby Fleming and Leiper were enabled to pay for the lands purchased by them from Young; and they, having thus had the benefit of the Bank's money, are liable to the Bank, in the circumstances of the case, independently of the document of debt; and, at all events, they have no interest to resist payment, since, by their arrangement with Young's creditors, it is the creditors alone who now have any interest in the matter.

Lord Justice-Clerk.—After considering the whole of the able argument at the bar, and the authorities and decisions referred to, I can see no reason to alter the opinion which I originally had occasion to form, both on considering the validity of the charge on the bill in the suspension, and on considering the cases in which the whole question in the reduction and ordinary action were taken to report. The facts of the case are quite plain—namely, that in consequence of their purchase of land from Young, the defenders, besides setting off a debt of £2000 due to them by Young, and paying £40 in cash, granted two acceptances for £400 and £369, which Young received from them, the drawers' names in each being left blank. These bills, it is said, were intended to be deposited with Hamilton, the agent of the Paisley Union Bank; but he being unwilling that any more of Young's paper should appear to his employers

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to be discounted, and yet willing to cash this £369, relying on the acceptors, advanced its contents, having previously put his own name on it as drawer; and then having applied the Bank's money for its discount, he indorsed it to the Bank, where it lay till approaching to maturity. It was then simply re-indorsed by the then cashier of the Bank to Hamilton, as agent, to recover the contents in the usual way. He being afraid, in consequence of Young having become bankrupt, that the defenders would deny having given him (Hamilton) value for it, scored out his name as drawer, and caused Young to inscribe his own as drawer, and also above Hamilton as indorsee. Now, on these facts, the bill thus altered has been suspended, as affording no valid ground of charge; and now, that this ordinary action has been raised, founded on the bill, and the narrative contained in the summons, in which, however, there is no pretence or allegation that the alteration was made with the knowledge or privity of the defenders, I am of opinion that there lies no legal ground of action against the defenders. It is most material to observe that the bill, as originally completed by filling up Hamilton's name as drawer and indorser, was used and circulated by actually discounting it, and transmitting it as a valid document of debt to the Bank at Paisley, before the alteration was made on it. As it stood, down to the period when it was about to fall due, the acceptors were liable only to Hamilton and the Bank; but, by the alteration, Young was made the drawer, and therefore a totally new and different instrument was created. I hold it therefore, as clearly established by the authority of Mr. Justice Bayley, as well as Chitty and the cases referred to by him, that as here the alteration on the bill was most material, as it was made without the privity of the acceptors, and after the bill had been used and circulated, it was rendered utterly null and void under the Stamp Laws, as being entirely a new instrument, and that it can afford no ground of action whatever. It is impossible to view what took place here as merely restoring the bill to what it was originally intended to be, so as to bring the case within certain decisions referred to; and, at any rate, no such operation can take place upon a bill after it has been circulated, which this one unquestionably was. The present action is truly an attempt to make the defenders responsible for the irregularity committed by Hamilton, and for which he and his cautioners were undoubtedly responsible to the Bank. Now, are the rules of law to be stretched to assist the pursuer in any such object? I am of opinion that they ought not, and that they are such as preclude decree being given in this action. I think it is no judicial ground of decision to allege that the defenders have no essential interest; and, at any rate, they are creditors of Young, and stand in the same situation as his other creditors.

Lord Cringletie.—I most heartily concur in what has been stated. Both vitiation and want of new stamp afford objections to this bill. It is impossible to deny that the alteration made an entirely new bill; and so, in point of vitiation, it is fatal, as there might be claims of compensation to the acceptors that would be lost by the operation. In the case of Martin v. Miller, mentioned by Chitty, the act of a stranger was held fatal to a bill, because it is not the same deed, and thereby voids it.

Lord Glenlee.—I concur that in this particular case the defences should be sustained. I am not prepared to say that if the acceptors had got the money, the vitiation would have freed them from the conclusions under both the branches

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of this summons. But, in this case, if you were to restore the parties to their original situation, they would have been entitled to all their defences. Then the acceptors have a great deal to say as to Mr. Hamilton's acts, as there appears reason to think that Hamilton got the bill as depositary.

Lord Meadowbank.—My opinion coincides with that of the rest of the Court.

Chisholm v. His Creditors. Brown v. Hunter &c.

Pursuers' Authorities.—Clark v. Blackstock, (Holt's N. P. 474); Wilson v. Maddox, (3. Campbell, 1); Kinshaw v. Cox, (3. Esp. 246); Henderson, Feb. 20. 1802, (17059); Mill v. Russell, Jan. 16. 1810, (F. C.); Maxton v. Petit, (1. Camp. 82); Parker v. Southey, (1. Moodie and Malcolm, 14); Johnstone v. Gibb, (2. Chitty Rep. 123); Beattie, Feb. 18. 1823, (ante, II. 225); M'Ara, June 9. 1823, (ante, II. 360); Callender, Dec. 10. 1812, (F. C.); Sutherland, July 1. 1823, (ante, II. 442.)

Defenders' Authorities.—English Cases cited in Chitty on Bills, p. 130; Murchie, July 1. 1796, (F. C.); Rodger v. Murdoch, (Glen on Bills, 103, last edit.); Bryce, Nov. 16. 1810, (F. C.)

J. Court, S. S. C.—A. Fleming, W. S.—Agents.

No. 306.

Chisholm, Pursuer.—*Moir.*

His Creditors, Defenders.—*Stoddart.*

Cessio.—Interim liberation on caution granted, before decree, to a party found entitled to the benefit of the cessio.

Mar. 11. 1831. 1st Division.

The benefit of the cessio was granted to Chisholm, but at so late a period of the session, that the oath could not be reported before its close. The defenders opposed his interim liberation on caution; but the Court, on considering the precedents of Kirkpatrick,[1] 10th March 1827, and Hunter,[2] 11th March 1828, granted warrant for his liberation on finding caution for £50.

No. 307.

Rev. William Brown, Petitioner.—*Wilson.*

James Hunter and Others, Respondents.—*Macallan.*

Arrestment—Clergyman—Trust.—1.—Circumstances in which arrestments of a minister's stipend (which was under £150) for a debt of £130 were recalled on his granting a disposition omnium bonorum, and assignation of his stipend, to a trustee, to pay £30 per annum to his creditors, and the balance to himself.—2.—Observed—A clergyman of the Established Church cannot be named trustee for creditors by the Court.

Mar. 11. 1831. 1st Division. H.

The respondents, as creditors of the Rev. William Brown to the extent of £130, arrested his stipend, the amount of which was so small as to require an addition from Exchequer to raise it to £150. He applied for a recal of the arrestments, on his finding caution to make so much of his stipend forthcoming annually to his creditors as the Court might ordain. He was eighty years old,—had a family of six children under sixteen years of age,—and required an assistant, to whom he was obliged to pay £30 per annum. He possessed some heritage, said to be

[1] Ante, V. 565. [2] Ante, VI. 750.

burdened to its full value. The respondents insisted on his executing a disposition omnium bonorum to a trustee for behoof of his creditors. No. 307.

When the petition was first moved, the petitioner prayed the Court, if they ordained a trust-disposition to be granted, to appoint the Rev. James Strachan, minister of Cavers, trustee.

Mar. 11. 1831.
Brown v. Hunter &c.
Laidlaw v. Dunlop.

LORD PRESIDENT.—The Court will not appoint a minister of the Established Church.

The case was delayed a few days, that some trustee might be agreed on; but this not being done—

THE COURT recalled the arrestments; but ordained the petitioner, before extract, to grant "a disposition omnium bonorum in favour of such person as a majority of his creditors may agree upon, and failing their doing so before three weeks from this date, in favour of the Sheriff Clerk of Roxburghshire, as trustee for the petitioner and his creditors, the trustee being bound to pay from the petitioner's stipend £30 yearly for behoof of his creditors, and the balance to the petitioner."

ADAM and BROWN, W.S.—AINSLIE and MACALLAN, W.S.

ROBERT LAIDLAW, Pursuer.—*Jameson—Russell.* No. 308.
ROBERT DUNLOP, Defender.—*Sol.-Gen. Cockburn.*

Process—Record.—A plea in bar of action not having been stated among the defences, and, though afterwards inserted in the record, not having been decided or reserved before the record was closed—Held incompetent afterwards to entertain it.

LAIDLAW, founding on a contract of copartnery between him and Dunlop, W. S., as writers, raised, at the dissolution thereof, an action of count and reckoning against Dunlop, who stated defences, and made up a record, in which the fifth plea in law was, that, under the contract of copartnery, all disputes were to be submitted to the arbitration of Mr. Cuninghame, advocate. This plea was not stated in the defences, and the record was closed without its being reserved or decided.

Mar. 11. 1831.
1ST DIVISION.
Ld. Corehouse.
H.

The Lord Ordinary "found that the fifth plea founded on by the defenders, being one in bar of the action, is of a preliminary nature; and that the same, not having been brought forward previous to closing the record, cannot now be insisted in.

The defender reclaimed, and pleaded chiefly that the plea had in truth been brought forward before closing the record; so that the judgment rested on an error in fact, and must be recalled.

The pursuer answered, that, by an error of the clerk, the judgment was inaccurately expressed; for the Lord Ordinary had really found, and the Court were now bound to find, that a plea in bar of action should have been stated among the preliminary defences; and not having been discussed and decided on, or reserved, before closing the record, it could not afterwards be entertained.

No. 308.

Mar. 11. 1831.
Laidlaw v. Dunlop.

Robertson v. Allardyce &c.

THE COURT, "in respect that the fifth plea founded on by the defender, and referred to in the Lord Ordinary's interlocutor as of a preliminary nature, though brought forward, was not discussed previous to closing the record," refused the note, and allowed the pursuer the expense of appearance, which was modified to £5. 5s.

WOTHERSPOON and MACK, W.S.—W. POLLOCK, S.S.C.—Agents.

JOHN ROBERTSON, Pursuer.—*Borthwick.*

No. 309.

R. B. ALLARDYCE and J. BOSWELL, Defenders.—*Sol. Gen. Cockburn—H. J. Robertson.*

Expenses—Jury Trial.—The defenders in an action of damages having, after a verdict against them, presented a Bill of Exceptions against the Judge's charge; and, on this being disallowed, having appealed to the House of Lords, who allowed a new trial, on the ground that there had been no sufficient evidence to support the verdict; and the defenders having thereupon obtained a verdict—Held that the pursuer was entitled to the expenses of the former trial.

Mar. 11. 1831.

2D DIVISION.

IN 1823, the pursuer Robertson raised an action of damages against the defenders Allardyce and Boswell, for certain slanderous expressions used by them, while sitting as Justices of the Peace, on a prosecution against him founded on the Game Laws. The defenders having disputed the relevancy, a discussion on that point took place, the result of which was, that the Court found the summons relevant, and remitted to the Jury Court, (as mentioned ante, VI. 244,) reserving the question of expenses. Thereafter a verdict was obtained against the defenders, jointly and severally, for £200; but it was afterwards set aside, on the ground that they were not in pari delicto, subject to payment of the expenses of the trial. On a new trial, a verdict was again returned against each separately for £125. An application for a third trial having been refused by the Jury Court, the defenders presented a Bill of Exceptions against the charge of the presiding Judge, which was unanimously disallowed,[1] and the question of expenses reserved for consideration of the Jury Court. The defenders thereupon entered an appeal against all the judgments which had been pronounced to their prejudice. The House of Lords, while they affirmed the judgment finding the summons relevant, and that awarding to the pursuer the expenses of the first trial, reversed the order of the Jury Court refusing a third trial, and the judgment of this Court disallowing the exception; and "declared that this House is of opinion that the action of damages in said appeal mentioned could not have been maintained without proof of malice; and that there was not in this case any proof of malice, nor any evidence from which malice could be inferred;"—with which declaration they remitted, that a new trial might be allowed, if the pursuer should so desire. On the cause return-

[1] Ante, VII. 601.

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ing to this Court to have the judgment applied, the pursuer took an order for a new trial, the result of which was a verdict for the defenders. Both parties now applied for the expenses of process, which (with the exception of those of the first trial awarded to the pursuer by a judgment affirmed in the House of Lords) remained undisposed of, and which consisted of four branches, 1. Those attending the discussion of the relevancy; 2. Those of the second trial; 3. Those of discussing the Bill of Exceptions; and, 4. Those of the third trial.

Lord Justice-Clerk.—The defenders must, of course, have the expenses of the last trial, they having succeeded. As to the other expenses, the pursuer is clearly entitled to those incurred in discussing the question of relevancy, our judgment on that point having been affirmed. Had it not been to avoid delaying the remit to the Jury Court, we should have decerned for them at the time, and we must now award them. As to the expenses of the second trial, the Bill of Exceptions brought nothing before us but the charge of the Judge; and having disallowed the exception, we were compelled by statute to declare the verdict final, as there was no objection taken to it on the ground of its being contrary to evidence. The House of Lords reversed our judgment, and remitted to allow a new trial, on the ground that there was no evidence of malice to support the verdict; though, how they got into this matter on a bill of exceptions to the Judge's charge, I do not understand. Now if, instead of the Bill of Exceptions, a motion had been made to set aside the verdict on the second trial as contrary to evidence, we would not have allowed a third trial without finding the defenders liable in the expenses of the preceding one, and we cannot do otherwise now. So far, therefore, from acceding to the demand on the part of the defenders for the expenses of the second trial, we must, I think, award them to the pursuer. Then as to the expenses of discussing the Bill of Exceptions, had it not been for the reversal of our judgment, these also must have been allowed to the pursuer. The House of Lords, however, having reversed our judgment, while they agreed with us on the law in holding the charge excepted against to be a good charge, we cannot allow to the pursuer the expenses of that discussion. On the whole, therefore, I would allow the pursuer the expenses of the discussion on the relevancy, and of the second trial, and the defenders the expenses of the third trial, and find neither party entitled to expenses in regard to the discussion of the Bill of Exceptions.

The Lord Chief Commissioner and the other Judges concurring, the Court decided accordingly.

J. Burness, S.S.C.—W. Duthie, W. S.—A. Boswell, W. S.—Agents.

No. 810.

Mar. 11. 1831.
M'Ra v.
Birtwhistle's Trustees.

DUNCAN M'RA, Advocator.—*A. Wood.*

BIRTWHISTLE'S TRUSTEES, Respondents.—*Cuninghame.*

Process—Stat. 48. *Geo. III. c.* 151.—To entitle a party to be reponed, under the 48. Geo. III. c. 151, against an interlocutor become final by mistake, he must pay the previous expenses.

Mar. 11. 1831.

2D DIVISION.
Ld. Fullerton.
F.

ON the Court refusing to receive the reclaiming note for the respondents in this advocation, in respect of the whole of the Inferior Court record, which was made the record of this Court, not having been appended, as mentioned ante, p. 265, they, without obtaining leave of the Lord Ordinary, in terms of the 48. Geo. III., presented a petition, praying the Court to receive the note. This petition having been refused as incompetent, the respondents moved the Lord Ordinary for leave to apply to the Court to be reponed, under the above-mentioned statute, as against an interlocutor become final by mistake. Having obtained leave of his Lordship, they presented a note accordingly, but contended that in the circumstances they were entitled to be reponed without payment of the previous expenses. The Court, however, holding that they had no authority under the statute to repone a party against an interlocutor become final by mistake, except on payment of expenses, allowed them to be reponed on that condition only.*

J. MACDONELL, W. S.—R. RUTHERFORD, W. S.—Agents.

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* The respondents ultimately declined to avail themselves of this judgment.

CASES

DECIDED IN

THE COURT OF SESSION.

SUMMER 1831.

JOHN MACKINTOSH, Complainer.—*Skene—Rutherfurd.*
SIR JOHN PETER GRANT, Respondent.—*D. F. Hope—Buchanan.*

No. 311.

May 12. 1831.
Mackintosh v. Grant.

Freehold Qualification—Sasine—Stamp—55. *Geo. III. c.* 184.—Three several infeftments under three several charters being taken, and included in one instrument written on a 9s. stamp—Held, in a question as to a claim of enrolment as a Freeholder,—1.—That the instrument afforded no legal evidence of the infeftment, and therefore that the claim was properly dismissed;—and,—2.—That in a complaint against such rejection, the objection could not be cured to the effect of altering the judgment of the Freeholders, by having the additional stamps adhibited to the instrument.

May 12. 1831.

1ST DIVISION.
Ld. Moncreiff.
S.

BY the Stamp Act 55. Geo. III. c. 184, certain stamps are imposed in terms of an annexed schedule. In that schedule there is the following entry:—"Seisin.—Instrument of seisin given upon any charter, precept of clare constat, or precept from Chancery, or upon any wadset, heritable bond, disposition, apprising, adjudication, or otherwise, of any lands or heritable subjects in Scotland not of burgage tenure, - £0 9 0
And where the same shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of - - - - 0 9 0."

At the Freeholders' Head Court of Michaelmas 1826, Mr. Mackintosh of Daltullich, presented a claim for enrolment, which rested on three separate charters. The evidence which he tendered of his being infeft under these several charters, was a single instrument of sasine bearing a 9s. stamp, and narrating the execution of the three precepts. Various objections were taken to the claim; and the Freeholders, on the motion of Sir John Peter Grant, rejected it. Mr. Mackintosh then complained

No. 311.

May 12. 1831. Mackintosh v. Grant.

Phaup &c. v. Phaup &c.

to this Court, and the respondents then for the first time objected that under the Stamp Laws the instrument of sasine was improbative. In support of this objection they contended, that although several acts of infeftment, if all referable to the same charter, might be contained in one instrument having the ordinary 9s. stamp, yet wherever there were more charters than one, an additional stamp of 9s. was requisite for each of the charters, or warrants of infeftment; and that as the Freeholders were therefore justified in rejecting the claim, seeing that there was no legal evidence of Mr. Mackintosh's infeftment produced, the Court could not now alter that judgment.

The complainer answered, that infeftments under different charters might be effectually included in the same instrument, and the Stamp Acts did not make it imperative, at least under the sanction of nullity, that there should be a stamp for every charter; that, besides, from the length of the instrument, he had paid stamp-duties equivalent in amount to those exigible on three separate instruments; and, at all events, he prayed the Court not to dismiss the complaint, but merely to supersede it until a proper stamp could be adhibited.

Lord Gillies.—It would be contrary to the meaning of the Stamp Acts to allow any number of investitures under separate charters to be included in one instrument of sasine having a single 9s. stamp. The stamps that are ordered to be affixed by the statute, in proportion to the length of each instrument, do not supersede the necessity of a separate stamp, wherever there is a separate charter.

Lord Balgray.—While the objection remains uncured, we cannot refuse effect to it; nor can we alter the judgment of the Freeholders, rejecting the claim as ill founded when laid before them.

Lord President.—In the mean time the instrument can make no faith in judgment.

Lord Craigie concurred.

The Court accordingly, "in respect the instrument of sasine founded on by the claimant was not duly stamped in terms of the statute, found that the Freeholders did right in refusing to enrol the claimant; therefore dismissed, &c., with expenses."

R. Roy, W. S.—H. Macqueen, W. S.—Agents.

Single Bills, &c.

Mrs. Wharton or Phaup, &c., Petitioners.—*Maidment.*
Thomas Martinus Phaup &c., Respondents.—*More.*

May 12. 1831.

1st Division.

Curator—Factor loco Absentis.—Petition for the appointment of a factor loco absentis refused with expenses, the absent party having appointed a factor, with a regular power of attorney, to act for him in this country,—this fact having been known to the petitioners.

J. Paitison jun. W. S.—J. Kermack, W. S.—Agents.

W., A. G., and R. Ellis, W. S., Pursuers.—*More.* No. 312.
T. Muckersie and H. Rose, Defenders.—*H. Bruce.*

May 12. 1831.
Ellis v.
Muckersie &c.

Arrestment.—A party incarcerated upon a decree for expenses having obtained his liberation upon consignation of the amount in the hands of the governor of the jail, and having immediately thereafter arrested the same on the dependence of an action at his instance against the charger—Found, in an action raised by the charger's agents, (who had disbursed these expenses,) that the arrestment was incompetent, and that they were entitled to recover the amount.

May 12. 1831.

2d Division.
Lord Fullerton.

The defender Muckersie having been incarcerated by one Small on a decree for expenses of process obtained against him in an application for recal of an inhibition used by Small against him, was liberated upon consigning the amount in the hands of Rose, the governor of the jail. Previously to the liberation, Muckersie had, on the dependence of an action of damages at his instance against Small, in respect of the inhibition, obtained letters of arrestment, in virtue of which he used arrestment in his own hands of this sum of expenses, and thereafter arrested in the hands of the governor of the jail the amount consigned. The pursuers Messrs. Ellis had been agents for Small in the proceedings in which expenses were awarded, and had in that capacity disbursed the expenses decerned for. They now, with concurrence of Small, raised an action against Muckersie and Rose, the governor of the jail, claiming to be preferred to Muckersie thereto, and concluding for payment accordingly.

To this action defences were given in for Muckersie, who pleaded that the arrestment was a bar to decree being obtained—at least in form of an ordinary action; and that Messrs. Ellis, not having taken decree in their own name, could not now compete with him after arrestment had been used against the principal party.

The Lord Ordinary decerned in terms of the libel, with expenses, against Muckersie, adding the subjoined note.*

The Court adhered.

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* "1. The arrestment does not appear to the Lord Ordinary to be competent. It has been decided that a party who has consigned money in the Bill-Chamber, in order to obtain the passing of a bill of suspension, cannot arrest the sum so consigned, on the dependence of an action of damages against the charger; and there are evidently grounds precisely of the same nature, and, to say the least, as strong, for refusing effect to an arrestment of a sum consigned to procure liberation, after the diligence has been actually enforced. 2. As the arrested sum consists entirely of expenses in which the arrester had been found liable, and in regard of which he could not have pleaded against the pursuers, the agents of his adversary, compensation on any claims alleged to be due by their principal, it does not appear that these expenses, still extant and in medio, could be effectually covered by the arrestment in question in competition with the present pursuers."

W., A. G., and R. Ellis, W. S.—A. Burns, W. S.—Agents.

No. 313.

May 13. 1831. Tennent v. Muter.

HUGH TENNENT, Suspender.—*Sol.-Gen Cockburn—Alison.*
REV. R. MUTER, Respondent.—*D. F. Hope—More.*

Servitude.—A clause in a feu-charter, by which the proprietor had right to collect the water of the springs on adjacent lands, and convey them to the dominant lands, found not to include a right to bore for water.

May 13. 1831.

2D DIVISION. Lord Medwyn. T.

HUGH TENNENT, the suspender, acquired right to a piece of ground of about five acres, called the Well Park, being part of the lands of Wester Craigs near Glasgow, which had originally belonged to the Merchants' House there. In the original feu, as taken by Tennent's authors, a clause followed the disposition of the ground, giving to them liberty "to collect the water of the several springs on the said Merchants' House their other adjacent lands of Wester Craigs, and convey the same, in open or close ditches, through the said lands to the lands hereby feued, without molestation or hinderance, for ever." This clause appeared in all the subsequent titles, and in virtue thereof Tennent and his authors had, for a considerable time, employed the water drawn from these lands in the operations of a brewery situated on their feu. Latterly, however, Tennent, with a view to ascertain what quantity of water he could command from the adjacent lands of Wester Craigs, set workmen to bore a rock in the bottom of a quarry on part of the ground, which had become the property of the respondent Muter, under titles reserving to the proprietor of the Well Park the right of collecting water, in precisely the same terms as the servitude was expressed in Tennent's title. Muter having interrupted the boring in his quarry, Tennent presented a bill of suspension and interdict, which was passed.

The Lord Ordinary pronounced this interlocutor:—"Finds that, in virtue of the titles of the parties respectively, the complainer is entitled to collect the water in the several springs in the respondent's lands of Broompark, and to convey the same, in open or close ditches, through the said lands to the lands belonging to himself; and in so far grants the interdict against the respondent molesting or troubling the complainer in the above operations;—but that the complainer has no right to bore for water, or, by any such artificial operations, to bring water to the surface, for the purpose of being collected and conveyed to his own lands; and to that effect refuses the interdict, and repels the reasons of suspension;—finds no expenses due, and decerns."

The Court adhered.

LORD JUSTICE-CLERK.—I have no difficulty when I read the clause in the titles, which gives right to do no more than collect superficial water. It is quite extravagant to claim a right to bore by means of machinery, as this might be carried to an indefinite extent, and be exercised so as to become a positive nuisance.

The other Judges concurred.

P. TENNENT, W. S.—W., A. G., and R. ELLIS, W. S.—Agents.

JOHN BELL, Pursuer.—*More.* No. 314.
JOHN M'KUNE, Defender.—*D. F. Hope—Ivory.*

May 13. 1831.

2D DIVISION.
Lord Medwyn.
R.

Bell v. M'Kune.

Bill of Exchange.—BELL, the holder of a bill of exchange drawn by M'Kune upon and accepted by certain parties named Smith, having been obliged, as an indorser, to retire the bill from the bank with whom it had been discounted, raised an action for payment against M'Kune, and also against the Smiths, who had become bankrupt. M'Kune alleged in defence, that Bell had put his name on the bill to accommodate the Smiths, and to guarantee their sufficiency to M'Kune; but he did not offer to instruct this by the writ or oath of Bell. The Lord Ordinary decerned against the Smiths, who made no appearance, and also conjunctly and severally against M'Kune, reserving to him "to bring any action which he may think proper against the pursuer; and to the pursuer his defences as accords."

The Court adhered.

J. W. MACKENZIE, W.S.—R. WELSH, S.S.C.—Agents.

J. GIBSON-CRAIG, Pursuer.—*Rutherfurd—Ivory.* No. 315.
SIR PATRICK WALKER, Defender.—*Whigham.*

Public Officer.—A party in possession of an office, under a commission subsequently set aside, having been found entitled to a reasonable allowance for such duties as he could instruct to have performed, not having shown that any duty was done, held not entitled to any part of the emoluments.

May 13. 1831.

2D DIVISION.
Ld. Mackenzie.
T.

Gibson-Craig v. Walker.

SEQUEL of the case mentioned ante, V. 843, as to the pursuer's claim for the fees and salary of the office of Deputy Usher of Exchequer, during the dependence of the dispute as to the validity of the defender's commission, which was ultimately set aside. The Court (as stated in the report referred to) found the pursuer entitled to recover the fees &c. which had been drawn by Sir Patrick, under deduction of the sums paid by him to the persons who might actually have performed the duties of the office, and a reasonable allowance for such duties as he should instruct to have been performed by himself personally. Thereafter the Lord Ordinary remitted to Mr. Longmore of the Exchequer to ascertain and report upon the amount of fees &c. and deductions, on an agreement that his report should have the same effect, and none other, that would have attended the verdict of a Jury. Mr. Longmore accordingly reported the amount of fees &c.; and as to deductions, that the defender had failed to instruct the performance of any of the proper duties of the office.

The Lord Ordinary having approved of Mr. Longmore's report, decerned for the amount as ascertained by him; and the Court adhered with a variation as to interest, which, by an oversight in the interlocutor was allowed to be accumulated.

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—A. GOLDIE, W.S.—Agents.

No. 316.

May 14. 1831. Mitchells v. Mein.

M'Lachlan &c. v. Rob &c.

J. and J. MITCHELL, Complainers.—*D. F. Hope—Neaves.*
ALEXANDER MEIN, Respondent.—*Keay—Gillies.*

Expenses—Counsel—Process.—In ordinary cases, fees are not allowed to more than two counsel in taxing an account against an adverse party; but this rule, though general, suffers exceptions in important cases.

May 14. 1831.

1st DIVISION.

IN the complaint Mitchells v. Mein, the former prevailed to a considerable extent, and were found entitled to expenses, subject to modification.[1] Mitchells now objected to the Auditor's report that he had struck off the fees allowed to a third counsel.

Mein answered, that although, where cases were of great importance and intricacy, it might be necessary to have more than two counsel, and fees to them might be allowed; yet the present was merely an ordinary petition and complaint against him as trustee, and was marked by no peculiarity, so as to except it from the general rule by which the expense of two counsel only could be charged.

The Court observed, that though there were cases of magnitude in which the Auditor ought to allow fees to more than two counsel, even in taxing an account against an adverse party, yet there was nothing in this case to justify any such departure from the ordinary rule, and therefore repelled the objection.

J. CULLEN, W. S.—C. FISHER,—Agents.

No 317.

MRS. REOCH or M'LACHLAN and HUSBAND, Pursuers.—*Ld. Adv. Jeffrey—Jameson—Wood.*
MRS. MARY ROB and MANDATARY, Defenders.—*Sol.-Gen. Cockburn—More.*

Jurisdiction—Foreign—Mandatary.—1.—A foreigner cited in an action of transference as the representative of a deceased defender, held not liable to the jurisdiction of the Scottish Courts.—2.—Circumstances not inferring a prorogation of the jurisdiction.—3.—The mandatary of a foreigner having sisted himself to an action, and pleaded on the merits, but only under reservation of a declinator of the jurisdiction, which was ultimately sustained,—held amenable to the jurisdiction of this Court for the expenses of process, but, in the circumstances, not liable for them.

May 14. 1831.

1st DIVISION. Lord Meadowbank. H.

ANDREW ROB, farmer in Clackmannanshire, died in 1808, leaving a daughter in pupillarity,—and a widow, the present pursuer, who afterwards married the Rev. John M'Lachlan. Soon after Andrew's death, his brother Ralph, who was a Scotsman, but domiciled in England, was appointed tutor-at-law to the child, and intromitted with the estate. In 1816-18, two actions of count and reckoning were raised against him,—one at the instance of the pupil, which was eventually compromised,—the other by the widow for her share qua relict. This latter action (in which

[1] See ante, p. 115.

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the present question arose) was remitted by the Lord Ordinary to Mr. Clerk, an accountant, who made several reports. In 1823, Rob having objected to a report by the accountant, the Lord Ordinary, on the 1st of July, remitted of new to the accountant. Previous to the date of this interlocutor, Rob had died, leaving his widow, Mrs. Mary Rob, (who was an Englishwoman, and domiciled in England,) his general disponee. The pursuers then executed arrestments to found jurisdiction against her; but it was averred by her, and not disputed, that she had no funds in this country, and the case was decided on the footing that the arrestments were unavailing. They thereupon brought an action of transference against her, as the representative of her husband; and the Lord Ordinary, on the 17th of June 1824, (no defences being lodged,) "decerned and transferred in statu quo;" and a few days thereafter, "in respect of the decree of transference, of new remitted to Mr. Clerk, the accountant," &c.

Mrs. Rob, designing herself "relict of the deceased Ralph Rob of Gristewaite, as the sole accepting trustee of her deceased husband," then put in a representation against the decree of transference and the remit, in which, after stating that "it appears to the representer to be clearly for the benefit of all parties that a specific judgment should be pronounced upon one and all of the objections to the accountant's report," she pleaded, that "before entering further upon the discussion of these points, she requests your Lordship's attention to two points of preliminary importance, and which, it is submitted, must be decided before any further proceeding whatever. In the first place, it is laid down as a general maxim of law, that no Judge can pronounce sentence on persons or subjects without his territory. As, therefore, the representer is a native of, and residenter in England, she contends that she is not amenable to the jurisdiction of the Courts, &c., and must necessarily be assoilzied altogether from the action of transference. But, in the next place, the representer is merely and nominally a trustee, acting under her late husband's trust-settlement," and could only be liable to the extent of the trust-funds in her hands. The prayer of the representation was "to recal the interlocutors; and in respect of the representer's living without the jurisdiction of this Court, to assoilzie her from the action, with expenses; or at least to find that she can only be liable, as trustee under her husband's settlement, to the extent of the trust-funds in her hands; and, at all events, to recal the remits to the respective accountants, and, before further procedure, to make avizandum of new with the accountant's report, and objections thereto; and thereafter to pronounce such interlocutor upon the merits of the different points brought under your consideration, as to your Lordship may seem proper."

The Lord Ordinary ordained her, ante omnia, to lodge a mandate, and any new documentary evidence, with the accountant. A mandate, dated Gristewaite, 11th January 1825, and addressed to Mr. Hutton, writer, Stirling, in these terms, was accordingly lodged:—"Sir, As trustee for

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the late Ralph Rob of Gristewaite, my husband, I do hereby nominate and appoint you to be my mandatary for carrying on in my name the two several actions of count, reckoning, and payment, &c., now depending before the Honourable Lord Meadowbank, &c., with power to you to act in the premises in the same way, and as fully and freely in all respects, as any mandatary may or can do in such cases." His Lordship thereafter, on the 8th of February 1825, "in respect of the mandate and documentary evidence produced, remitted of new, before further answer, to Mr. Clerk, in terms of the interlocutor of the 22d of June 1824, &c.—reserving the further consideration of this representation until the additional report is produced."

The case then proceeded before the accountant, the subsequent papers being lodged in name of Mrs. Rob and her mandatary, defenders. In one of these papers they "earnestly entreated the Lord Ordinary to pronounce judgment in reference to those principles of the accounting as to which parties are at issue."

On the Judicature Act, 6. Geo. IV. c. 120, being passed, the Lord Ordinary, on the 1st of December 1825, "appointed Mrs. Rob and mandatary to give in a condescendence, in terms of 6. Geo. IV. c. 120, and relative A. S., within four weeks; appointed answers &c. before answer as to the previous expenses," &c. The rest of the interlocutor related to the accountant's charges. In the record no plea was stated as to the jurisdiction; nor in Cases, which were subsequently ordered, was the question argued. The representation, however, still remained undisposed of.

Another remit having been made to the accountant, he reported that there was a balance of £3212 due to the pursuers. Mrs. Rob then lodged objections, in which the declinator of the jurisdiction was resumed, and a judgment thereon craved before further procedure.

The Lord Ordinary ordered Cases to the Court on the question of jurisdiction; and the Court afterwards, on the 30th of June 1830, held Mr. Hutton sisted as mandatary, and ordered additional Cases "on the point of the liability of the mandatary for the expenses of process in this cause since the representation was put in."*

Pleaded by the Pursuers—

1. The principal defender, Mrs. Rob, is liable to the jurisdiction of this Court on various grounds. In the first place, it is undoubted that a foreigner may, by means of an agent or mandatary, enter into a contract in this country, which will be binding, and be enforced by the Courts. But there is nothing peculiar in the contract of litiscontestation to prevent him from entering into it by his mandatary, through whom he is himself legally and civilly present in Court. Although it may be true that a Court will not decern against a foreigner, because they have no jurisdiction over him, yet if he appear, either by coming within the

* The expenses incurred in discussing the merits were said to have amounted to about £1000 on each side.

territory to defend himself and lodging defences, or, what is equivalent, by appointing a mandatary within the territory to appear for him, then the Court may determine the cause, because its decree will be valid, and binding on both parties. But, in the second place, as the original action was raised against Ralph Rob, and was depending against him at his death, and the defender was his representative, she was liable to fulfil his obligations, and, inter alia, to answer in this action;[1] at least by her mandatary she could make herself a party to such action. A decree in her favour would bind the pursuers; and that single fact implied that she was regularly in Court. It was therefore competent for her to appear; and, by pleading to the merits, she had prorogated the jurisdiction of the Court.

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2. At all events, both she and the mandatary, and particularly the latter, were liable in the expenses of the process from the date of their appearance in it. If she was a party, then unquestionably he was jointly liable with her; and if she was not a party, he stood in the position of dominus litis, and must be responsible. Besides, by discussing the merits so long without bringing the point of jurisdiction to a decision, he had either actually meant to waive it entirely, and could not be allowed to recur to it without paying the previous expenses,—or he had acted pessimâ fide in keeping it all the while in reserve, lest the cause should go against him.

Pleaded by the Defender and Mandatary—

1. A Court has no jurisdiction over the persons or estate of foreigners. It cannot explicate its decrees against them; and there is no difference in principle between an original action raised against a foreigner, and one attempted to be transferred against the foreigner; nor will the sisting of a mandatary give the Court jurisdiction against a foreigner in relation to expenses of process. Jurisdiction, therefore, cannot be prorogated, as to a foreigner, by means of a mandatary. But even if it could, the conduct of the defender had not barred her from declining the jurisdiction. She stated the objection to the jurisdiction at the very outset; and though the Judge had ordered interim procedure, yet he had expressly reserved the question, and ordered all the subsequent pleadings "before further answer."

2. If the principal was assoilzied, the mandatary could not be subjected in the expenses of process. In a legal sense, the mandatary had no positive, but merely a relative existence. He was the representative of his principal; but he represented him, inter alia, in the right to state the declinator, which plea must apply to both or neither. If, however, he could be made separately liable, his conduct was not such as to subject him. It was the duty of the pursuers, as much as of the defenders, to have had the preliminary question of jurisdiction determined before fur-

[1] Dundas, Dec. 13. 1743, (2058.)

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ther discussion; and if both parties deferred so far to the Lord Ordinary as to enter on the merits, the defenders had only done so under the fullest reservation of the declinator. The point was distinctly brought under the judicial notice of his Lordship at the outset; but he saw it expedient to reserve it, and to order pleadings on the merits. In obeying these orders, no blame could be imputed to the mandatary; and it would be impossible to give complete effect to the judicial reservation, unless it was not only sustained, but all subsequent expenses allowed to the party who pleaded it.

Lord President.—A foreigner cannot prorogate the jurisdiction of this Court. The use of arrestments, jurisdictionis fundandæ causâ, proceeds from this, that we cannot explicate our jurisdiction against a foreigner, unless we attach some of his funds within our territory. In regard to the separate liability of the mandatary for expenses, I conceive that he is more to blame for the protracted discussion which has taken place, than the pursuers are. It was his peculiar duty to press the declinator of jurisdiction, unless he had resolved to waive it. As to the pursuers, it was no business of theirs to force a judgment on a point which the conduct of the other party led them to believe was abandoned. But I have great doubts whether the mandatary, as such, is or can be a party now before us. As soon as the declinator was stated by the defender, that she was a foreigner, and that there was no jurisdiction, it must follow that her mandatary, as such, was no longer before the Court, unless perhaps to the special effect of declining its jurisdiction. In a vulgar sense, it may be said that the individual, who is the mandatary, is locally within the kingdom, and is therefore liable to our jurisdiction, while the individual who is the principal is a foreigner, and exempt. But in a legal sense, and when viewed according to those relations which alone a Court can recognise, I apprehend we cannot hold the mandatary to be a party before us, if it be ab initio radically incompetent for the principal to be so, and if the mandatary make no appearance, except under reservation of that incompetency as to his principal, and consequently to himself. If I had no difficulty on this point, I might incline to subject the mandatary in expenses; but, in the view which I take of the case, it is unnecessary for me to decide that question.

Lord Gillies.—In the first part of your Lordship's opinion I concur. I think that the foreigner could not prorogate the jurisdiction of this Court, and I think she did not. Look to the representation, being the first paper lodged in process in her name. It specifically pleads in the outset, "that no Judge can pronounce sentence on persons or subjects without his territory." This principle is most explicitly stated, though not enlarged upon. It might, no doubt, have been swelled out to any number of pages, but it could not have been more distinctly set forth. The prayer of the representation, inter alia, craves, "in respect of the representer's living without the jurisdiction of this Court, to assoilzie her from the action, with expenses;" and it is only after this that the rest of the prayer, relative to the merits, is added. I conceive the rule of law on which she rests to be well founded, and that she ought to have been instantly assoilzied. It is said that an action of transference is different from an

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original action against a foreigner; and that if the original action was raised against a deceased relative, it may be transferred against his representatives, though domiciled abroad. But this is erroneous. An action of transference cannot effectually proceed against any defenders who are not amenable to the jurisdiction of this Court. Here, then, the origo mali lay with the pursuers, who brought an action against a party residing abroad, the competency of which action they made an ineffectual attempt to establish, by previously using the form of arrestments which attached nothing. Still the pursuers persevered in their action; but the defender tempestivè declined the jurisdiction on the very threshold of the Court. She was not bound to appear even to this effect; but it might be agreeable to her to do so, from a reluctance to have even the form of a decree taken against her. She was ordered to produce a mandate that her plea might be received, and she did so; but the Lord Ordinary reserved the declinator for after consideration, and it was only under that reservation that the subsequent proceedings were took place. The point being thus reserved, I hold that the defender must be entitled to the full benefit of her plea now, as much as when it was first stated. In regard to the separate liability of the mandatary, I do not adopt the argument, that because the principal's declinator is sustained, the mandatary cannot be held to be a party before us, so as to be amenable to the question of expenses. The principal is a foreigner, who cannot prorogate the jurisdiction. The mandatary lives within the territory, and undoubtedly, so far as regards the expenses occasioned to himself and others by the papers put into process by him, he is liable to our jurisdiction. It was said by the pursuers that he was to blame in not pressing the question of jurisdiction to a judgment, before going into the subsequent proceedings. But it was at least as much their duty as his, and more their interest, to do so. He deferred to the Lord Ordinary's disposal of the cause, but only under reservation of this preliminary plea. Eventually it is found that he must succeed in virtue of a preliminary plea, which was duly stated by him; and I see nothing in his conduct to deprive him of the benefit of the general rule, which, in such a case, awards expenses to the prevailing party. It is said he was in mala fide to recur to this preliminary plea; and if I believed this, it would affect the question of expenses. But as every discussion subsequent to the reservation by the Lord Ordinary was "before further answer," and under a full reservation of the question of jurisdiction, it must be held to have been equally the act of both parties to go on with the interim discussion; and the pursuers may blame themselves for not sooner having the preliminary point disposed of.

Lord Balgray.—I think the reservation by the Lord Ordinary was ample enough to save the full effect of the declinator to the defender, who is not amenable to our jurisdiction. As to the separate liability of the mandatary for the expenses, I do not see any difficulty in holding it to be established. No litigation can go on in this Court without there being parties to the process who may be subjected in expenses; and the mandatary here may be subjected by us, even while we sustain the declinator as to the principal. But holding this to be so in point of principle, the question remains, whether the conduct of the mandatary be such as to subject him. I think not. Certainly there was no error committed by the mandatary, of such a nature as to infer personal responsibility against himself. On

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the contrary, it was his duty to his constituent to bring the reserved point of jurisdiction before the Court for its judgment, before allowing a decision on the merits to take place. And I can easily see that it might be much for the interest of his constituent to go on with the interim discussion of all these questions of accounting, because he thereby recovered evidence, written and oral, which was placed on record, and might be made available afterwards to his constituent, whatever might eventually be the judgment of the Court on the question of jurisdiction. The conduct of the mandatary, in my opinion, was blameless, and instead of being liable for expenses, I hold him entitled to them.

Lord Craigie.—I am of the same opinion. The mandatary did his duty. He employed a respectable agent to conduct the cause in this Court; and where we cannot subject the principal, I see nothing in the conduct of the mandatary to infer any personal liability for expenses against him. A decree of transference passes against the foreigner in absence: A representation is then put in, objecting in limine to the jurisdiction: This is followed by subsequent proceedings, which are only held under a full reservation of that preliminary system, in virtue of which reservation we are now called on to give it complete effect:—In these circumstances, who is the author of all this expense and unavailing discussion? The pursuers undoubtedly, by the inept action of transference which they raised. This, in my view, decides the question of expenses, and decides it against the pursuers.

The Court then, "having resumed consideration of the representation, recalled the interlocutors therein complained of; sustained the objection to the jurisdiction of this Court pleaded by the defender Mrs. Mary Rob, dismissed the action of transference, and decerned; found there are no grounds for subjecting Mr. Andrew Hutton, the mandatary for Mrs. Rob, in expenses; assoilzied him from the said claim, and decerned; found him entitled to the expenses incurred in defending himself against the said claim subsequent to the 25th of June last, &c.; and, in the circumstances of the case, found no other expenses due."

Pursuers' Authorities.—Dundas, Dec. 13, 1743, (2038); Anderson, July 1747, (4779); Pirie, March 8. 1796, (4594); French, June 13. 1800, (For. Comp. App. No. I); M'Kenzie, March 8. 1810, (F. C.); Bell, Feb. 22. 1812, (F. C.); Edmonstone, June 1. 1806, (F. C.); 1. Bell, 384; Lindsay, Feb. 8. 1827, (ante, V. 310.)

Defenders' Authorities.—1. Ersk. 2. 16; Leigh, Dec. 19. 1792.

Alex. Douglas, W. S.—J. Renton, W. S.—Agents.

No. 318.

Duke of Hamilton, Petitioner.—*Ld. Adv. Jeffrey—Jardine.*

G. R. Aikman, Respondent.—*D. F. Hope—H. J. Robertson.*

Appeal.—Leave granted to the defender in an action for declaring a servitude, to appeal against a judgment, on a remit from the Jury Court, deciding certain points of law preparatory to trial, on his allowing the pursuer to exercise the right claimed in the mean time.

May 14. 1831.

2d Division. R.

Petition by the Duke of Hamilton for leave to appeal from the judgment mentioned ante, VIII. 943, which was pronounced on a remit from the Jury Court to have certain questions of law settled preparatory

to trial, and whereby it was found that Aikman, the pursuer, who claimed a right of taking sand and gravel from the banks of the Clyde, was not bound, under his summons, to plead a right of commonty in the bank—that he was entitled to plead that the Duke had no right of any kind—and that, in support of his conclusions, he was entitled to found upon the possession of occupiers of other houses, situated like his own, within the town of Hamilton. Aikman opposed the application, as calculated to allow the Duke to contest the litigation in a harassing manner; but on his Grace consenting to permit Aikman to exercise, in the mean time, the right claimed by him, the Court granted leave as craved.

No. 317.

May 14. 1831.

Duke of Hamilton v. Aikman.

Andrew v. Fraser.

Marjoribanks' Trustees v. Chalmers' Trustees.

R. Rutherford, W. S.—Mack and Wotherspoon, W. S.—Agents.

John Andrew, Suspender.—*Keay.*
Kenneth Fraser, Charger.—*Boswell.*

No. 318.

Suspension.—This was a special case, in which the Lord Ordinary having refused a bill of suspension on certain conditions, the charger reclaimed, and insisted for an unconditional refusal. His note was refused, with expenses.

May 17. 1831.

1st Division. Bill-Chamber. Lord Craigie. H.

G. L. Sinclair, W. S.—D. Clyne, S. S. C.—Agents.

Marjoribanks' Trustees, Pursuers.—*More—J. Paterson.*
Chalmers' Trustees, Defenders.—*Maitland.*

No. 319.

Process—Expenses.—Circumstances in which objectors to a multiplepoinding allowed to be heard on a new objection, after the record was prepared, but not closed, without payment of previous expenses.

The late Mr. Marjoribanks of Marjoribanks borrowed £5000 belonging to Mr. and Mrs. Chalmers, and granted bond for that sum over his estate to Messrs. Balderston, Berry, and Scott, then acting as trustees under a deed, which was afterwards reduced at the instance of the defenders, trustees under a later deed. The bond provided that redemption might be made by consigning the amount in the Royal Bank, on three months premonition. Marjoribanks having conveyed his estates to trustees, they, in 1830, tendered payment to Scott as the only survivor of Chalmers' trustees under the first deed, (which had by this time been set aside); and he having refused to accept it, they consigned the money in the Royal Bank. Thereafter an action of declarator of redemption containing also the conclusions of a multiplepoinding, was raised in name of Marjoribanks' trustees and of the Bank. To this action defences and objections were given in by the trustees of Chalmers under the subsisting deed, and parties proceeded to make up a record by condescendence and answers. After these were revised, but before the record was closed, Chalmers' trustees, alleging that they had hitherto believed that the action

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2d Division. Ld. Mackenzie.

No. 320.

May 17. 1831. Marjoribanks' Trustees v. Chalmers' Trustees.

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was truly raised by the Royal Bank, but that they had now ascertained that it had been raised by Marjoribanks' trustees, in name of the Bank, without their concurrence, stated a new objection, denying the right of the trustees thus to raise the action in the Bank's name.

The Lord Ordinary having appointed parties to debate on the new objection, Marjoribanks' trustees reclaimed, and contended that Chalmers' trustees were not entitled now to state the objection; or, at all events, that they could only do so by an amendment on the original defences and objections, and on making payment of the previous expenses.

The Court refused their reclaiming note.

W. C. Balderston, W. S.—E. M'Millan, S. S. C.—Agents.

No. 321.

J. Kirkland and J. F. Sharpe, Pursuers.—*Sol.-Gen. Cockburn—Cuninghame.*

Archibald Gibson (Wilson and Sons' Trustee), Defender.—*Skene—Hunter.*

Bankrupt—Sequestration—Landlord and Tenant—1.—A trustee on a sequestrated estate having entered into possession of a coal lease, and been infeft in feu-rights belonging to the bankrupt; and having for many years taken the benefit of the lease and feu-rights for the use of the sequestrated estate—Held that he and the trustees who succeeded him were bound to fulfil the prestations to the landlord, and not entitled to abandon the contracts.—2.—The claims of the landlord against the estate having been settled down to a certain date by a decree-arbitral—Found that the contracts were not thereby abandoned, or the landlord's future claims foreclosed.

May 17. 1831.

2d Division. Lord Medwyn. F.

Wilson and Sons, ironmasters at Wilsontown, held a lease of coal in the lands of Climpy, and two feus of the same property, from the proprietor Crawford. The estates of Wilson and Sons were sequestrated in June 1812; and Mr. James Bristow Fraser, as trustee, entered into possession of the coal lease, as well as of the two feus, in which he was afterwards infeft. He carried on the Wilsontown iron-works from the term of his appointment till December 1812; and during this period the coals in the lands of Climpy were, in virtue of the lease, worked for the use of the iron-works. The estates of Crawford, the proprietor of Climpy, having also been sequestrated, his trustee, in 1812, instituted three actions against Fraser as trustee on the estates of Wilson and Sons,—one in the Sheriff Court relative to the lease, and the other two in the Court of Session relative to the feus, for payment of the feu-duties, and for declarator of irritancy ob non solutum canonem. Fraser, in defence, did not deny his liability, but stated counter claims against the conclusion for rents and feu-duties. In August 1814, these processes, and the mutual claims of the parties, were submitted to the decision of Mr. Cockburn, advocate; and, pending their discussion, sums were paid to and received on account of sales of coals at Climpy, and as rents of the pasture grass on the Climpy feus, on behalf of the sequestrated estate.

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May 17. 1831. Kirkland &c. v. Gibson.

In July 1817, Mr. Cockburn, pronounced a decree-arbitral, by which he sustained various claims of the parties hinc inde; the landlord's claim to the coal-rents and feu-duties down to Whitsunday 1817; assoilzied Fraser from the declarator of irritancy; and found, "that upon implement of the foresaid findings, the said parties-submitters respectively are hereby severally and mutually discharged of all claims which they may have against each other under this submission, or the processes referred to in it, together with the said processes themselves, and all following or competent to follow thereon." In 1818, the present pursuers, Messrs. Kirkland and Sharpe, purchased the lands of Climpy from Crawford's trustee; and in September of the same year, the Wilsontown property, including the lease, but not the feu-rights, was exposed to public roup, and also in the following year, until June 1820, when, for the first time, the lease was left out of the articles of roup. Kirkland and Sharpe, alleging that Fraser, as trustee, had continued in possession of the lease and feu-rights, raised this action, concluding for payment of the rents and feu-duties since Whitsunday 1817. Fraser resisted this claim, on the ground that the estate was not liable, and that at all events, the decree-arbitral having been implemented, nothing more was due. The estates of Fraser having been sequestrated, he was succeeded in his office by Gibson, who was sisted as defender in the action.

Under these circumstances, the Lord Ordinary found, "that the Wilsontown trustee having entered into possession of the lease, and been infeft in the feu-rights, and having for so many years taken benefit of the lease and feu-rights for the use of the sequestrated estate, has become the assignee to the lease, and the vassal in the feu-rights, and must be bound to fulfil the prestations due under these contracts towards the landlord, and is not now entitled to abandon them;—that Mr. Fraser, the trustee, has been succeeded in his office by the present defender, and no decree is now craved, either as an individual or as trustee, against Mr. Fraser;—therefore, and in respect that the pursuers have acquired right to the coal-rents and feu-duties which fell due subsequent to Whitsunday 1817," decerned against the trustee for the rents and feu-duties subsequent to Whitsunday 1817, and thereafter to fall due.

Gibson reclaimed, and chiefly maintained—

1. That the decree-arbitral settled all claims down to Whitsunday 1817, and expressly excluded and discharged all subsequent claims.

2. That the acts and deeds upon which the subsumption of liability, subsequent to 1817, was founded, were those of the late trustee Fraser, and therefore were not applicable to the present trustee.

The Court unanimously adhered.

Lord Justice-Clerk.—After paying every possible attention to this case, I can find nothing in the decree-arbitral which can possibly be said to extinguish these contracts of lease and feu in all time coming. As to the argument that nothing was done by this trustee, does not the new trustee just step into

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the shoes of the old? The action is against him qua trustee, and he has succeeded to Fraser. I think the interlocutor perfectly right.

The other Judges concurred.

GREIG and MORTON, W. S.—JOHN WIGHT, W. S.—Agents.

No. 322.

ALEXANDER THOMSON, Pursuer.—*Skene—Thomson.*
GEORGE IZAT, Defender.—*D. F. Hope—Cowan.*

Master and Servant—Ship—Stat. 2. Geo. II. c. 36, 2. Geo. III. c. 31.—A ship-owner assoilzied from a claim made by a party for wages, as having been hired for a voyage, and unwarrantably dismissed, in respect of the failure of the party to prove a concluded contract.

May 18. 1831.

1ST DIVISION.
Admiralty.
Ld. Moncreiff.
R.

ALEXANDER THOMSON, ship-carpenter in Culross, pursued George Izat, ship-owner there, before the Court of Admiralty, for £19. 13s. 9d. of wages, sea-board, and lodging, during the period when a ship of Izat's, named the Alexander, made a voyage, out and home, between Kincardine and Archangel.

In support of this demand, he stated that Izat had engaged him as ship's carpenter for that voyage, and had unwarrantably dismissed him after he had been taken on board ship, and on the eve of the commencement of the voyage.

In defence Izat stated, that although Thomson had been on board for a trial of his fitness, yet there was no concluded engagement; and he pleaded—1. That as there was no written agreement in terms of 2. Geo. II. c. 36, and 2. Geo. III. c. 31, Thomson could not maintain this action; and, 2. That even if there had been a concluded agreement with Thomson as ship's carpenter, he had shown himself, while on board the Alexander, to be so unfit to perform his duty, as to have justified his dismissal. The Judge Admiral found "it alleged by the pursuer that the engagement libelled was an unconditional one, and that he was dismissed by the defender without a just cause; that it was alleged by the defender that the agreement entered into was only conditional, dependent on the fact that the pursuer was properly qualified, and that the pursuer was dismissed, because he was found unqualified; and he allowed the parties a proof of their respective averments on this head." After the proof had been taken, the Judge Admiral "found that no written articles of agreement were entered into in this case, in terms of the Acts of Parliament founded on by the defender; that the pursuer has not brought a parole proof sufficiently satisfactory of the nature of the agreement entered into between the parties; that the pursuer has brought no proof with respect to the wages earned by him after he left or was dismissed from the vessel; therefore, without entering into the question whether the pursuer was sufficiently capable of discharging the duties of a carpenter on board the vessel in question, on which point the

proof is very contradictory, assoilzied the defender; but, in the particular circumstances of the case, found no expenses due." No. 322.

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Inglis & Co. v. Lane & Co.

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Both parties brought actions of reduction of this decree,—the pursuer because it assoilzied, and the defender because it gave no expenses. The Lord Ordinary having reported the cause, the Court unanimously affirmed the judgment of the Judge Admiral.

Lord President.—There is no proof of any completed bargain. The pursuer appears merely to have been taken on board for trial, and no contract was made.

Lord Gillies.—I concur in all that the Judge Admiral has found in this case.

Lords Craigie and Balgray assented.

Hotchkis and Meiklejohn, W. S.—D. Adamson, S. S. C.—Agents.

James Inglis and Co., Pursuers.—*D. F. Hope.* No. 323.

William Lane and Co., Defenders.—*Skene—Marshall.*

Process—Amendment of Libel.—An amendment of the libel in consequence of new documents recovered, making no alteration in the conclusions, but merely an addition to the narrative, allowed after the record was prepared, but not closed, under reservation of all claims for expenses.

May 18. 1831.

2d Division. Lord Medwyn. F.

J. Harvey, W. S.—J. Rymer, W. S.—Agents.

Blincow's Trustee, Pursuer.—*Skene—Wilson.* No. 324.

Alex. Allan and Co., Defenders.—*Whigham.*

Process.—Several points having been argued in minutes of debate before the Court, who decided most of them, and remitted one point to the Lord Ordinary, but omitted to decide or remit as to another; and the Lord Ordinary having refused to allow discussion of that last point, as not falling under the remit; and having pronounced a judgment as exhausting the cause; new remit granted by the Court, embracing the point in question.

When this cause was before the Lord Ordinary in a former stage, he had, inter alia, decerned against the defenders for £354. 4s. 5d., and made avizandum to the Court on minutes of debate upon other points. These related to the competency of conjoining a supplementary summons with a prior process, in which a jury had returned a verdict; the ineptness of the supplementary summons per se; and the question whether the first summons could reach certain payments in cash, and a particular bill for £155. All these were argued by the parties in their minutes. Besides this, the defenders reclaimed, and pleaded that the Lord Ordinary had, in his decree against them, included a sum of £118.

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1st Division. Ld. Moncreiff. D.

No. 224.

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19s. which was not due. The Court refused to conjoin the processes, dismissed the supplementary summons, and "remitted to the Lord Ordinary to hear parties on the defenders' claim for deduction of the sum of £118. 19s., upon which they have not been heard before his Lordship; — quoad ultra, adhered to the interlocutor reclaimed against, and refused the desire of the note, and decerned; and allowed decree to go out and be extracted ad interim for the sum decerned for and found due in the Lord Ordinary's interlocutor, under deduction of the foresaid sum of £118. 19s., and corresponding interest; reserving all questions of expenses incurred in the Court of Session."

Under the remit the pursuer proposed to resume discussion as to the bill for £155, which was objected to by the defenders on the ground that it was one of the points which were fully discussed before the Court, and that the interlocutor had exhausted the cause, except as to the special remit to try the question of the £118. 19s. The pursuer answered, that in regard to the bill for £155, no judgment had been pronounced by the Lord Ordinary; and it was equally plain that the interlocutor of the Court did not decide the question as to it, and therefore it must be held as embraced in the remit. The Lord Ordinary assoilzied the defenders from the claim for £118. 19s.; "and in respect that the interlocutor of the Court contains no remit as to any other matter, refused to allow any further discussion or investigation relative to the bill of £155, mentioned in the summons and pleadings, as demanded by the pursuer; and the Lord Ordinary, considering the merits of the case to be exhausted by the interlocutor of the Court, and this judgment on the remit, and having heard parties' procurators on the question of expenses reserved by all the interlocutors, makes avizandum." His Lordship afterwards disposed of the question of expenses.

Blincow's trustee reclaimed, and contended that the question relative to the £155 bill remained still to be disposed of. Allan and Co. reclaimed as to the details of expenses allowed. The Court refused the note of Allan and Co., but remitted to the Lord Ordinary to hear parties in regard to the £155 bill, which their Lordships considered to be a matter on which no judgment had yet been pronounced either by the Lord Ordinary or by the Inner House.

J. Pattison Jun. W. S.—Allan and Bruce, W. S.—Agents.

PATRICK CAMERON, (for GEO. F. CAMERON,) Pursuer.—*Ld. Adv. Jeffrey—Shene—Moir.*
JOHN MACKIE and Others (DICK'S TRUSTEES), Defenders.—*D. F. Hope—H. J. Robertson—Paterson.*

No. 325.
May 19. 1831.
Cameron v. Mackie &c.

Trust—Testament—Revocation—Writ—Foreign.—Held,—1.—That a trust-disposition of all heritage of which a party should die possessed, and referring to trustees as specified in any will executed, or to be executed by him in the English form, formed, with such a will, an effectual trust-conveyance of heritage in Scotland.—2.—That a formal trust-disposition of heritage could not be revoked by an English will not probative according to the law of Scotland;—and,—3.—That the legal effect of the combined trust-deed and will was a question to be decided by the law of Scotland, and not of England.

May 19. 1831.
1ST DIVISION.
Ld. Moncreiff. D.

THE late Mr. James Dick, a native of the north of Scotland, but domiciled in London, acquired a large fortune, amounting to about £170,000, of which £82,000 were invested on heritable bonds in Scotland. He died on the 24th of May 1828, leaving certain deeds, the effect of which was to exclude from his succession his heir at law, an infant grand-nephew, George Fenton Cameron, son of the pursuer Patrick Cameron, and to vest his funds in trustees for the benefit of the parochial schoolmasters in the counties of Aberdeen, Banff, and Moray. Of those deeds, in so far as related to the heritable bonds, an action of reduction was raised on behalf of Geo. F. Cameron, the heir at law by his father, in which two leading questions arose:—First, Whether a trust-deed, executed in the Scottish form, had not been recalled by a subsequent English will, and other deeds of Mr. Dick? Second, Supposing it was not so, whether that will, being improbative by the law of Scotland, could form part of the trust-deed?

It appeared that, prior to 1823, Mr. Dick had executed an English will, and that in that year he had employed Mr. Pearson, W. S., to invest several sums of money on Scottish heritable bonds. After this had been done, Mr. Pearson, in October of that year, wrote to him in London, explaining that if he wished his Scottish heritage to descend to any other than his heir at law, it was necessary for him to execute a deed of settlement according to the forms of the law of Scotland. After some correspondence, which distinctly intimated Mr. Dick's desire to exclude his heir at law, and to place his Scottish heritage in such a situation as to be controllable by his will, a trust-deed of settlement, in the Scottish form, was prepared by Mr. Pearson, and executed by Mr. Dick in London on the 14th of November of the same year.

This deed was in these terms:—"I do hereby give, grant, assign, and dispone, from and after my death, to and in favour of John West,* John Mackie, J. A. Simpson, and John Dick, executors named and appointed by me, conform to will in the English form already executed by me,

* The designations are omitted.

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and the survivors or survivor of them, and the heirs of the survivor, and their or his disponees and assignees, declaring that a majority of them acting for the time shall constitute a quorum, all and sundry lands and heritages, with all debts heritable and personal, and whole sums of money and effects, situated in Scotland, which shall pertain and belong, or be addebted, resting and owing to me any manner of way, at the time of my death," &c. The deed then contained the usual obligation to infeft, to grant procuratories and precepts, &c., power to uplift, sell, &c.; "but always to and for the uses, ends, and purposes, and under the declarations specified and contained in my will, in the English form, already executed by me, or to be specified and contained in any other will, codicil, or other writing, which may yet be executed or signed by me, and to all which express reference is hereby made; reserving always, not only my own liferent of the subjects, heritable and personal, before disponed and assigned, but also full power and liberty to me to alter and revoke these presents, in whole or in part, as I shall think fit, at any time in my life, or even on deathbed, dispensing with the not-delivery hereof, and declaring these presents to be a good, valid, and effectual deed, though found lying by me at the time of my death." On dispatching this deed to London, and before it was executed, Mr. Pearson wrote to Mr. Dick that it was so conceived that he might "make any alteration on the English will, or even a new will altogether, and still this general disposition will require no alteration, as it would be applicable to any of these cases."

On the 18th of May 1827, Mr. Dick executed, in London, a will in these terms:—"I James Dick, &c. hereby revoking all wills by me at any time heretofore made, do hereby make and declare this to be my last will and testament. I give, devise, and bequeath all and every my lands, tenements, and hereditaments, money and securities for money, stock in the public funds, goods, chattels, and all other my real and personal estate and effects whatsoever and wheresoever, not herein after otherwise disposed of, unto John Dick, John Mackie, and J. A. Simpson,* whom I hereby nominate my executors, their heirs, executors, administrators, and assigns, upon trust, with all convenient speed after my decease, to call in and convert into money such part thereof as shall not consist of money, or of stock in the public funds of England; and I hereby declare my will to be, that my said executors shall stand possessed of the money so to be produced, and of my stock in the public funds, and of other the money and personal estate not herein after otherwise disposed of, upon trust, in the first place, to pay my just debts, and funeral and testamentary expenses, and the pecuniary legacies herein after given, and, subject thereto, to dispose of the same in manner herein after mentioned, (several legacies were enumerated here:) And as to all

* These were the parties named in the trust-deed, with the exception of Mr. West, who was omitted.

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the rest, residue, and remainder of my property whatsoever and wheresover, I direct my executors to pay, assign, and make over the same, from time to time, as the same shall be received or come into possession, and all interest, dividends, and annual produce thereof, in the mean time, to the Principals and Professors for the time being of the King's and Marischal Colleges, Aberdeen, to be by them invested in or upon Government or heritable security in their names, and with full power to the said Principals and Professors for the time being to vary such securities, and to manage the fund hereby directed to be formed, in such manner as to them shall seem best." He then appointed those Professors to pay over to the Professors of Arts and Divinity in these Colleges, the annual produce, to be by them applied, according to certain rules, in improving the condition of the parochial schoolmasters of the shires of Banff, Moray, and Aberdeen, exclusive of the royal burghs of these districts:—"Provided always, and I hereby declare my will to be, that if any one or more of them, the said John Dick, John Mackie, and J. A. Simpson, or any trustee to be appointed in their or any of their stead, as herein after is mentioned, or their respective executors or administrators, shall depart this life, or decline to act, or become incapable of acting, in the trusts hereby created, then and in every such case it shall be lawful for the said Elizabeth Colley,* during her life, and afterwards for the survivors and survivor of them the said John Dick, John Mackie, and J. A. Simpson, and the executors or administrators of such survivor, by any deed by her, them, or him legally executed, to appoint a trustee or trustees in the room of the trustee or trustees so dying, or refusing or declining to act, or becoming incapable of acting; and that, upon the appointment of any such new trustee or trustees, all the funds and property then subject to the trusts aforesaid, and which shall be vested in the trustee or trustees so dying, or refusing or declining to act, or becoming incapable of acting as aforesaid, shall be forthwith assigned to and vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees of the same trust-estates or funds, or solely, as occasion shall require; and every such trustee shall have the same rights, powers, and exemptions, as the trustee or trustees in whose room he or they shall be so respectively substituted." This will was in the English form, and was not a probative writ by the law of Scotland; but it was a formal and valid instrument by the law of England.

Soon afterwards Mr. Dick came to Scotland, and visited Aberdeen, and on the 6th of July of the same year, and whilst there, he executed a trust-deed, which was prepared by an Aberdeen agent. This deed proceeded on the narrative of,—"considering that, by my last will and testament, dated 18th May last, I appointed J. A Simpson &c. to be executors of my said will, and directed them, after satisfying the several purposes, and fulfilling the trusts therein specified," to pay over the

* Mr. Dick's natural daughter.

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residue to the Principals and Professors of the two Colleges of Aberdeen, &c. After engrossing the directions of the English will as to the payment of the annual produce to the Professors of Arts and Divinity, to be applied for behoof of the parochial schoolmasters according to the rules formerly stated, the deed proceeded in these terms :—" And being desirous, in as far as in me lies, to ensure the success of the scheme on which I have so resolved, and to render the same as perfect as circumstances will admit of for answering the purposes expressed in my said will, and making the residue of my estate available, in the easiest and simplest way, to the object of improving the condition of the parochial schoolmasters of the counties above mentioned, and advancing the interests of literature and general education in these counties, I have resolved, with that view, to execute the supplemental deed underwritten, which I desire to be taken and held as a part of my said will: That is to say, I give, grant, assign, and dispone to my executors aforesaid, viz. the said John Dick, John Mackie, and J. A. Simpson, and the survivors or survivor of them, in trust, for the uses, ends, and purposes expressed in my last will and testament, above mentioned, all and sundry lands, heritages, debts, sums of money, mortgages, adjudications, bonds heritable and moveable, bills, accounts, and other estate, real and personal, of whatever kind, and wheresoever situated, which shall belong or be resting and owing to me at the time of my decease, together with the whole vouchers, evidents, and instructions of the same." This was followed by the usual clauses binding himself to execute all deeds necessary for vesting "in the persons of my said trustees and executors, and rendering complete, their title to my said estate, in trust, for the purposes of the said will: but providing always, that my said will, jointly with the present supplemental deed, is to be taken and understood, and carried into effect, with and under the conditions and qualifications herein after specified," viz. that his trustees and executors should pay over the residue of his property, and the annual produce thereof, to Dr. Glennie and seven other Professors who were named, and to the survivors of them, or such persons as should be chosen by the respective colleges to succeed these gentlemen in the manner therein prescribed. The deed contained no power of revocation, and, soon after its execution, was delivered by Mr. Dick to Dr. Glennie.

On his return to London, Mr. Dick was advised by his agent there, and by Mr. Pearson, that it was inexpedient to place any part of his fortune beyond his own control during his lifetime, and therefore that he ought to cancel the above deed; and, that if he wished the trust brought into operation during his life, he should make one in a different form. He therefore applied for the delivered deed to Dr. Glennie, who restored it to him.

On the 20th of November 1827, he executed in London a codicil to his will of the 13th of May, in which, after narrating the direction in that will to his executors " to pay over all the residue of my property, subject

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to the bequest therein contained, to the Principals and Professors," &c., he recalled that direction, and enjoined his executors to vest the residue of his estate in any set of trustees whom they might think best fitted for carrying into effect his purposes, as expressed in his will, in favour of the schoolmasters. In all other respects he expressly ratified his will. Neither the will nor the codicil referred to the trust-deed of 1823.

Towards the end of the same year (1827,) Mr. Dick, with the advice of his agents in Edinburgh and London, took steps for having a new trust-deed prepared, under the revision of Scottish counsel, with a set of relative regulations for the administration of the trust, in order to give effect to his wishes in favour of the schoolmasters, and to carry into execution his desire of immediately calling the trust into operation. In one of the letters on this subject, written by Mr. Pearson in November 1827, he stated,—" There is another circumstance which I wish to mention, for I believe it has hitherto escaped the notice of yourself and me. I allude to the general disposition and settlement which, if you recollect, was prepared by me, &c. I see you have executed a will so late as 18th May last. The deed prepared by me, above alluded to, bears reference to your will then in existence; but as it is also made to apply to any will to be executed, this is all perfectly right."

On the 7th of May 1828, the proposed new trust-deed and settlement, together with a " table of rules and regulations," having been prepared in Edinburgh, were forwarded to London, in order that Mr. Dick might revise and approve them. He then cancelled the deed executed at Aberdeen, but died before he could execute those of which the drafts had been sent.

The trust-deed of 1823, and the last will and codicil of 1827, were found in his repositories uncancelled.

Under these circumstances, the trustees maintained in defence—

1. That the trust-deed of 1823 was sufficient, in point of form, to convey to them the heritable bonds, and that the English will was effectual as a relative deed of instructions; and,

2. That Mr. Dick never had any intention to recal the trust; that the English will was unavailing to that effect; that the deed executed in Aberdeen had been cancelled and abandoned; and that as it excluded the heir-at-law, he could not found on it.

The Lord Ordinary ordered Cases.

Pleaded by the Pursuer—

1. The disposition of 1823 was void, as it was in favour of disponees, qua executors, under a prior will, which was afterwards revoked, and the same set of executors were never again appointed. It was true that three out of the four were appointed in the subsequent will of 1827. But that will made an entirely new provision for the appointment of successors to his executors, different from the provision in the trust-deed for the appointment of successors to his trustees, and thereby demonstrated that the testator held that prior deed to be revoked or extinguished. As both

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trusts might endure for a tract of time, such new provision was incompatible with that under the deed of 1823.

2. Even if that trust-deed were originally valid, still, as it was a mortis causâ deed, it had been effectually revoked by the English will of May 1827, which revoked all prior wills; and, as the word 'will,' by the law of England, meant a devise of heritage in contradistinction to moveables, this was an effectual revocation of the trust-conveyance. Independently of this, it had been revoked by the execution and delivery of the Aberdeen trust-deed, and was never subsequently revived.

3. At all events, if the trust-deed of 1823 were a subsisting deed, it was inoperative, because it contained no purposes of trust; and the English will, being an improbative deed, could not be founded on to affect heritage in Scotland; and,

4. Assuming that the will could be held as part of and relative to the trust-deed, still the legal effect of it must be judged of by the law of England, and by that law the will did not embrace or allude to Scottish heritage.

Pleaded by the Defenders—

1. The trust-disposition of 1823 was a valid de presenti conveyance of all the heritage which should belong to the granter at his death. It was in favour of four individuals fully designed; and although it is true that they were executors under the pre-existing will, and only three of them were named executors under the will of 1827, yet it was no condition of their being disponees under the trust-deed that they should all be executors under the will. Neither did it militate against the trust-deed that succeeding trustees were directed to be appointed in one shape; and that, by the will of 1827, the nomination, in filling up vacancies by the death of executors &c., was placed on a different footing. This might, or it might not, at a future period, create a practical embarrassment, which it would be time to remove after it arose.

2. The trust-deed was not revoked by the will of 1827. This was a question of Scottish law, and it was fixed that a conveyance of Scottish heritage could not be effectually revoked by any testament or improbative writing. As to the Aberdeen trust-deed, it had no clause revoking the trust of 1823. Had it not been cancelled, it might have superseded that deed; but having been cancelled, while the other was carefully preserved, it was clear that the force of the original trust-deed was the same at the granter's death as if the Aberdeen deed had never possessed even a temporary existence. There was clear evidence of the animus of the testator, that the trust-deed of 1823 should receive effect. It was therefore the regulating deed as to his Scottish heritage at his death.

3. Although the will of 1827 was not effectual as a conveyance of heritage, yet it was valid, as containing directions to the trustees, and as defining the purposes and obligations of the trust. To this effect it was operative in their favour, being probative by the law of the place where it was made; and,

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4. As it was admitted that the will of 1827 was a valid English instrument, containing a clear exposition of the wishes and views of the testator, and there being a clause of reference in the Scottish trust-deed to any future will, the decision of the question, whether that clause of reference was sufficient to connect the two deeds, and so specify the obligations and purposes of the trust-conveyance of Scottish heritage, was a question of Scottish law.

The Lord Ordinary found "that the deed of trust executed by James Dick, deceased, according to the forms of the law of Scotland, dated the 14th of November 1828, was not revoked by the last will and testament, also executed by the said James Dick, dated the 18th of May 1827, or by any other deed, instrument, or act;—that the said deed of trust is subsisting, and effectual to convey to the persons therein named, and to the survivors or survivor of them, the whole heritable property of the deceased, situated in Scotland, in which he was vested at the time of his death, subject to the effect of the obligations of trust therein expressed;—that it being admitted, that the said last will and testament, dated the 18th of May 1827, and the codicil of 20th November 1827, executed according to the forms of the law of England, where the testator had his domicile, are in all respects valid and effectual to their purposes under that law; and there being no ground for alleging that there is any technical ambiguity in the terms or clauses thereof, the question as to the effect of the obligations of trust, expressed in the said trust-deed, in relation to the testator's property in Scotland, by reference to the purposes specified and contained in a last will previously executed, or to be specified and contained in any will, codicil, or other writing which the testator might afterwards execute, in the application of the said obligations of trust, to the purposes actually specified and contained in the said last will and testament of the 18th May 1827, and the codicil of 20th November 1827, is a question which must be determined exclusively by the law of Scotland;—found it fully settled, as matter of the law of Scotland, that an heritable estate may be effectually conveyed by a trust-deed in the form of the trust-deed executed by James Dick, and that the obligations of trust provisionally created by reference to any will to be afterwards executed may be effectually perfected and defined by a testamentary deed or will executed according to the law of the place where the testator is domiciled, though not bearing the forms of the law of Scotland;—that, in this case, the provisions of trust in the trust-deed are so laid down and expressed, as to apply with effect to the purposes specified and contained in the said last will and testament and the said codicil, and that there is no incongruity which can prevent such application;—therefore sustained the defences, and assoilzied the defenders, and decerned; but found no expenses due."

The pursuer reclaimed.

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* "NOTE.—The cases of election quoted by the pursuer, as being held to depend on the law of England, are entirely different from this case. In them, the question de-

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Lord Gillies.—This is an important case patrimonially, but not so on account of its raising any question of legal difficulty. There is no point of the law of deathbed involved in it. All the deeds were executed in liege poustie. The English will is admitted to be a formal and valid instrument. Ever since the case of Willoch in 1769, it has been held fixed in our law that a feudal conveyance of heritage, regularly executed according to our forms, and disponing to trustees, to be held by them for such purposes as the granter might express in a separate writing under his hand, either at that or a subsequent time, or which he might have already expressed in a prior writ, is an apt conveyance, and both empowers and obliges the trustees to give effect to the will of the granter, as declared in such separate writing. We had lately occasion particularly to consider the state of the law on this subject in reference to the case of Lady Essex Ker. The effect of the law of deathbed there gave rise to a difficult question, in which I differed from the opinion of the majority of the Court, to whose judgment I must bow, although I cannot surrender my own opinion. But in regard to the main question, apart from the specialty of deathbed, I have already said that I conceive it to be perfectly fixed ever since the case of Willoch. So soon as it is admitted that the English will is good and formal by the law of England, we have enough to enable us, and to constrain us, to decide, by the law of Scotland, whether the clause of reference in the Scottish trust-deed be sufficient to connect it with the English will, and so make an operative conveyance of the Scottish heritage, to the exclusion of the heir-at-law. We cannot go to England to ask a lawyer there whether the English will, either by itself, or by conjunction with the Scottish deed, can carry heritage in this country. It is here, and only here, that such a question can be answered. I concur without hesitation in the judgment of the Lord Ordinary.

Lord President.—My opinion is the same. The Scottish deed conveys in trust for the purposes contained in the testator's will to be afterwards executed. Such a will is afterwards executed, containing purposes and directions which are perfectly intelligible, and I hold it to be the same as if these had actually been originally engrossed in the Scottish trust-deed. The effect of the combination of the two deeds is the same as if the last had all along formed part of the first. It is said that a will or testament in our law is always presumed to

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pended wholly on an English deed. But here the operative deed is a Scotch deed. The English deed is but incidental to it; and though an English lawyer, looking at that deed alone, might very possibly say that the purposes expressed do not go beyond the property carried by it, he could give no legal opinion as to the effect of the trust-deed to extend the operation of the same purposes to the Scotch heritable estate, because that would plainly be to judge of the effect, not of the English deed, but of the Scotch deed.

"The questions arising under the law of Scotland from the facts in the record are so clearly treated in the Cases, and the argument of the defenders appears to the Lord Ordinary to be so conclusively supported by the authorities referred to, that he thinks it unnecessary to express the grounds of his opinion on the several points discussed, more particularly than he has done in the above interlocutor. The way in which a title is to be completed, and the testator's design carried into effect, is a matter in which the pursuer has no interest, if he cannot reduce the settlement."

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be on deathbed, and has only the force of a deathbed deed. But this is in one sense inaccurate. It is true, that at whatever date the will was written, it is presumed to have a continuous existence to the last moment of life, and to be in reality the will of the dying man, even in articulo mortis. But it is equally true, that if the deed be regularly tested, (and we see that it was written at a period of 20 years distance from the death of the testator,) it is the expression of the testator's will in liege poustie, and, when combined with a prior feudal conveyance, is completely operative and effectual in questions as to heritage. The law of deathbed does not touch the question now before us, and I cannot hesitate to sustain the defences.

Lord Balgray concurred in these opinions.

Lord Craigie dissented.

Ld. Adv. Jeffrey for the Pursuer.—Though the Court have adhered on the merits, yet I trust there may be an alteration on the point of expenses, and that the expenses of both sides will be laid on this very ample trust-fund. This was done in the House of Lords in the late case of the Earl of Strathmore, where an unsuccessful appellant was nevertheless allowed his expenses out of the trust.

The Court adhered on the merits, but allowed the expenses on both sides to be paid out of the trust-funds.

Pursuer's Authorities. — Simpson, Dec. 11. 1751, (Elchies, v. Testament, No. 12); Lang, Nov. 16. 1809, (as reported in Moir, March 1. 1824, 2. Shaw's App. Ca. p. 13, Note); Muir, June 1. 1813, (F. C.); Muller, (Promptuar. Juris,) Vol. 7. p. 426; Voet, l. 27. tit. 3. § 5; Vinnius, l. 2. tit. 18. § 6; Lord Meadowbank's opinion in Howden, July 8. 1815, (F. C.); Robertson, Feb. 16. 1816, (F. C.); Trotter, Dec. 5. 1826, (ante, V. 78.)

Defender's Authorities.— 3. Erak. 8. 20; Mitchell, Nov. 21. 1759, (8084); Robertson, June 17. 1785, (15947); Dundas, May 21. 1783, (15590); Henderson, May 29. 1802, (Dict. App. Tailzie, p. 9); Fordyce, July 5. 1827, (ante, V. 897); Brack, Nov. 23. 1827, (ante, VI. 113); Willoch, Dec. 14. 1769, (5539); Fordyce, July 5. 1827, (ante, V. 897); Brack, Nov. 23. 1827, (ante, VI. 113); Ker, Feb. 24. 1829, (ante, VII. 454); Rowan, Nov. 22. 1775, (11371); Donaldson, July 20. 1776, (2. Bligh's Rep. 646, Note); Duke of Roxburghe, May 25. 1820, (2. Bligh's Rep. 619); Toller's Law of Executors, p. 15, 6th edit.

Gordon and Burnett, W. S.—Pearson, Wilkie, and Robertson, W. S.— Agents.

No. 326.

James Dobie, Petitioner.—*Cuninghame—J. Paterson.*
David Scales and Others, Respondents.—*D. F. Hope—M'Neill.*

Bankrupt—Sequestration—Law-Agent's Hypothec.—Creditors of an ancestor holding heritable bonds, with powers of sale, and a law-agent holding the title-deeds hypothecated, having offered to the trustee on the bankrupt estate of the heir, (who had made up no title,) to give him either full inspection of the title-deeds, or actual delivery of them, on payment or caution for their debts,—found not bound to deliver them up on any other condition.

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1st Division.
Lord Meadowbank.
S.

Dobie, as trustee on the sequestrated estate of Walter Shanks, presented a petition, stating that the father of the bankrupt, the late Thomas Shanks of Glasgow, was proprietor of two heritable subjects there; that he had borrowed from Mrs. Douglas and others certain sums, in security

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of which he had granted to them heritable bonds, with powers of sale; and that Mr. David Scales, writer in Glasgow, (who alleged he was agent for the heritable creditors, and claimed a business account as due to him by the bankrupt,) held the titles, and refused to deliver them up to the petitioner as trustee. He therefore prayed the Court to ordain the creditors and Mr. Scales to deliver up the title-deeds, "under reservation of any right of hypothec competent to him thereon, and that upon the petitioner's granting an obligation to pay to the said David Scales any account due by the bankrupt, covered by such hypothec, out of the first and readiest of the proceeds to be recovered, and also an obligation to redeliver the said title-deeds within a short space, or when required so to do."

In defence the creditors and Scales stated, that they had extrajudicially offered to the trustee inspection of the deeds, or actual delivery of them, on payment of, or caution for payment of the debts; but that this had been refused; that the properties had been disponed to the creditors, with power to sell them, and the titles assigned to them in security of the payment of their debts; that they were in the course of bringing the subjects to a sale, and could sell them without the expense of making up any titles in the person of the bankrupt; and if there were any reversion, it would be paid to the trustee; that they required undisturbed possession of the titles, in order to go on with their sale, and were entitled to maintain this in virtue of their assignation to the writs; and that the subjects would sell much more advantageously for all concerned, if sold by them, than if sold by the bankrupt, whose right to them was limited and burdened with life-rents, besides their debts. The Lord Ordinary, "in respect the respondents have offered full inspection of the titles claimed, and were to deliver them up on caution being found for the amount of the debts due to them, both which offers are declined, refused the petition, and found the respondents entitled to expenses," &c.

Dobie reclaimed; but the Court adhered.

Petitioner's Authorities.—Paul, Feb. 2. 1826, (ante, IV. 420); Jaffray, July 11. 1828, (ante, VI. 1144); 2. Bell, 414.

J. Cullen, W. S.—Tod and Wright, W. S.—Agents.

No. 327.

James Kerr, Suspender.—*Keay—Marshall.*
William Little, S. S. C., Charger.—*D. F. Hope—G. G. Bell.*

Agent and Client.—The purchaser of a property having delivered his title-deeds to the sellers, to enable them to defend an action of reduction of the titles; and the sellers having employed a law-agent to do so, and given him the titles—Held that the purchaser was not liable to the law-agent for payment of his account.

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2d Division. Lord Medwyn. F.

Herries and Edgar sold to Kerr a dwelling-house erected on a piece of ground known by the name of Blackacres, and bound themselves in warrandice. Thereafter, one Howat, founding upon a right to an old

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lease of Blackacres, raised an action of reduction of the rights of thirteen proprietors on that piece of ground, including that of Kerr. Several of these proprietors united to defend themselves, and to pay the expense in proportion to the rents of their properties; and they employed Martin, late writer in Dumfries, of the firm of Armstrong and Martin, and brother-in-law to the charger Little, solicitor in Edinburgh. Kerr having required Herries and Edgar to relieve him from the action, and relying upon their warrandice, did not join in this arrangement, or employ Armstrong and Martin. Herries and Edgar undertook to relieve Kerr, borrowed his title-deeds, became parties to the agreement, and put the titles into the hands of Armstrong and Martin. Little was thereupon employed by Armstrong and Martin to attend to the interest of the defenders in the action of reduction; and although he was put by them in possession of part of the title-deeds, yet he had no communication with Kerr himself. After some procedure in the action, the defenders effected a compromise with Howat. Some of the parties became unable to pay their proportion of the expense under the agreement; but Herries and Edgar, after being threatened with an action by Little, paid theirs. Little then raised an action for the balance of his account, in which he called Kerr, along with six other parties, as conjunctly and severally liable, but not including Herries and Edgar. Kerr allowed a decree in absence to go out against him, and thereafter brought a suspension of the charge.

The Lord Ordinary having suspended simpliciter, Little reclaimed, and contended, that by having Kerr's title-deeds delivered to him, he must be considered as employed by that gentleman.

Lord Glenlee.—I think this interlocutor is right. It is quite plain that Little must have considered Herries and Edgar as his direct employers. His whole correspondence proves this, and it appears that he even libelled a summons against them; yet here he raises a summons, which excludes their names in toto.

The other Judges concurred.

The Court adhered.

T. Rankeu, S. S. C.—W. Little, S. S. C.—Agents.

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May 19. 1831.
Hall v.
Grant &c.

T. HALL, Suspender.—*Skene—Rutherfurd.*
LADY GRANT, Charger.—*D. F. Hope—Lumsden.*

Landlord and Tenant—Irritancy—Process.—1.—A clause in a lease, though expressed in the form of an irritancy, may, if truly forming a reasonable condition of the contract, support an action of removing before the Sheriff.—2.—Declaratory expressions do not necessarily infer a declaratory summons, so as to render it incompetent before the Sheriff.—3.—A composition-discharge, founded on a private trust-deed for behoof of creditors, not sufficient to purge an irritancy arising on the execution of such a trust-deed.—4.—The right to purge such condition in a lease held to be waived by a letter from the tenant admitting the irritancy, and consequent termination of his lease.

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2D DIVISION.
Ld. Fullerton.
F.

LADY GRANT of Monymusk let to Thomas Hall the farm of Braehead for the period of 19 years from Whitsunday 1826, by conditions of lease bearing, inter alia:—"It is expressly covenanted and agreed upon, that if the tenant of this possession becomes bankrupt by execution of diligence against him, or if he grants any conveyance or trust-deed to or for behoof of his creditors, in any such event his lease shall expire, and the farm return to the proprietor at the first term of Whitsunday thereafter, to be at his disposal, and who shall thereupon have right to charge the tenant to remove before the Judge Ordinary in the usual form, as if at the expiry of a lease. But in such an event, if any surplus rent exceeding £5 sterling yearly is obtained for the farm, in a fair bonâ fide manner, when let anew under these or similar articles and conditions, the same shall be accounted for annually, when recovered, and after payment of the rents, to the creditors or trustee during the remainder of the lease." In 1828, Hall having become insolvent, and being under diligence, executed a trust-deed for behoof of his creditors, and the trustees entered into possession of his farm and other property. On the 17th of October of the same year, Hall addressed to Lady Grant's commissioner the following letter:—"Sir, I have seen the letter from the trustees for my creditors to you of this date, and I acknowledge that, by the trust-deed I have granted, my lease of Braehead farm of Monymusk is at an end at Whitsunday next. But if I can have stocking and sufficient means to lay down next crop 1829 as a removing crop, and find security for the rent therefor, I am to be entitled to have it, in terms always of the rotation and mode of management in the lease." Lady Grant concurred in this arrangement for a waygoing crop, and thereafter relet the farm to another tenant at a surplus rent of £15, which she offered to communicate to the creditors in terms of the lease. Hall shortly afterwards obtained a discharge from his creditors on payment of a composition of 15s. per pound; but having failed to find caution in terms of the above letter, and to remove from the farm, Lady Grant raised two actions before the Sheriff of Aberdeenshire—one for implement of the letter, and the other of removing—founding on the above clause of the lease, and concluding "that it ought

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to be found and declared that the foresaid conveyance or trust-deed had been granted, and that thereby the said Thomas Hall has incurred the irritancy stipulated in the said articles and conditions for a lease; and the same being so found and declared, it ought and should be further found and declared, &c. that the said Thomas Hall has forfeited all right and title to a lease in terms of the said articles and conditions, and to the lands thereby agreed to be set, &c., and that the farm returns to the proprietor as at the term of Whitsunday first, subject always to the condition before mentioned as to any surplus rent," &c.

Pending the proceedings, Hall paid the composition, and got a discharge from his creditors.

The Sheriff having decerned against him in both these actions, he brought a suspension of the decree of removing, and advocation of the other process, chiefly on these grounds—

1. The summons of removing is a declarator of irritancy, and, as such, was not competent before the Sheriff. The conclusion for removing is merely a sequel to, and dependent on the previous declaratory and reductive conclusions. But on these conclusions judgment must be pronounced in a competent Court, before the Sheriff can decide upon the removing.[1]

2. Before the action of removing was raised, all the suspender's creditors had agreed to discharge him, whereby the trust came to an end; and having obtained a discharge, the irritancy has been purged.[2]

To this it was answered—

1. An action of removing, founded on a conventional irritancy, and where the act inferring the irritancy is admitted, is competent before the Sheriff,—more especially where the lease itself bears that such procedure shall be competent before the Judge Ordinary.[3]

2. As the composition-agreement is expressly founded on the trust-deed, and as the execution of such a deed is stipulated in the lease to infer an irritancy, and the execution of the deed is admitted, it cannot be purged.

3. Besides, the suspender is bound by, and not entitled to resile from, the admission in the letter of the 17th of October 1828.

The Lord Ordinary in the advocation remitted simpliciter, and in the suspension found the letters orderly proceeded, adding the note below.*

The Court adhered.

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[1] Young, May 25. 1826, (ante, IV. 617); Horn, Jan. 19. 1830, (ante, VIII. 329.) [2] Hog, March 4. 1825, (ante, III. 617.) [3] Gordon, Dec. 7. 1805, (App. No. 11. Tack); Munro, Dec. 11. 1811, (F. C.); Duncan, June 2. 1812, (ibid.)

* "NOTE.—It seems fixed in practice, that a clause in a lease, though expressed in the form of an irritancy, may, if truly forming a reasonable condition of the contract, support an action of removing before the Sheriff. But the clause in the lease in question appears to the Lord Ordinary to be of this description:—The landlord has clearly a fair and legitimate object in stipulating that he shall have a tenant ostensibly free from

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Lord Craigletie.—The first point is the competency. I have not the least doubt that an action of declarator, properly speaking, is not competent before the Sheriff. But if the facts enable him to pronounce findings on the summons, it is natural and proper for him to do so. The words of the Act of Sederunt of 14th December 1756 prove the competency of this procedure. In all such cases the Judge must first find and declare the fact. Now, can this summons be called incompetent? Had the word *declare* been left out, there would have been simple findings concluded for. I was at first a good deal struck by the allegation that this gentleman had entered into a transaction of discharge previous to the raising of this action; but the landlord moved immediately, and the letter of the 17th of October is conclusive. Then there is an express clause by which the surplus rent upon the new lease does not go into the landlord's pocket, but to the creditors or trustee of the tenant removed. This is a most liberal clause on the part of the landlord, and rendered this litigation on behalf of the tenant the more reprehensible. Now, after granting this letter, and allowing the landlord to relet, the tenant can have nothing to say.

Lord Glenlee.—I am of the same opinion. I see much is said about an irritancy. Properly speaking, there is no irritancy stipulated in the tack; all that is said is, that it shall come to a termination. But I take irritancy as a short word for that stipulation. I can see no incompetency in the Sheriff having entertained this summons, or in his being called upon to pronounce certain findings in fact before deeming in the removing. Where is there such a form of process, or does any one ever desire there should be, as, in the first place, an

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embarrassment; and the granting of a trust-deed for the behoof of creditors has been fixed upon by the parties as one of the tests for ascertaining the privation of that character, to which, more particularly considering the equitable condition in favour of the tenant attached to the clause in the present lease, there does not seem to be any objection. It is true there still may remain the question how far the irritancy may be purged; or, in other words, how far the breach of the condition admits of being taken off by subsequent fulfilment. But even admitting this to be competent, it does not appear to the Lord Ordinary that it would avail the tenant in the present case. Considering the terms and the object of the stipulation in question, he does not think that the operation of the clause, rendering the tenant's right dependent on the non-exemption of a trust-deed in favour of creditors, can be held to be excluded by his compounding with those creditors at the rate of 15s. in the pound. Even supposing the irritancy arising from sequestration be purgeable, it could hardly be maintained that it was actually purged by the statutory discharge of the tenant, on the payment of a penny in the pound to his creditors. It rather appears to the Lord Ordinary that in such cases nothing short of full payment could, even in the most favourable view for the tenant, be held to rehabilitate him in the sense of the condition of the lease.

"But, besides, the tenant seems, in the present case, to have barred himself from urging such a plea by his letter of the 17th of October 1828, in which he acknowledges that, 'by the trust-deed I have granted, my lease of Rinchood farm of Monymusk is at an end at Whitsunday next.' The right to purge an irritancy may certainly be waived, and it appears to have been waived by this letter, which does not seem to be exposed to any valid objection."

action for the declaratory past in this Court, and then a separate action of removing? As to the merits, I can have no doubt that the interlocutor is right. By the letter of the 17th of October, the tenant expressly comes under an agreement. Had he not done so, what was there, seeing there was a subsisting trust, to prevent an action proceeding at once in terms of the clause? Now the action is brought in 1829, and the defence is this discharge. But that does not meet the stipulation. Then there is a very humane clause in favour of the tenant, which gave him all the benefit of the new lease.

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Lord Justice-Clerk.—The preliminary objection I certainly thought worthy of attention; but the terms of the act of sederunt referred to by Lord Cringletie afford a complete answer. The Sheriff has in this case done nothing to infer an assumption of declaratory power—these are mere findings; and I am equally impressed with Lord Glenlee with the awkwardness and uncertainty of such a double form of process as the suspender points at. Then as to the facts of this case, there is not a shadow of hardship. It is clear that when this man granted the letter, he considered his lease as already forfeited.

Lord Meadowbank concurred.

Gairdner and Monroe, W. S.—J. M'Innes, S. S. C.—Agents.

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Neil M'Kinnon, Suspender.—*Keay*—*W. Bell.*

J. Nairne and M. N. Macdonald, Chargers.—*Sol.-Gen. Cockburn*—*Marshall.*

Meditatio Fugæ.—Circumstances which justified an arrest, as in meditatione fugæ, of a Scotsman who was sued on a liquid debt for a large sum in this country, although he alleged that he was going abroad to take certain requisite steps for instructing his defence against the debt.

May 20. 1831.

1st Division. Bill-Chamber. Ld. Moncreiff. H.

In 1824, the chargers became cautioners to the Bank of Scotland for payment of the interest of £20,000, borrowed by Mr. M'Kinnon of Corrychattachan, who promised to get some of his friends to grant to them an obligation of relief. A short time thereafter the suspender and another person granted a letter of relief to the chargers. The suspender was a native of Scotland, but had gone at an early period of his life to the West Indies, where he carried on business as a planter. Not long before granting the obligation, he had returned with his family to this country; but he still retained his plantation, which was managed by an overseer or partner.

The chargers, having been obliged to pay the interest on the loan to the Bank, raised an action against the suspender and his co-obligant for relief, and for repayment of £2500, being the amount of the sums advanced by them. This action was met by one of reduction of the obligation, at the instance of the suspender and his co-obligant, on the head of fraud. The reduction was remitted to the Jury Court, and the case stood for trial on 19th March last, but was postponed on the motion of the sus-

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pender, on account of the absence of an alleged necessary witness, who had gone to Baltimore, where he was likely to remain some time. A commission for examining him there was subsequently obtained. In the mean time the suspender disposed of any effects he had in Scotland, and took out his passage in a vessel which was to sail from Greenock for New York on the 30th of April. On that day the chargers procured a warrant from the Sheriff of Renfrewshire to arrest him as in meditatione fugæ, sent an officer on board the ship as she was getting under weigh, and apprehended him. After undergoing an examination, the Sheriff "granted warrant to imprison the said Neil M'Kinnon within the tolbooth of Greenock until he find caution de judicio sisti for his appearance, six months after requisition by the pursuers, in the action at their instance against him."

He then presented a bill of suspension and liberation, in which, while he admitted his intention of going to America, he stated that the object of his voyage was to accomplish the examination of the witness, and contended that as this was a lawful purpose, he could not be regarded as in fuga; and he craved that at least a longer term from the period of requisition for presentation should be granted.

The chargers stated various circumstances which indicated an intention on the part of the suspender to go abroad permanently; and maintained, that even supposing his allegation to be true, still, as they held a liquid obligation for so large a debt against him, they were entitled to caution.

Lord Craigie, on advising the case in vacation, issued the subjoined note.*

* Note by Lord Craigie.—"It is not now necessary, in applying for a meditatione fugæ warrant, to allege fuga in the ordinary sense of the word, if it can be stated on probable grounds that the alleged debtor is about to leave the kingdom of Scotland; and it will not be readily supposed that the chargers have resorted to that measure for preventing the suspender from superintending in person a proof of such importance to him, and where, from his knowledge of the circumstances, he may give full effect to the interrogatories as proposed in the Jury Court. Yet it may happen that the application now made, if granted, would have the same effect which might follow from such a course as has been stated. It has been properly provided by the interlocutor of the Sheriff, that the caution shall be judicio sisti within six months after requisition to that effect; but the requisition may be made as soon as caution is found, and in this way the suspender might be compelled to return home long before it was necessary. The Ordinary rather thinks that the time should be fixed from the date of the day fixed for the trial, and affording a reasonable time for the suspender to get notice, and to return to Scotland, as soon as there may be parata executio against him; or the form of juratory caution may be adopted, including a conveyance of the suspender's effects and property. After considering what has been stated, the parties and agents may perhaps fall upon some other plan that may be agreeable to them. If they do not, the Lord Ordinary will be inclined to send the case to the permanent Ordinary on the Bills, whose functions will begin to-morrow, and who will lose no time in giving a judgment."

Thereafter Lord Moncreiff made avizandum to the Court, and subjoined this note.* No. 329.

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THE COURT, without making any observations, refused the bill, but allowed the term for the suspender's appearance to be extended to twelve months from the date of requisition.

Chargers' Authority.—Wright, Feb. 6. 1782, (8553.)

J. JOHNSON, W. S.—C. NAIRNE, W. S.—Agents.

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* "NOTE.—If the Lord Ordinary, on reading this bill and answers, had found himself in a situation to give the complainer relief, he would at once have pronounced a judgment. But the impression on his mind is against the complainer's demand; and if he were to decide the case, he would be under the necessity of refusing the bill, perhaps with some slight modification of the Sheriff's judgment. It appears to him that the grounds of belief that the complainer is legally in meditatione fugæ, as explained in the answers, are fully sufficient to sustain the oath taken to that effect; and that the circumstance that a commission has been granted for examining a witness in America, is not sufficient to remove the strong ground of suspicion that a permanent departure is contemplated. If the deposition of that witness should be adverse to the complainer, the respondents have evidently the greatest reason to fear that he will not return. It is no doubt a difficult thing to procure caution where the amount of the debt is so large. But as the caution is only de judicio sisti, upon a long requisition, it is hard to say to the creditor, that if the complainer cannot find any friend willing to put such confidence in his honour as to be security for his reappearance, the creditor should be obliged to take that risk. Perhaps some modification may be proper according to the view of Lord Craigie. The object of the caution is only to secure the presence of the party in this country, when the creditor may reasonably expect to get parata executio against him. And perhaps, if the requisition were to be made immediately, six months might be too short a period in reference to that object. The Lord Ordinary would be inclined to extend the period perhaps to nine months, but not to limit the respondents as to the time of making the requisition. Juratory caution has been suggested. The Lord Ordinary would not think himself at liberty, in the circumstances of this case, so to qualify the ordinary right of creditors, situated as the respondents are, more especially as it might possibly turn out that the complainer's chief property was in the West Indies, which could not be made available if he did not return. But this is a matter very proper for the consideration of the Court."

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May 20. 1831. Henderson's Trustees and Others.

COLONEL HENDERSON'S TRUSTEES, Claimants.—*L'Amy.*
DRUMMOND'S TRUSTEES, Claimants.—*Skene—Marshall.*
WILLIAM LANG, Claimant.—*Skene—Marshall.*

Arrestment—Confirmation.—1.—Arrestments in the hands of debtors of a defunct, as debtors to his trust-disponees, while the debts are unconfirmed, inept.—2.—Arrestments in the hands of "Sibbalds Brothers," and of "the individual partners of that company," do not attach funds due by "Sibbalds Brothers and Co." to the common debtor.—3.—Question raised, but not decided, whether an arrestment "in the hands of James Ker, Esq., Manager of the Leith Bank, of the sum of £5000, more or less, due and addebted by him to the said trustees," &c., attached debts due by the Bank, or only debts due by him as an individual.

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1st DIVISION. Lord Newton. H.

WILLIAM SIBBALD, merchant in Leith, died on the 14th of December 1817, leaving a deed of settlement, by which he conveyed all his effects to trustees. At the time of his death, Mr. Sibbald held certain shares in the Leith Bank,—was a creditor of John Sibbald and Co., and of other parties,—and claimed right to one half share of the stock of the Edinburgh Ropery and Sail-cloth Company of Leith. On the other hand, he was indebted to Colonel Henderson's trustees—to Mr. Drummond's trustees,—and to a Mr. Grieve and others, in whose right Mr. Lang claimed as trust-assignee. The present question related to a competition among these parties, in virtue of their respective diligences. No confirmation was expede by Mr. Sibbald's trustees till the 22d and 29th of November 1822.

1. Colonel Henderson's trustees claimed for £2545. 19s. 2d., and founded, (1.) On an arrestment, dated the 22d of November 1820, on the dependence of an action against Sibbald's trustees, "in the hands of James Ker, Esq., manager of the Leith Bank, the sum of £5000, more or less, due and addebted by him to the said trustees." This arrestment was executed at Ker's dwelling-house. At this time Sibbald's trustees had a cash-credit with the Bank; but the dividends accruing on the shares were carried to an account in name of the deceased. (2.) On an arrestment, also in virtue of the action against the trustees, dated on the same day, (22d November 1820,) in the hands of "Sibbalds Brothers," Leith, (in place of Sibbalds Brothers and Co.) and John and William Sibbald, the individual partners, who were debtors to the trustees in their own right. (3.) On an arrestment, dated on the 27th of the same month, in the hands of Erskine and Curl, who were indebted to the trustees in their proper right; and, (4.) On an arrestment, dated the 8th of January 1821, "in the hands of David Ogilvy, manager of the Edinburgh Ropery and Sail-cloth Company of Leith;" and on another, in similar terms, dated the 26th March of the same year, in the hands of Mr. James Hay, who had succeeded as manager of the company. In regard to this stock, the facts were these:—In 1805, Mr. Sibbald (who was then the leading partner, and ultimately became the sole partner of William Sibbald and Co.) acquired one-half of the stock. Thereafter

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he agreed to transfer all his right as sole partner of William Sibbald and Co., including the share in the Ropery Company, to John Sibbald and Co., on condition of their paying the debts of William Sibbald and Co. No actual transfer was made; and John Sibbald and Co. having become bankrupt, and their estates having been sequestrated in 1815, a question arose between the trustee on their estate, and Mr. Sibbald as to the share in the Ropery Company. This was submitted, in 1816, to the decision of an arbiter; but, during the dependence of the submission, Mr. Sibbald died, and his trustees thereupon sisted themselves as parties to the submission. In 1818 an award was pronounced, finding that the half of the Ropery stock belonged to Mr. Sibbald, and now to his trustees. In the mean time the Ropery Company (who were creditors of John Sibbald and Co.) had raised a declarator, to have it found that Mr. Sibbald had effectually transferred his share to John Sibbald and Co., and that the Ropery Company were entitled to retain that share in payment of the debt due to them. This was met by a counter declarator by Mr. Sibbald, to which, on his death, his trustees sisted themselves as parties; and the Lord Ordinary pronounced a decree, (December 1818, and December 1819,) finding that they, "as trustees of the said William Sibbald senior, have the sole and exclusive right to the said one half share of the stock of the Ropery Company," &c. The trustees then sold it to the Ropery Company for £900. They never executed the conveyance, nor received the price; but a decree, ordaining them to implement the sale, was obtained against them in absence.

2. Drummond's trustees claimed for £500, and founded, (1.) On a bond granted by Sibbald's trustees in 1819, diligence thereon, and arrestments, dated in July 1821, executed in the hands of the above arrestees, with the exception of Erskine and Curl; and, (2.) On a decree cognitionis causâ against Mr. Sibbald's apparent heir, dated in December 1821,—a decree of confirmation, by Mr. Sibbald's trustees, of the shares in the Leith Bank,—the stock of the Ropery Company, and certain other funds, amounting in all to seven in number,—and on arrestments raised in virtue of the decree cognitionis causâ, executed in January and May 1822, against the above arrestees, with the exception of Erskine and Curl.

3. Lang claimed for about £1000, and his diligence was in pari casu with that of Drummond's trustees.

On the part of Drummond's trustees and Lang it was maintained—

1. That as the arrestments of Henderson's trustees proceeded in virtue of diligence against the trustees of Sibbald, and attached funds as belonging or owing to them; and as these funds were, at the date of the arrestments, in bonis of the defunct, and were not vested in his trustees till November 1822, (being about two years posterior to the execution of the arrestments,) they could not compete with the arrestments by Drum-

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mond's trustees and Lang, which were executed after the date of the confirmation.

2. That although the debt due by Sibbalds Brothers and Co. belonged to the trustees in their own proper right, and the arrestments by Henderson's trustees were prior in date; yet, as they were not executed against that company, but against "Sibbalds Brothers," they were inept; and,

3. That supposing the shares of the Leith Bank and the Ropery Company could be held as transferred to Sibbald's trustees at the date of the arrestments by Henderson's trustees, still they had not been attached, as the arrestments were not executed against the Bank, but only against Kerr as an individual in the one case, and Ogilvie and Hay individually in the other.

On the other hand, it was maintained by Henderson's Trustees—

1. That the stock in the Ropery Company had been effectually transferred to and vested in Sibbald's trustees by the decree-arbitral in 1818—the decrees of declarator in that year and 1819, and by the act of possession exercised in selling it to the Ropery Company; and therefore the arrestments were effectual to attach the fund without confirmation, and they were unobjectionable in point of form.

2. That the company of Sibbalds Brothers, and Sibbalds Brothers and Co., were one and the same, and therefore the objection was frivolous; and,

3. That Sibbald's trustees had, by acts of possession, acquired right to the Leith Bank shares prior to the arrestments, and that the diligence was executed against the proper officer.

The Lord Ordinary pronounced this interlocutor:—"Finds that the fund in the hands of the Ropery and Sail-cloth Co. was effectually attached by the confirmation, as executors-creditors, obtained by the trustees of the late Gavin Drummond and Mr. Lang, and that the previous arrestments by Colonel Henderson's trustees were inept, the fund remaining at the time in bonis of the late William Sibbald;—therefore prefers Mr. Drummond's trustees and Mr. Lang to this fund primo loco and pari passu; prefers them also, primo loco and pari passu, to the seven funds which were confirmed by the late Mr. Sibbald's trustees, and to the fund in the hands of Sibbalds Brothers and Co.; prefers Colonel Henderson's trustees to any funds in the hands of John Sibbald, or of William Sibbald, as debtors, directly to their father's trustees, and distinct from what was confirmed by the trustees, as having been due to the father himself; prefers them also to Erskine and Curl's fund;—finds that the arrestments which may have been used by any of the claimants for attaching the funds of the late William Sibbald, which have not been confirmed by his trustees, are ineffectual, and can be no ground of preference."*

* "NOTE.—It does not appear to the Lord Ordinary that either the proceedings in the arbitration, or the subsequent actions in the Court of Session, could have the effect

Henderson's trustees reclaimed on the merits, and Drummond's trustees and Lang &c., as to expenses.

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LORD PRESIDENT.—The finding of this Court, or of an arbiter, that certain trustees have right to a particular subject, does not vest it in them. They must make up a title. The shares of the Ropery Company, and of the Leith Bank, were not vested in Sibbald's trustees when the arrestments of Henderson's trustees were used. These arrestments were therefore inept; but the confirmation, which took the funds out of the hæreditas jacens of the defunct, followed by the arrestments of Drummond's trustees and Lang, validly attached them.

LORD BALGRAY.—I think the interlocutor well founded in all respects on the merits.

LORDS CRAIGIE and GILLIES assented.

THE COURT then adhered on the merits; but altered as to expenses, and allowed them to Drummond's trustees and Lang.

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to vest the Ropery Company fund in Mr. Sibbald's trustees. Their general conveyance, having the effect of a licence to pursue, entitled them to proceed with the arbitration, and with the actions, the object of both being merely to ascertain whether the subject belonged to the deceased, or to John Sibbald and Co. Still, however, after succeeding in the submission, or in the actions, a confirmation was necessary to vest them with the right, in the same manner as it would have been necessary to an executor suing under a licence, even after obtaining decree in his favour.

"As to the Leith Bank shares, the Lord Ordinary sees no evidence of possession previous to confirmation. The trustees had a cash-account with the Bank, on which they operated, and it may have been granted to them in the view of the shares being a security; but the operations on such an account can never be held as possession of the shares,—the dividends, indeed, arising from which, were not placed to the credit of the trustees, but of Mr. Sibbald. If the arrestments of Colonel Henderson's trustees, both regarding this and the Ropery Company fund, had not been liable to the objection of these funds not having been vested in Mr. Sibbald's trustees, it is at least very questionable if they would not have been ineffectual from another cause. The persons in whose hands they are used are designed managers of the respective companies; but what is arrested, is not all debts due by the company, but all debts due by him, the manager. Had the arrestment been used in the hands of A. B. as manager, then it would have appeared that it was in his character of manager, and as acting for the company, that he was called upon to retain, and the debts due by him might have been held to be debts due in this capacity. But the simple addition of the term manager for the company does not necessarily show that the diligence was used against him in that character. It may have been very naturally added as a designation to point out the individual; and had any of these gentlemen happened to be individually debtors to Mr. Sibbald's trustees, the arrestments would have been quite effectual for attaching such debt.

"The arrestment used by Colonel Henderson's trustees, in the hands of Sibbalds Brothers does not appear to be effectual,—the debt being due by a company bearing a different firm, Sibbalds Brothers and Co. Nor does the mistake seem to be remedied by the circumstance that the execution bears that arrestment was laid in the hands of John Sibbald and William Sibbald, the partners of that company, because the company is still that of Sibbalds Brothers, while the proper debtor is Sibbalds Brothers and Co."

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Henderson's Trustees and Others.

Ewing &c. v. M'Gavin.

Authorities of Henderson's Trustees. — 3. Ersk. 6. 11; 3. Bank. 1. 49; Riddell, Jan. 21. 1681, (2790); Hume, Feb. 1688, (2790); Crawford, July 20. 1732, (2791.)

Authorities of Lang and Others. — 3. Ersk. 9. 99; Forbes, June 30. 1705, (3890); Park, June 28. 1785, (14382); Arbuthnot, Nov. 27. 1789, (14383); 2. Bell, 90; Laing, July 8. 1741, (Elchies, v. Service Confirm. 9); Richardson, Feb. 19. 1794, (14377); Lennox, Nov. 26. 1784, (14381); Sloane Lawrie, July 27. 1779; Atkinson, Jan. 14. 1808, (Mor. App. v. Service and Confirm. No. 3); Carmichael, June 22. 1742, (2791); 2. Bell, 77; Dalrymple, June 23. 1762, (752); Donaldson, Jan. 18. 1709, (785); Campbell, Dec. 12. 1752, (742); Cuningham, Nov. 18. 1760, (748.)

PHIN and PITCAIRN, W. S.—J. FORMAN, W. S.—Agents.

No. 331.

W. EWING and Others, Pursuers and Claimants.—*D. F. Hope—Marshall.*

TRUSTEES of the PICTOU ACADEMY &c., Claimants.—*Monteith—A. C. Dick.*

W. M'GAVIN, Raiser and Defender.—*Skene—Rutherfurd.*

Donation—Repetition.—Circumstances in which it was found that the subscribers to a charitable fund were not entitled to withdraw the balance of their subscription from the committee originally appointed, or to apply it to a different purpose, upon the ground that the original charitable purpose was fulfilled.

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2D DIVISION.
Ld. Fullerton.
T.

SEVERE loss having been occasioned, in 1825, by fires at Miramichi in New Brunswick, public meetings were held in Glasgow, and subscriptions set on foot for relief of the sufferers. A committee, consisting of Ewing and others, was appointed to raise the necessary funds; and a subscription-paper having been made out, by which the subscribers agreed to pay the sums affixed to their respective names in aid of the sufferers by the fire, a considerable fund was obtained. Of this fund M'Gavin, agent at Glasgow for the British Linen Company Bank, was appointed treasurer by the committee, who also nominated eight persons resident in New Brunswick to superintend the distribution, and with power to draw for funds on the treasurer in Glasgow. These persons drew to the extent of £500, which was applied by them to the purposes of the subscription. There still remained in the treasurer's hands a balance of upwards of £600; but no further drafts were made by the committee in New Brunswick. Applications were, however, made to the committee in Glasgow in the year 1829, signed by the public authorities, and also by Mr. Thomson, clergyman at Miramichi, with a view to contradict statements circulated here that there was no distress still subsisting attributable to the fires, and asserting that great distress, occasioned by that calamity, still subsisted. The committee were desirous of appropriating the balance to the original object of the subscriptions; but many of the subscribers were of opinion that the original purpose of the subscriptions had been fulfilled, and that they were at liberty to dispose of the balance in the treasurer's hands as they thought proper. Various charitable purposes abroad were proposed by them, and in particular it was suggested that the "Pictou Academical Institution"

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was a proper object for the disposal of the fund. Several subscribers accordingly granted an assignation of their unappropriated subscriptions to the trustees of that institution. Thereafter Ewing and others, the members of the committee, raised an action of count and reckoning against M'Gavin, who brought a multiplepoinding, in which claims were given in for the committee on the one hand, and on the other for the Pictou Academy Trustees, and certain individual subscribers, who contended that in the circumstances they were now entitled to appropriate what remained of their subscriptions to such other purpose as they deemed expedient.

The Lord Ordinary, "in the count and reckoning, decerned against M'Gavin for the balance in his hands, and in the multiplepoinding preferred the committee, adding the subjoined note." *

The Court adhered.

Lord Justice-Clerk.—I have no difficulty in this case. The Lord Ordinary has decided it upon proper principles of law. The benevolent purpose of this subscription is much to the honour of Glasgow, and certainly extended in the broadest terms to every species of calamity arising from this fire. Of the extent and present existence of that calamity it is impossible to entertain a doubt, after the application and information to the committee, signed by Mr. Thomson and others, and for the very purpose of removing misrepresentation. Then the question just comes to be as to the right of these subscribers to reclaim their subscriptions, and I cannot hesitate in agreeing with the Lord Ordinary. They say, indeed, that the money is not to return to their own pocket, but to go to the Pictou Academy; they wish, however, to alter the object of this charitable fund entirely.

The other Judges concurred.

W., A. G., and R. Ellis, W. S.—J. Pattison, W. S.—Agents.

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* "Note.—The action of count, reckoning, and payment, is brought by the committee, or a majority of the committee, appointed to receive and superintend the application of the subscriptions in aid of the sufferers by the fires in Miramichi. It concludes against Mr. M'Gavin, the secretary and treasurer appointed by that committee, for the balance of the subscription in his hands. The action of multiplepoinding was raised by Mr. M'Gavin, in consequence, it is said, of the pretensions of several of the subscribers, or the assignees of these subscribers, to get back their subscriptions, on the ground that the object of the subscription had been fully accomplished. The claimants in the multiplepoinding are, on the one hand, the pursuers of the action of count and reckoning,—and, on the other, the trustees of the Academy at Pictou, who hold assignations from several of the original subscribers.

"The Lord Ordinary thinks, that when subscriptions are made for a charitable or any other legitimate purpose, the committee appointed to receive and apply these subscriptions must be considered in some measure trustees for the accomplishment of that purpose, with large discretionary powers in the selection of the individuals objects included in it; and he holds it to be quite clear, therefore, that subscribers are not entitled, after payment to the committee, to retract their subscriptions as a matter of right. On the other hand, it is possible that cases may occur in which there is such clear and absolute evidence of the non-existence of any objects falling under the scope

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May 21. 1831. Campbell &c. v. Lord John Campbell.

J. H. G. CAMPBELL and TUTOR AD LITEM, Petitioners.—*Jameson.*
LORD JOHN CAMPBELL, Respondent.—*D. F. Hope.*

Entail—5. Geo. IV. c. 87.—Clause in the Aberdeen Act, authorizing proprietors of entailed estates to grant provisions &c. in a certain proportion to the free yearly rent, "as the same may happen to be at the death of the granter," interpreted to mean the year current at the death of the granter.

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2D DIVISION. Ld. Moncreiff. F.

BY the 5th Geo. IV. c. 87, commonly called the Aberdeen Act, heirs-female in possession of entailed estates are empowered to infeft their husbands in a liferent provision not exceeding one-half of the free yearly rent, "all as the same may happen to be at the death of the granter." Under the authority of this act, the late Lady John Campbell, proprietrix of the entailed estate of Longniddry, made a provision in favour of her husband, Lord John Campbell, in addition to a former provision in their contract of marriage executed in virtue of powers contained in the entail. Lady John Campbell died on the 22d of January 1828. The amount of both provisions exceeded one-half of what, in any view, could be considered the free yearly value; and it became necessary to restrict it under the regulations in the statute to that effect. The rent of Longniddry being a grain rent, and the price having varied considerably in the years 1827 and 1828, it was of importance to determine by which year's rental the provisions should be regulated. In order to have the amount determined, the eldest son of the marriage, and heir of entail, John Henry Glassell Campbell, presented a petition to the Court, founded on the statute, praying that the provision in question should be fixed at a sum amounting to "one-half of the free rental for

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of the subscription, as to warrant a demand on the part of the subscribers for a division of any balance remaining unapplied in the hands of the committee. But the present is certainly not such a case. In the subscription-papers, the contributions were made 'in aid of the sufferers by the late fires in the province of New Brunswick;' and nobody can well doubt, upon considering the nature and consequences of such a calamity, that, however large the contributions in other quarters may have been, there must still be cases of suffering and distress fairly falling within the scope of the subscription, and the limits of the discretionary power vested in the committee; and if any confirmation of this were necessary, it is to be found in the paper signed by the High Sheriff and various other respectable persons in the colony. In these circumstances, whatever right individual subscribers may have to inquire into the objects to which the committee proposes to apply the balance, and to object if these objects are truly foreign to the proper objects of the subscription, it is clear they cannot interfere between the committee and the treasurer appointed by that committee, upon the general allegation, and the offer to go to a jury on the point, that the whole distress occasioned by the fires at Miramichi had been relieved. But that is the only question here; and the Lord Ordinary thinks it must be decided in favour of the committee merely demanding the balance of the subscriptions from the party appointed by themselves to hold those subscriptions, until they found it convenient to apply them."

crop and year 1827; or fixing such other amount as shall appear to your Lordships to be the yearly sum to which the said Lord John Campbell is entitled." Lord John having sisted himself as a party, their Lordships remitted to the junior Lord Ordinary, after appointing a tutor ad litem to the petitioner, who was a pupil. In his answers to the petition, Lord John maintained that the amount of his provisions ought to be regulated by the rental for crop 1828, and not by the rental for the preceding crop.

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Campbell &c. v. Lord John Campbell.

Millar v. Mills &c.

The Lord Ordinary made avizandum to the Court, and stated in a note, that "the question which the Court have to decide is, By what year's rent, whether 1827 or 1828, is the rental to be estimated? The Lord Ordinary is of opinion that it ought to be estimated by the rent of 1828, that having been the year current at the time of Lady John Campbell's death, on the 22d of January 1828, and the Act of Parliament providing that the provision shall not exceed one-third of the free yearly rent, as the same may happen to be at the death of the granter."

The Court ordered minutes, upon advising which, their Lordships found in conformity to the suggestion of the Lord Ordinary.

J. Kermack, W. S.—A. Montpenny, W. S.—Agents.

Robert Millar, Pursuer.—*Wilson.*
W. Mills and W. Vary, Defenders.—

No. 333.

Wrongous Imprisonment—Process—Amendment of Libel.—A summons founded exclusively on the act 1701 cannot support a conclusion for damages at common law, independently of the penalties imposed by the act; but an amendment of the libel allowed.

Millar brought an action of wrongous imprisonment against Mills and Vary, libelling solely on the act 1701, and concluding for damages at common law, and for the pains imposed by the statute. The defenders pleaded, that as the summons was laid exclusively on the statute, it could not support a conclusion for damages at common law. The Lord Ordinary having sustained this defence, and dismissed the summons so far as it concluded for damages, the defenders reclaimed.

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The Court, while they concurred in holding that the summons, as it stood, could not support the conclusion for damages, remitted to his Lordship to allow an amendment of the libel, on payment of such expenses as might be deemed reasonable.

J. Pattison Jun. W. S.—Hunter and Whitehead, W. S.—Agents.

No. 334.

May 21. 1831. Mackintosh v. Macdonald.

DONALD MACKINTOSH, W. S., Raiser.—*Thomson.*
COLL MACDONALD, W. S., Objector.—*Macdonald.*

Compensation — Retention. — The country agent in a sequestration having employed a writer in Edinburgh to conduct the proceedings there; and the latter having debited the former with the expenses; and on the sequestration being wound up on a composition-contract, the bond for these expenses having been taken to the country agent, as the sole creditor, with the knowledge of the Edinburgh agent—Held that the claim was transferred to the country agent, so as not to afford a ground of retention or compensation on the part of the Edinburgh agent against a creditor of the bankrupt.

May 21. 1831.

2D DIVISION. Ld. Mackenzie. F.

DONALD MACKINTOSH, W. S., held an heritable bond, dated 6th May 1815, for £300, over property belonging to Alexander Dallas, saddler in Inverness. Dallas's estate having been thereafter sequestrated, Campbell Mackintosh, writer in Inverness, father of Donald, acted as agent; and in that capacity employed his son to conduct the sequestration proceedings in Edinburgh. These were brought to a close by a discharge on a composition-contract; and Donald Mackintosh then transmitted his account to his father, with this docquet attached:—"Edinburgh, 1st January 1817.—The amount placed to the debit of Mr. C. Mackintosh." (Signed) "Don^{d}. Mackintosh." His father, on the other hand, added the amount to his own account against the estate,—the item being thus entered:—"Paid Mr. Donald Mackintosh his account in this business." The bond by Dallas and his cautioners, for payment of the expenses of the sequestration, was accordingly granted to Campbell Mackintosh, who thereafter obtained decree against these parties for the full amount, including his son's account; and diligence was done on this decree, but without effecting payment. In these proceedings, Donald acted as his father's agent. Some time thereafter, in virtue of powers of sale contained in the heritable bond, Donald sold the property for £600. Mr. Macdonald, W. S., a creditor of Dallas, then used arrestments in Donald's hands; and a process of multiplepoinding was subsequently brought in his name. In this process he claimed deduction of the amount of the business-accounts incurred to him in the sequestration, and in the subsequent proceedings against Dallas and his cautioners.

To this it was objected by Macdonald, 1. That the expenses of the sequestration had been extinguished so far as Donald was concerned, and transferred to his father by the arrangement between them, so as to be incapable of forming a ground of retention or compensation on his part; and, 2. That as to the expenses of the other proceedings, his father was his sole employer, so that no claim thereby arose against Dallas.

The Lord Ordinary sustained the objections, adding the subjoined note.* Donald Mackintosh reclaimed; and the Court, considering that a

* "NOTE.—What the Lord Ordinary goes on is this, that the expenses of the sequestration had ceased to be due to Mr. Mackintosh junior. He had, as a

plea as to the efficacy of Macdonald's arrestments, so as to give him a title to object, had not been decided, remitted to the Lord Ordinary to hear parties thereon, (ante, 85.) His Lordship, however, being satisfied that the arrestment was effectual, repeated his former interlocutor; and the Court adhered, under a reservation as to certain other objections not adverted to in the Lord Ordinary's note.

D. MACKINTOSH, W. S.—COLL MACDONALD, W. S.—Agents.

WILLIAM ROBISON, Pursuer.—*Skene—Monro.*
ADAM CHARLES, Defender.—*Rutherfurd—G. G. Bell.*

Property—Servitude.—A party having acquired land from one to whom it was feued with a servitude of making, on an adjacent piece of ground, a water-cut from an adjoining river, and which had been exercised for a considerable time, though latterly disused—Circumstances held to be insufficient to instruct that the servitude had been abandoned.

THE river Cowie in Kincardineshire, near the bridge of Cowie, flows [illegible] from west to east, and, after continuing in that course for a short way, makes a sweep, and then proceeds from north to south. The ground between the bridge and that sweep belonged to Allardyce of [illegible], and in 1804, those immediately adjacent to the river, and [illegible] waste, or formed a beach, which in floods was covered with water. In that year Allardyce disponed to Robert and William Selbys a piece of ground (afterwards subdivided) extending from a point near the bridge to the sweep of the river, and marked on a plan B. C., leaving a part of the water or beach ground, marked A. and D., intervening between it and the river. The disposition was granted "with liberty and privilege to make in, by a lead opposite to said piece of ground [illegible] said water of Cowie, for the purpose of driving [illegible] only." In virtue of this deed the Selbys were infeft.

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letter, placed these to the debit of his father, who was the [illegible] the case, and so immediately liable to him for them. It [illegible] that there was, if not an express, yet at least an implied [illegible] derstood assignation of his right to claim these expenses from [illegible] Accordingly Mr. Mackintosh senior, when the [illegible] tion, actually stated these expenses as paid by him [illegible] due to him; and he, and he alone, obtained a [illegible] due to himself, after which the sequestration was [illegible] the full knowledge and approbation of Mr. [illegible] Ordinary that, by these proceedings, the right [illegible] viously existed in Mr. Mackintosh junior, [illegible] guished, and therefore that it is not [illegible] compensation upon it; and this seems [illegible] debited [illegible] objected [illegible]

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May 24. 1831.
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v. Charles.

Adam Charles about the same time acquired from Allardyce the waste land marked A. which lay between the river and that part of Selbys' feu marked B. There still remained a piece of unappropriated waste or beach ground marked D., which was in part opposite to Selbys' land marked B. Soon after their respective acquisitions, Charles and the Selbys concurred in erecting a dam-dike across the river opposite to D.; and Selbys then cut a sluice through D., led the water into their property B, so as to propel a waulk-mill situated within it, and discharged the water into the river below the sweep through the part marked C. Charles in like manner introduced the water into the part purchased by him (A.), in order to work a waulk-mill which he built close to the river, and adjacent to the part of Selbys' property marked C.

The dam-dike having fallen down in 1814, Robert Selby (who had acquired the right of William) built a waulk-mill on that part of the property marked C. immediately adjacent to Charles's mill; so that, by forming at this part of the river a new dam-dike and sluice, the water was introduced into a lead which passed between and supplied both mills. These operations took place in 1815; and Robert Selby then removed the machinery from his old waulk-mill on B. No further use was at this time made of the former sluice cut through D, nor of the mill-lead introduced into B. Charles made considerable additions to his mill, and converted it into a spinning one. In 1820, Robert Selby sold to one Glegg his new mill, and the portion of his land marked C.; and in the disposition it was stipulated that the right of Charles to use the lead passing between the two adjacent mills should be reserved in his favour in any feu-right which Glegg might take from the superior. Glegg obtained a charter, and was infeft under that reservation.

About the year 1825, Charles purchased from Mr. Allardyce the piece of waste or beach ground D, (through which the former sluice had been cut,) and was infeft, without any servitude being expressed in the title. Thereafter the pursuer Mr. Robison acquired right to that part of the land marked B. As the part C. had been sold to Glegg, Mr. Robison could not discharge the water through that property, except by consent of Glegg. This Robison alleged he had arranged with Glegg, and he proceeded to open the old sluice passing through D., and to introduce the water from the river into the old lead running through B. Against this Charles having obtained an interdict from the Sheriff, Robison raised a declarator, libelling on his title and the former use of the sluice and lead, and concluding to have it found that he had right "to take in, by a lead opposite the said piece of ground, water from the said water of Cowie, for the purpose of driving or turning machinery only; and to make such leads or cuts through the beach, or piece of ground intervening between the said piece of ground and the water of Cowie, as may be necessary for the due enjoyment of the said right."

Charles pleaded in defence, 1. That Robison's author (Selby) had, by

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his acts and deeds, abandoned his right—that he had acquiesced in the new arrangements—had made provision accordingly in favour of the defender in the sale to Glegg—and that Robison, having purchased subsequent to the time when these arrangements were carried into effect, could not revive that right. 2. That it was now unavailing to him, and therefore he had no interest, because he could not discharge the water from his lands; and, 3. That the defender having got a feudal title, without any such servitude being imposed, he could not be burdened with it.

The pursuer answered, 1. That as he held a regular title with infeftment to the servitude, and it had been exercised with the knowledge of the defender, he was entitled to avail himself of it; and the circumstance of the defender's recent acquisition of D. from the same superior could not deprive the pursuer of the benefit of his privilege; and, 2. That the proceedings in 1815 did not infer even a personal obligation upon Selby to abstain from opening a lead opposite his feu whenever he chose; but, at any rate, the pursuer was a singular successor who could not be affected by them.

The Lord Ordinary "found that Robert and William Selby, the pursuer's authors, by the disposition produced, dated 7th September 1804, obtained right to the piece of ground marked B. on the plan in process, "with liberty and privilege to take in, by a lead opposite to said piece of ground, water from the said water of Cowie, for the purpose of driving and turning machinery;"—that the pursuer has now right to this subject by progress from the said Robert and William Selby;—that the defender has not adduced or offered evidence competent to prove that the pursuer or his authors abandoned the privilege of taking in and using the water in the manner and for the purpose mentioned in the disposition;—therefore decerned, and declared in terms of the libel, with expenses."

Charles reclaimed; but the Court, without hearing the counsel for the pursuer, adhered.

J. Burness, S. S. C.—Dennistoun and Christison, W. S.—Agents.

No. 336

James Runciman, Pursuer and Advocator.—*Keay—More.*

William Craigie, Defender and Respondent.—*Skene—Maitland.*

Arbitration.—Arbiters having issued notes of their opinions as to some of the points in a submission, and which they entitled "joint report and interim decree," but without pronouncing any regular decree; and having in their report devolved points of difference upon the oversman, who pronounced a decree limited to those points—Found,—1.—That the interim decree or report was not valid as a decree-arbitral.—2.—That the decree pronounced by the oversman, deciding only part of the matter referred, could not stand by itself.

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Runciman &c. v Craigie.

Craigie was tenant of Leith of Freefield. His lease expired at Whitsunday 1825, and the farm was let by Leith to Runciman, on a lease of nineteen years from that term. Disputes having arisen as to the state of the ground for the waygoing crop, a submission was entered into betwixt Leith and Runciman on the one part, and Craigie on the other, to two men of skill, and to an oversman in case of difference of opinion. After a good deal of procedure, the arbiters made out notes of their opinions, which were entitled "joint report and interim decree," signed before witnesses, but not stamped, and concluding with a clause devolving on the oversman the "determination of these points on which we have differed." Thereafter the oversman issued a decree-arbitral, in which he set forth the various findings which he understood the arbiters to have made "in their joint report above mentioned,"—and then proceeded to determine the points of difference only, and to pronounce his award, which was confined to these points.

Craigie, (in whose favour the determination of the arbiters was,) raised an action before the Sheriff of Aberdeenshire to enforce their award. The Sheriff having decerned in favour of Craigie, Runciman brought an advocation and a reduction of the proceedings under the submission. These processes being conjoined, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note:*—"Finds that the decreet-arbitral libelled, bearing to be pronounced by the oversman Andrew Youngson, decides only part of the matter referred, and cannot stand by itself;—that the other writing libelled, and called a report or interim decreet by the two original arbiters, Deuchar and Watt, is not valid as a decreet-arbitral of any kind, either in itself, or by virtue of the notice of it in the decreet of the oversman, or by virtue of any alleged acquiescence in, or acting upon the same as such decreet;—therefore, in the reduction, reduces, decerns, and declares in terms of the libel; and in the advocation, advocates the cause, assoilzies the defender, and decerns; but finds no expenses due to either party."

The Court unanimously adhered.

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* "Note.—The Lord Ordinary does not see any proceedings before the oversman that recognised the report as a final decreet-arbitral, actually given out, to any extent. The question whether, under a submission in this form, the original arbiters, agreeing in part, and differing in part, may give out a partial decreet-arbitral, and devolve the rest on the oversman, who may give out a supplementary one, does not seem to arise in this case; for the original arbiters never gave out any decreet, but only made a report or notes of their opinions; and the oversman, on the other hand, does not adopt that, and give decree in terms of it, but limits his decreet to the points on which the two original arbiters differed. The Lord Ordinary is not satisfied that the parties considered any thing to have been finally decided until the oversman should give his decreet; and at any rate, even if they had viewed the report as notes from which a decreet-arbitral was to be made out by the original arbiters, that would not be sufficient to convert it into such a decreet."

LORD JUSTICE-CLERK.—A complete decree-arbitral could not be made out of the whole of these proceedings put together.

The other Judges agreed.

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Runciman &c. v. Craigie.

Murray v. Johnston.

Advocates' Authorities.—Percy and Caldwell v. Maikle, Nov. 25. 1808, (F. C.); Short v. Habkin, July 3. 1711, (16867.)

JOHN TURNER, W. S.—JOHN JOPP, W. S.—Agents.

JAMES MURRAY, Pursuer.—*M'Neill.*
JOHN JOHNSTON, Defender.—*Keay*—*W. Bell.*

No. 337.

Trust—Expenses.—Circumstances in which a trustee was found liable, in the expenses of process and arrestment, to the pursuer of an action for payment of his legacy under the trust.

May 24. 1831.

2D DIVISION.
Ld. Mackenzie.
T.

MURRAY was entitled, under his uncle's trust-disposition and settlement, to a legacy of £300 sterling, declared not to be payable till Whitsunday 1828. The truster died in May 1823, and his heir at law raised an action of reduction of the trust-settlement against the trustee, who was the natural son of the truster, and particularly benefited under the deed. This action was compromised in the form of a contract betwixt the trustee and the heir at law, with the defender Johnston as his cautioner. By this contract, Murray's legacy of £300 sterling was guaranteed to him; and Johnston was infeft, as trustee, in the property on the 13th of January 1827, for the purpose of carrying the obligations of the contract into effect. Previous to Whitsunday 1828, (the period when his legacy was payable,) Murray made several ineffectual applications to Johnston, either to pay the legacy, or to give security for payment, or to exhibit a state of the affairs, and let him have such information as might enable him to ascertain whether his interest was duly attended to. Not having received any satisfaction from these applications, Murray raised the present action in May 1828, and used arrestments on the dependence. This summons was not called in Court till November 1828; and it appeared that Murray, both before and after calling, had expressed anxiety to settle the matter extrajudicially, and not to press for decree; but Johnston refused to pay the expense of the summons and arrestment.

The Lord Ordinary decerned for payment of the legacy, in terms of the libel; and this interlocutor was not reclaimed against. Having taken the question of the expense of the process and arrestment to avizandum, his Lordship thereafter also decerned against the defender; and the Court unanimously adhered.

M'LEAN and GIFFEN, W. S.—J. JOHNSTON, S. S. C.—Agents.

No. 338.

May 26. 1831.
1st Division.
Ld. Corehouse.
S.

Craig v.
D. of Hamilton.

Innes v.
D. of Gordon.

REV. JAMES CRAIG, Advocator.—*J. Paterson.*
DUKE of HAMILTON, Respondent.—*Ld. Adv. Jeffrey—Jardine.*

Relief—Reparation.—Special case, in which the Duke of Hamilton, as defender in a process of relief from an action for damages, was assoilzied in respect of a discharge previously granted by the pursuer to the defender, in reference to the transaction out of which the claim of damages arose; and also in respect that the pursuer was, pendente processu, assoilzied from the action of damages.

R. NIVEN, W. S.—R. RUTHERFORD, W. S.—Agents.

No. 339.

MRS. EUPHEMIA INNES, Pursuer.—*Ld. Adv. Jeffrey—Skene.*
DUKE of GORDON, Defender.—*Lumsden.*

Res Judicata—Entail—Homologation—Process.—1.—A judgment dismissing a claim for ameliorations, in a question with an heir of entail in possession, held to form res judicata in a question with a succeeding heir.—2.—A transaction, by which a substitute heir sold his eventual interest under a lease to the tenant, but which the tenant afterwards renounced, held to be no bar to the heir, after his succession, pleading res judicata.—3.—Conclusions against an heir of entail for ameliorations generally, held to include a claim for them to the extent of a power under the entail to contract debt, though not specially founded on in the summons.

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2d Division.
Ld. Mackenzie.

THIS was an action against the present Duke of Gordon, similar to that brought by the representative of Mr. Innes against the late Duke for ameliorations made on the entailed estate of Durris during the subsistence of his lease afterwards reduced, already fully reported ante, VI. 279, (which see.) In the present action, two new points arose. The first was a plea founded on the circumstance that in the entail of Durris there had been reserved a power to burden with debt to the extent of 20,000 merks; and that the Earl of Peterborough, granter of the lease, was so far proprietor of the estate in fee-simple, and the estate liable for his debt. But this fact was not specially founded on in the summons, in which merely certain large sums were claimed for ameliorations generally. On the other hand, it was stated that a bond to the amount of 20,000 merks had been already granted by the Earl of Peterborough over the estate; but the bond was not produced.

The second point was, that the present Duke had, in 1797, when he was Marquis of Huntly and a substitute heir of entail, entered into a transaction with Innes, whereby, in consideration of a certain price, he sold to the latter his eventual interest in the estate, and prospective benefit under the lease; and that the late Duke of Gordon had repurchased the same from Innes. This, it was alleged, was an act of homologation which put Innes in bona fide in the question of ameliorations with the present Duke, and rendered the latter liable.

The Lord Ordinary assoilzied the defender, adding the note below.* Mrs. Innes having reclaimed, it was maintained for the Duke, that besides the fact that the power of burdening had been exhausted by the bond granted by Lord Peterborough, this special plea was not competent under the general conclusions of the summons. The Court, however, while they adhered as to the other points, remitted to the Lord Ordinary to hear parties more fully upon this point.

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Innes v. D. of Gordon.

Stove v. Colvin &c.

Lord Justice-Clerk.—With regard to the general question of ameliorations, right or wrong, that has been decided here, and affirmed in the House of Lords, and is now res judicata. But the question raised as to the 20,000 merks is not res judicata; and the first consideration is, whether it be a competent averment under this summons? Now I think it is. The summons is broad and general, and clearly comprehends such a plea as this, upon the power of burdening the estate with debt to the extent of 20,000 merks. If the Duke defends himself generally upon the strict nature of the entail, is it not competent to this lady to reply upon this clause of it? I would therefore remit this point to the Lord Ordinary for further investigation.

The other Judges concurred.

Dallas and Innes, W. S.—A. Scot, W. S.—Agents.

Obadiah Stove, Advocator.—*Neaves.*
Gavin Colvin and Others, Respondents.—*J. W. Dickson.*

No. 340.

Spuilzie—Fishing—Reparation—Expenses.—A party of the inhabitants of one of the Shetland Isles having discovered a shoal of small whales off the island, and succeeded in driving them into a bay, where they were joined by another party who assisted in killing and taking them, and thereby, according to usage, became entitled to a share of the blubber; and this second party having attended at the flinching to receive their share; but having then been prevented and ordered off by the factor of the proprietor of the ground, who was entitled to one-half of the fish—Held,—1.—That he had, as guilty of a spuilzie, become liable to them for the loss thereby suffered.—2.—That the second party, though entitled to a share, should not draw the same share with those who discovered and drove in the fish;—and,—3.—That it is no ground for not awarding expenses against an unsuccessful party in an advocation that an error calculi was corrected, which, if noticed, might have been corrected in the Inferior Court.

Among the Shetland Islands, it occasionally happens that a shoal of small whales, called 'ca'ing whales,' are discovered near the land, and are driven on shore by the inhabitants, and killed. According to the usage of the islands, one-half of the blubber of the whales so caught belongs to the proprietor on whose ground they have been driven ashore,

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2d Division. Ld. Mackenzie. R.

* "Note.—The plea of res judicata seems applicable to all the pursuer's media concludendi, except, 1. The power under the entail to burden with debt to the amount of 20,000 merks, which seems to the Lord Ordinary to have been exhausted, for there is no sufficient denial of the defender's averments on that subject; 2. The transaction with the present Duke when an heir-substitute, in which the Lord Ordinary can see no solidity."

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and the other half to the parties who have been engaged in capturing them. In the month of September 1829, a number of such whales were discovered off the island of Yell by the inhabitants of the southern part of the island, a party of whom set off in boats, and succeeded in driving them towards a voe or bay called Hamnavoe. When they had got them to a shoal in the centre of the bay, about 60 fathoms from high water mark, and with deep water interposed between and the shore, a number of men from the western part of Yell (including the respondents Colvin and others) came up in boats, and joined the party in killing the whales, and dragging them to shore. The West Yell men were equally active in this part of the business as the South Yell men, and were allowed to co-operate without objection, although one of the South Yell men had directed his comrades to mark the boats that came up after the whales were driven into the bay, that they might have no share of the spoil. The whales having been dragged on shore, a guard was set over them, and the captors separated on the understanding that the flinching and distribution of the blubber was to take place next morning. Accordingly both the South and the West Yell men attended for that purpose next morning; but that being the sacramental fast-day in the parish, it was agreed to postpone the operation till Tuesday. On Tuesday morning the parties again attended, but delayed commencing the flinching till the advocator Stove, one of the captors, and factor for Mr. Bruce of Symbister, who was proprietor of the ground, should arrive. On his arrival, he read aloud a letter from Mr. Bruce, the import of which was understood to be, that the West Yell men were to have no share of the blubber; and he then ordered them off the ground, telling them he would mark those who remained. Most of the West Yell men were tenants of Mr. Bruce, and they all obeyed the order. The flinching then proceeded, and one-half of the blubber having been set apart for Mr. Bruce, and taken charge of by Stove, the remaining, or salver's half, was, under his superintendence, divided among the South Yell men, certain individuals of whom had not given any greater, or even so much assistance as the West Yell men. Thereupon Colvin and others of the West Yell men raised an action of spuilzie and damages before the Sheriff of Orkney against Stove, concluding for their share of the salver's half, as having been illegally deprived thereof by his authority and interference. The Sheriff allowed a proof, which established the facts as above narrated; and also that, by the practice of the islands, parties in the situation of the West Yell men were entitled to a share proportioned to their labour.

The Sheriff thereupon pronounced an interlocutor on the 6th of August 1823, which, after finding the facts as to the capture, proceeded thus:—"Finds that it is proved that the pursuers were deprived of their share of the whales in question by the direction and influence of the defender, and therefore that he is answerable to them for whatever loss they have thereby sustained;—therefore, on the whole, finds the defender liable to

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the pursuers, and allows an account thereof to be given in," &c. He subsequently fixed the amount of damages due at £24. 10s., which was calculated at the same rate with the value of the shares allotted to the South Yell men, without, however, taking into consideration that these shares would necessarily have been diminished by the admission of the West Yell men to participate with them.

Stove, without applying to the Sheriff to have this error calculi corrected, brought an advocation, in which, besides a plea as to the Sheriff having no jurisdiction, afterwards abandoned, and an argument on the proof to which it is unnecessary to advert, he contended—

1. That whales, being royal fish, belonged to the Crown; and whatever claim as of salvage the captors might have, it could not be of the nature of property in the fish, and therefore there could be no foundation for an action of spuilzie.

2. That the persons among whom the salver's half had been divided ought to have been the parties called, and that the action was incompetently laid against Stove alone; and,

3. That, at all events, the West Yell men were not entitled to an equal share with those who had discovered the fish, as well as assisted in taking them; and that, even if they were, the amount awarded was beyond their proportion.

To this it was answered—

1. The right of the Crown is jus tertii as to Stove, and cannot be founded on by him; and, according to the practice of the country, the captors have a right to a share of the fish themselves, and not merely a claim for remuneration or salvage.

2. Stove having been the person who prevented the West Yell men from getting their share, is liable to them for the loss thereby suffered; and,

3. Although there is undoubtedly an error calculi which falls to be corrected, yet the West Yell men were, under the circumstances, entitled to an equal share with the others, as without their assistance the fish probably would not have been secured.

The Lord Ordinary pronounced this interlocutor:—"Of consent, repels the first reason of advocation, being the objection to the jurisdiction of the Sheriff; advocates the cause, finds that the advocator is excluded, by the objection of jus tertii, from pleading the right of the Crown, or any other party having right in the whales in question, as prejudicial to the claim of the respondents in this cause, no such party appearing to state any such right;—finds in terms of the findings in the interlocutor of the Sheriff Substitute, of date the 6th day of August 1823; but that, in estimating the amount of damage due to the respondents, there appears to have been an error calculi in not attending to the diminution in the amount of the shares which must arise from admitting the respondents, as an additional number, into the partition; and also that a deduction

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ought to be made from the shares of the respondents, as not having been concerned in the original discovery and driving of the whales; and, on the whole, modifies the damage due to the respondents to £15 sterling, with interest since the 14th day of September 1819, and decerns;—finds the advocator liable to the respondents in expenses," &c.

Stove reclaimed, and, besides insisting on the pleas on the merits, maintained, as to expenses, that having obtained an alteration of the Sheriff's judgment to a certain extent, he ought not to be subjected in full expenses. To this it was answered, that as to the amount awarded, he might have had the error corrected without an advocation.

The Court refused his reclaiming note.

Lord Glenlee.—The proceeding here complained of was, strictly speaking, a spuilzie. The whales caught became the absolute property pro indiviso of the whole. If one co-proprietor carries away what belongs to all, that is a spuilzie; and any person who advises and takes an active part in such proceeding, is liable for the whole loss occasioned by the illegal act. Now this gentleman took an active part, both in his individual capacity of salver, and as acting for the proprietor, in the illegal act of appropriating the whole to a certain portion only of those having the joint right, and therefore he is liable.

The other Judges concurred, with the exception of Lord Cringletie, who doubted if Stove's interference was sufficiently made out by legal evidence.

W. Duthie, W. S.—J. Smith, S. S. C. Agents.

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Kenneth Fraser, Pursuer.—*D. F. Hope—Boswell.*
John Andrew, Defender.—*Keay.*

May 27. 1831.

1st Division.
Lord Newton.
H.

Expenses.—Sequel of the case reported ante, p. 345. Under the remit of the Court, the Lord Ordinary found neither party entitled to expenses. Fraser reclaimed, and the Court allowed him expenses, which they modified to £50,—the account being stated generally at £150 to £200.

D. Clyne, S. S. C.—G. L. Sinclair, W. S.—Agents.

JAMES CULLEN, Pursuer.—*D. F. Hope—A. Wood.*
ANTHONY FONTAINE, Defender.—*Keay.*

No. 342.

May 27. 1831.
Cullen v. Fontaine.

Bankrupt—Expenses—Arbitration.—A trustee on a sequestrated estate having sisted himself as a pursuer in place of the bankrupt, and agreed to refer the question judicially, with a stipulation that the successful party "should be found entitled to the expenses of process incurred by him;" and the referee having assoilzied the defender, and found him entitled to expenses—Held (waiving the general question), in terms of the reference, that the trustee was liable in full payment of the expenses incurred prior to the sequestration; and that the defender was not bound to rank on the estate for and draw merely a dividend on the amount.

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1ST DIVISION.
Ld. Corehouse.
H.

CLIREHUGH raised an action against Fontaine, and, after the record was closed, Clirehugh's estates were sequestrated, and Cullen, the trustee, sisted himself as a party. Cullen and Fontaine then entered into a judicial minute of reference, by which they submitted to an arbiter the "whole points in dispute in the present action, with power to the said arbiter to do every thing in the premises, as fully and freely in all respects as the Court could have done, and upon the express condition that the party in whose favour the merits of the case shall be decided by the said arbiter, shall be found entitled to the expenses of process incurred by him."

The arbiter pronounced this judgment:—"The referee having considered the record &c., is humbly of opinion, upon the grounds communicated in detail to the parties, that the defender ought to be assoilzied from the action, and found entitled to expenses." The Lord Ordinary then interponed his authority to the report, "and in terms thereof sustained the defences, assoilzied, &c., found the defender entitled to expenses," &c. His Lordship afterwards decerned against Cullen, the trustee, for the whole expenses of process, as well prior to the sequestration of Clirehugh, as subsequent thereto.

Cullen reclaimed, and pleaded that as the reference gave no further power to the referee than belonged to the Court, his liability for the previous expenses was in no respect increased by the terms of the reference, and the defender could only rank on the estate for a dividend on the expenses incurred prior to the time when the trustee sisted himself.

Fontaine answered, that as a trustee who sists himself to a depending process takes the full benefit of all the prior proceedings in it, he is liable for them as if he had been a party from the first; and as the words of the minute expressly gave to the referee the power of awarding the whole expenses, without reserve, against either party, the interlocutor was well founded.

LORD GILLIES intimated a clear opinion that the terms of the reference were so express in empowering the arbiter to award expenses unreservedly against either party, that there was no room for deciding the question whether the Court would have had power to subject the trustee in full payment of the expenses incurred prior to the sequestration. In regard to that question,

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his Lordship was disposed to consider that the party to whom they were awarded was entitled only to rank for and draw a dividend on their amount.

Lord President was for adhering to the interlocutor, but inclined to differ from Lord Gillies regarding the liability of a trustee for the expenses prior to sequestration. His Lordship conceived that as the trustee, by sisting himself as a party, got the full benefit of the previous proceedings, he was liable in full payment of them, as much as of the subsequent proceedings. He did not see any ground for distinction in this respect between the contract of litiscontestation, and any other contract which was current at the date of the bankruptcy, and which was adopted by the trustee, who became liable to the prestations arising under it, by the same act which entitled him to the rights which it conferred.

D. F. Hope for the Trustee.—The general question of a trustee's liability, apart from the specialty of the terms of reference, is a matter of such magnitude, that if the Court entertain doubts regarding it, and are clear as to the specialty, perhaps they will not think it necessary to deliver any judgment or opinion, except that of adherence to the interlocutor.

Their Lordships, on this suggestion, and without further observation, adhered.

Defender's Authority.—Scott, Dec. 1. 1826, (ante, V. 172.)

D. Smith, W. S.—Stewart and M'Intosh,—Agents.

No. 343. J. Young and T. Macfarlane, Pursuers.—*D. F. Hope—Lumsden.*
R. Marshall, Defender.—*A. M'Neill.*

Passive Title.—Circumstances not inferring a passive title.

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1st Division.
Ld. Moncreiff.
S.

This was a branch of the case ante, VI. 854. Bennet having died, leaving a trust-deed in favour of Young, the latter, along with the other pursuer Macfarlane, raised a supplementary action of count and reckoning against Marshall, as representing the late Robert Boyd, one of Reid's trustees, (against whom the original action was raised,) alleging that Marshall represented Boyd. In defence, Marshall denied this allegation, and stated that, on Boyd's death, his widow and brothers (the only parties interested in his succession) arranged that the widow should confirm as executrix qua relict, and grant a factory to him for winding up the estate; that these steps had been adopted, and he had accounted to his constituents for his intromissions as factor. The pursuers did not deny these allegations, nor condescend on any other acts of intromission than those under the factory.

The Lord Ordinary assoilzied the defender with expenses, "in respect it clearly appears that he does not represent the deceased on any of the passive titles;" and the Court, without observation, adhered.

J. Young, S. S. C.—C. Fisher, Agents.

EBENEZER BEATTIE, Pursuer and Advocator.—*Jameson—A. M'Neill.* No. 344.
LORD NAPIER and Others, Defenders and Respondents.—*D. F. Hope —G. G. Bell.*

May 27. 1831. Beattie v. Lord Napier &c.

Property—Accretion—Retention.—A private school-house having been built by heritors, aided by a parish subscription, on the estate of one of their number, who made no objection, and was a subscriber; but no title having been got from him, and he having afterwards sold his estate—Held,—1.—That the purchaser was entitled to the property of the house, and to decree of removing against the tenant;—and,—2.—That the heritors could not retain possession until repaid the expense of building the house.

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1ST DIVISION. Ld. Corehouse. S.

ABOUT the year 1820, the heritors and parishioners of the parish of Ettrick agreed to erect by private subscription a house to be used as a sewing-school and boarding-house, under the care of a schoolmistress. Among these subscribers was Mr. Robertson, the proprietor of Ettrick-hall, and the house was built on his property, and possession taken. In 1825, he sold Ettrick-hall to Mr. Ebenezer Beattie; and, in 1829, Mr. Beattie, (who had been born in the parish, but had not resided there for many years previously,) raised an action of removing, as at Whitsunday next, against the schoolmistress, by whom the house was tenanted. Defences were lodged by her, and by Lord Napier and others as heritors of the parish, who pleaded, inter alia, a possessory judgment. Beattie, in December of the same year, raised a summons of declarator, concluding to have it found that the house being built on his property, and formed part of the subjects conveyed to him by his titles, belonged to him; for decree of removing against the schoolmistress, and the heritors who had appeared in the other process; and for rent from the term of Whitsunday then last, being the term specified in that summons of removing. Thereafter the process of removing was advocated, and conjoined with the declarator.

The defenders did not dispute that the pursuer was entitled to decree of declarator and removing; but they contended that under the circumstances, and more especially as his author was one of the subscribers, and had not objected to the erection, and the pursuer must have known that it did not form part of the estate, and he had not paid any price for the house, he was bound to pay them the original price or present value of the house; and that he could have no claim for rent prior to the date of the decree in the declarator.

Beattie denied that he had any knowledge as to the circumstances under which the school was erected and maintained; and contended that, having bought the estate, the house became his; that he was not affected by any personal exception which might have attached to his author; that he was entitled, on seeing the house on the estate, to believe that it was part of the property; and the price paid for the estate would have been so much the less, had not the house been there.

The Lord Ordinary, "in the advocation, advocated the cause; and, in the conjoined actions, found and declared that the house mentioned in

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the summons, now used as a sewing-school, with the ground on which it is built, and pertinents, pertains and belongs to the pursuer in virtue of his titles produced; and decerned and ordained the defenders, their families, servants, cottars, and dependents, to flitt and remove from the same at the term of Whitsunday next, and to cede possession to the pursuer; —found that the defenders are not entitled to retain possession of those subjects until they are repaid the sums expended in building the house in question;—found no expenses, either in this or in the Inferior Court, due to either party, &c.; reserving to the subscribers to the erection of the house or sewing-school, or those in their right, to insist against the pursuer for the recovery of the money bonâ fide expended by them in erecting the building, and to the pursuer his defence against that claim, as accords."*

Both parties reclaimed,—the defenders on the merits, and the pursuer as to rent and expenses.

The Court refused both notes.

Lord Balgray.—Inædificatum solo cedit solo is the law of Scotland. The house, therefore, belongs to the pursuer. But when a man builds inadvertently on another's ground, especially when the conduct of that other conduces to the mistake, the proprietor of the soil cannot order the party to remove without making remuneration to him. Here the author of Mr. Beattie was proprietor of the ground when the building took place. It is offered to be proved that he subscribed towards its erection for a public purpose, and that he never intimated any intention of claiming it as his own. On the contrary, he remains proprietor for some years afterwards, without making any claim of property in the house; and then he sells his estate to the present pursuer, who, after possessing for about four years, brings this removing and declarator. In these circumstances, I cannot hold him entitled to ask for a decree of removal, without first indemnifying the subscribers. I conceive the defenders have a right to appear and make that claim, each in proportion to the extent of his own subscription, as soon as he proves its amount. I do not dissent from the Lord Ordinary as to the property belonging to the pursuer, nor from the finding which refuses expenses to either party; but I would hold these parties not bound to remove until they receive indemnification for the advances which they have been induced to make for an object which this action will defeat.

Lord Craigie.—If the question lay with Mr. Robertson, the author of the pursuer, or with his representative, I should concur in these observations. But the pursuer is a singular successor who purchased the land with this house upon it, and who must be presumed to have considered it as part of the estate.

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* "Note.—It is admitted that the house used as a sewing-school is built on the pursuer's ground, and the defenders do not object to remove from it. As to the claim for bona fide ameliorations, the defenders are not in right of it, because the sewing-school is not a parochial school under the direction and control of the heritors. However useful to the parish, it is a private establishment, with which the heritors, as such, have no concern, whatever claims the subscribers may have for repetition of the funds employed in building it."

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Besides, I do not think the proper parties are now in the field to maintain the defences which have been stated.

Lord Gillies.—I am of the opinion last delivered. Whatever we may think of the motives of the parties to this action, we must decide it according to the principles of the law. Now there is not one more sacred than this, that no man is subject to have his property carried off or impaired by any act of negligence of a third party. It is said the subscribers built this house by mere inadvertency. It was indeed an act of gross inadvertency on their part to build it upon ground to which they had no title. Mr. Robertson is alleged to have consented to the proceeding; but still there was irregularity on the part of the subscribers, for a written conveyance should have been obtained from him. When a third party comes to buy the estate, he has no means of ascertaining that it is affected by this alleged burden, and he must conclude that this and every other house upon the property becomes his own when he makes the purchase. I am for adhering literally and strictly to the interlocutor under review.

Lord President.—I concur in opinion with the majority of the Court. Were this a question with Mr. Robertson or his heir, it would be different; but as Mr. Beattie is a singular successor, I can have no difficulty in adhering to the interlocutor of the Lord Ordinary on the merits. But I am equally decided in adhering to it as to the question of expenses, and would therefore refuse both notes.

D. F. Hope for Defenders.—There is a point of some practical difficulty remaining. The decree of the Lord Ordinary is for removal as at Whitsunday last. That is impossible, the term being past. I move the Court to substitute the term of Martinmas in its stead.

Lord Gillies.—That is quite impossible. The defenders have no right whatever to remain where they are; and I doubt whether the Lord Ordinary was justified in postponing the removing to any term beyond the date of decree, however near it might have been.

Jameson, for the Pursuer, submitted that he was entitled to rent from the term of Whitsunday 1829, when they were warned to flitt under the summons of removing.

Lord Gillies.—It may be proper to reserve a claim of rent to the pursuer, till his liability for ameliorations to the subscribers be disposed of; but at present I see no ground for awarding it.

None of their Lordships dissenting from this view, the Court pronounced a judgment of adherence accordingly.

L. Mackintosh, S. S. C.—W. Gardner, W. S.—Agents.

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Fitchie v.
His Creditors.

H. S. FITCHIE, Pursuer.—*Ld. Adv. Jeffrey—Christison.*
HIS CREDITORS, Defenders.—*Neaves.*

Cessio Bonorum.—Circumstances in which the Court refused, hoc statu, the benefit of cessio to a bankrupt under sequestration, in consequence of the report of the trustee as to the state of his affairs.

May 27. 1831.

2D DIVISION.
T.

IN a process of cessio at the instance of Fitchie, a sequestrated bankrupt, the Court, as usual, required a report from the trustee on his estate. This report, after stating his attendance at the diets of examination, proceeded thus:—" But while I mention his compliance with these forms, I cannot avoid noticing that the state of his matters and conduct are far from being satisfactory. His debts amount to about £4000, while all that I have been able to realize from his estate is £746, some shillings, leaving a deficiency of £3250 incurred in the short period of about seventeen months, during which he was properly in business. His business was not extensive, and all that he has himself stated as losses by bad debts is £171. 3s. 6d., of which £111. only turned out to be bad after he himself suspended payment. All that, by his own account, he lost by bad debts in the course of his business, was the single sum of £60. 3s. 6d.—a small amount of loss to have suffered in that way. The rest of his alleged losses are quite unsupported, and I consider are such as no person, at all versant in business, could credit. For instance, in yarn account No. 2, where flax and codilla appear to have been spun of the value of about £800, he states a loss of £439. 6s. 11d., upwards of 50 per cent. of the value of the article. In yarn account No. 3, in like manner, he states a loss of upwards of 40 per cent., and so on, while it can be ascertained from others in the trade at the time, not only that such extraordinary losses were not suffered, but that fair profits were made. His alleged loss by Letham Mill, during the short time he was concerned with it, is alike incredible. How he could have lavished £900 on such a subject in the course of so short a period, it seems impossible to conjecture. He appears from his books to have made a profit on the flax which he imported; but his state shows no profit either on that or any other part of his business. In short, I consider that the state is a random production, on which, so far as regards the accounting for the losses, no reliance can be placed.

" Mr. Fitchie has not kept regular books, and it is impossible from them to find out the true state of his affairs. His cash-book seems not to have been balanced since October 1828, and latterly had not been written at all, although a number of bills appear, from his bill-book and otherwise, to have been discounted, for the proceeds of which no proper account is given. Very few, if any, of his assets can be traced from his books. Several of the persons whom he mentions in his state to be his debtors, appear from the books to have claims against him; and although he states parties to be his debtors for sums as the balance of accounts-current be-

tween him and them, the parties deny having ever received any accounts-current, and in some instances deny being due any thing. I have, since June last, several times sent the books to him, and asked him to make out accounts which I wished, but he has never made out any; and I have found it impossible to make them out from the books myself. His estate, I apprehend, must suffer loss from this cause."

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Fitchie v. His Creditors.

Campbell v. Wallace.

In these circumstances, the Court refused the benefit of cessio bonorum.

W. Miller, S. S. C.—D. Houston,—Agents.

No. 346.

Arch. Campbell, Complainer.—*Forsyth—Walker.*
Robert Wallace, Respondent.—*Jardine.*

Freehold Qualification—Retour.—1.—Held to be no objection to an enrolment as a freeholder in virtue of a conveyance by a married lady of an open charter, that although trustees under her marriage-contract concurred as disponers, yet no conveyance in their favour was produced.—2.—Retour of lands in which the deceased had been infeft in warrandice only, received as evidence of the extent of these lands.

May 27. 1831.

2d Division. R.

At the Michaelmas Head Court of the county of Lanark in 1829, the respondent Wallace claimed to be enrolled as a freeholder on the lands of Noblesfarm or Coats, in virtue of the following titles:—1. Charter in favour of the Honourable Anne Douglas Hamilton or Westenra, spouse of the Honourable Henry Robert Westenra, her heirs and assignees. 2. Disposition and assignation thereto in favour of the Duke of Hamilton, his heirs and assignees, by Mrs. Westenra, with concurrence of her husband, and also by Mr. Robert Hamilton, advocate, who was set forth, not as a consenter, but as one of the disponers, in these terms:—"And I Robert Hamilton, Esq., advocate, one of the trustees under the marriage articles of the said Mrs. Anne Douglas Hamilton or Westenra, and her said husband, conform to deed of assumption executed by her, dated the 28th day of May 1821 years, and recorded in the books of Session the 4th day of March thereafter, for myself, as trustee foresaid, and as commissioner for, and having power, to the effect after mentioned, from the Right Honourable Lord John Campbell, &c., conform to commission in my favour executed by them and us, &c.; and we all, with mutual advice and consent," &c. 3. Disposition and assignation by the Duke to himself in fee, and Wallace in liferent; and, 4. Instrument of sasine thereon. To instruct that the lands were of sufficient extent, Wallace produced a retour of the special service of William Fleming to his father, which set forth that Archibald Fleming, the father, had died last vest and seised—"De totis et integris decem libratis terrarum antiqui extentûs terrarum de Crawfurdsferme, cum turre, fortalicio," &c. "jacen. infra parochiam de Rutherglen," &c. "Nec non de totis et integris prædictis quinque libratis terrarum antiqui extentûs de Nobilsferme alias Coats, cum carbonibus, carbonariis, domibus, ædificiis, hortis, partibus, pendiculis, et pertinentiis earundem quibuscunque, jacen. infra parochiam de Cambuslang et dictum vicecomitatum de Lanark; et

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illud non tantum in speciale warrantizatione et securitate dicto quodam Magistro Archibaldo hæredibus suis et assignatis quibuscunque de dictis terris de Crawfurdsferme, cum pertinen. et decimis earundem antedict., secundum dispositionem et securitatem ejusdem dicto quondam Magistro Archibaldo factam, sed etiam absque præjudicio dictæ warrantizationi pro securitate et solutione dicto quondam Magistro Archibaldo, ejusque prædict., principalis summæ sex millium mercarum monetæ Scotiæ, cum annuis redditibus earundem, vel lie backtak dewties dictarum terrarum, et pœnis lie penaltys pro eisdem obligatis, pro quibus dictæ terræ de Nobilsferme alias Coattis, cum carbonibus, carbonariis, et pertinen. earund. impignoratæ sunt dicto quondam Magistro Archibaldo suisque prædictis per Dominum Lodovicum Stewart de Minto, militem, et Dominam Elizabetham Cunynghame ejus sponsam, sine præjudicio prædictæ warrantizationi secundum contractum impignorationis inter ipsos eatenus confectum, de data decimo quarto die Januarii, anno Domini millesimo sexcentesimo et quinquagesimo sexto." In the valent clause, the retour bore Noblesfarm to be a £5 land of old extent.

Wallace having been enrolled without objection, Campbell thereafter presented a petition and complaint on the following grounds:—

1. From the disposition by Mrs. Westenra &c. to the Duke of Hamilton, it is evident that the trustees under her marriage-contract had acquired a right to the charter; but no title on their part was produced, nor was the commission by the other trustees in favour of Robert Hamilton produced.

2. The retour cannot be received as evidence of the extent of Noblesfarm. These lands did not belong in property to the deceased, but are set forth as having been merely warrandice lands. The jury consequently were not called upon to inquire into the extent, and the insertion of a valuation in the retour cannot afford satisfactory evidence thereof.

To this it was answered—

1. The disposition to the Duke of Hamilton is by Mrs. Westenra and her husband, which is all that was required. The insertion of the names of the trustees was superfluous, and cannot make the conveyance less effectual than it would have been without them; and,

2. The act 16. Geo. II. c. 11. merely requires evidence of the extent by a retour, and does not restrict it to retours of lands, the irredeemable property of which had been in the deceased. In this case Fleming's father had been infeft in the lands of Noblesfarm, and, though not in absolute property, the verdict of the jury in retouring his son as heir is complete evidence under the statute.

The Court dismissed the complaint.

Lockhart and Swan, W. S.—R. Rutherford, W. S.—Agents.

JOHN IRVING, Petitioner.—*Whigham.* No. 347.
ARCHIBALD SCOT, Respondent.

May 27. 1831.
Irving v. Scot.
Scot v. Fisher &c.

Expenses—Execution pending Appeal.—Circumstances in which the expenses of a petition for execution pending appeal were awarded against the respondent, though, in respect of the appeal having been dismissed, the petition became unnecessary.

A reclaiming note against an interlocutor in the Bill-Chamber, refusing a bill of suspension, having been presented by the respondent Scot, and refused to be written on in respect of its not having the answers attached thereto, Scot presented a second bill of suspension, maintaining that he was not bound to append the answers. This bill the Lord Ordinary refused as incompetent, and the Court, on a reclaiming note, adhered. Scot thereupon entered an appeal to the House of Lords against the interlocutors on this last bill, and that of the Lord Ordinary on the former, and also narrating and appealing against an alleged interlocutor of the Court as refusing the note not having the answers appended, while, as already mentioned, no interlocutor was pronounced by the Court. A petition for interim execution was afterwards presented by Irving, but before it was finally taken up by the Court, the appeal had been dismissed as incompetent. Their Lordships now, while they held it unnecessary to pronounce any order on the merits, found Scot liable in expenses. May 27. 1831. 2D DIVISION. F.

W. MARTIN, S. S. C.—T. SMALL, W. S.—Agents.

ARCH. SCOT, Advocator and Objector.—*G. G. Bell.* No. 348.
THOMAS FISHER and Others, Respondents.—*Whigham.*

Bankrupt—Sequestration.—Trustee.—The estates of a party being sequestrated pending a process; and the Court, before advising certain objections pleaded by him, having ordered the trustee to be made a party, and the trustee refused to appear,—the objections repelled, with expenses.

IN a competition of diligence, the Lord Ordinary ordered Cases, and made avizandum to the Court. in regard to certain technical objections taken by Scot to arrestments used by Fisher and others. In the mean time the estates of Scot were sequestrated under the Bankrupt Act, and the Court superseded the cause, that the trustee might have an opportunity of sisting himself. Intimation was made to him accordingly; but he having declined to appear, the Court repelled the objections, and found expenses due. May 27. 1831. 2D DIVISION. Ld. Mackenzie. R.

R. W. NIVEN, W. S.—W. MARTIN, S. S. C.—Agents.

No. 349.

ALEXANDER M'LEAN, Pursuer.—*Skene—W. Bell.*
JOHN M'NEILL, Defender.—*D. F. Hope—Miller.*

May 27. 1831.

2D DIVISION. Ld. Mackenzie.

T.

M'Lean v. M'Neill.

Commercial Bank v. Gilchrist &c.

Process—Consignation.—Pending a process of count and reckoning raised by M'Queen, the residuary legatee of Colonel Archibald M'Lean, and now insisted in by the pursuer Alexander M'Lean, assignee for M'Queen's creditors, against the defender M'Neill, as debtor to and trust-disponee of Colonel M'Lean, the Lord Ordinary pronounced decree against M'Neill for interim payment to M'Lean of £1000 for the purchase of an annuity to M'Queen's mother, which was the stipulated commutation of her liferent interest in the trust-estate, and which, it already appeared, the funds were able to bear. A dispute having arisen as to whether the trustee for M'Queen's creditors could, hoc statu, sufficiently discharge M'Neill of this claim, the Court recalled the decree for interim payment, but ordered consignation of the same pending the process of count and reckoning; and remitted to the Lord Ordinary to proceed with the cause.

ROBERT M'KENZIE, W. S.—M'LEAN and GIFFEN, W. S.—Agents.

No. 350.

ALEXANDER MACARTNEY (for COMMERCIAL BANK), Suspender.—
Sol.-Gen. Cockburn—More.
GEORGE GILCHRIST and TRUSTEE, Chargers.—*D. F. Hope—Russell.*

Interdict.—An interdict of a sale of horses at the instance of a party alleging himself to be a creditor of the seller, but having no constituted claim, refused as incompetent, although it was averred that the object of the seller was to defeat the right of the creditor.

May 31. 1831.

1ST DIVISION. Bill-Chamber. Ld. Moncreiff.

MACARTNEY, for behoof of the Commercial Bank, presented a bill of suspension and interdict, stating that, on the 24th of March last, the sum of £5712. 6s., belonging to the Bank, was abstracted from the Prince Regent coach, travelling between Edinburgh and Glasgow by Bathgate, belonging to the company of Bayne, Piper, and Gilchrist; that Gilchrist, after a full precognition, had been committed to jail to take his trial for the theft; that an advertisement had been published, announcing that about 50 coach-horses were to be sold at Bathgate, on the 17th of May, by public auction, which were the property of Gilchrist; that the Bank were forthwith to take proceedings to make their claim effectual against Gilchrist, but that the proposed sale was meant to defeat their claim. He therefore prayed for an interdict against the sale, or at least "that it may be appointed to take place at the sight of a proper person to be named or approved of by your Lordship; and that the proceeds of the sale may be consigned in the hands of such bank in Edinburgh as your Lordship may appoint, to meet the claim of the said Commercial Banking Company, and all others interested therein."

Gilchrist lodged answers, and thereafter executed a private trust in

favour of Mr. Alexander Robertson, W. S., for behoof of his creditors. On the part of Gilchrist and the trustee it was maintained, that as the Bank held no constituted debt against Gilchrist, and had not even raised an action so as to arrest, but had merely averred that they were to raise an action of restitution, it was incompetent to apply for an interdict of the sale, which, besides, was a measure not only prudent, but necessary both for Gilchrist and his creditors.

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Commercial Bank v. Gilchrist &c.
—
Lugton v. Molle &c.

The Lord Ordinary "passed the bill, but refused the interdict in so far as it is asked to the effect of stopping the proposed sale; but ordained the prices of the several articles which may be sold to be paid into the hands of the Sheriff Clerk of the district where the sale is to take place, therein to remain for behoof of all parties interested; expressly reserving, and without prejudice to, the rights of the respondent, and every other party concerned."

Gilchrist and his trustee reclaimed.

Lord Gillies.—By what authority has the Lord Ordinary ordered the prices to be lodged in the hands of the Sheriff Clerk of the district? The Bank had no right to present their application, which ought to have been at once dismissed.

The other Judges concurred; and their Lordships therefore altered the interlocutor, refused the bill, and found the reclaimers entitled to expenses.

J. A. Campbell, W. S.—Robertson and Bennet, W. S.—Agents.

Charles Lugton, Petitioner.—*Bell—Macallan.*
William Molle and Trustee, Respondents.—*Rutherfurd.*

No. 351.

Bankrupt—Stat. 54. *Geo. III. c.* 137, § 15—*Sequestration.*—Circumstances sustained as sufficient to bring a debtor within the description of a party liable to sequestration under the Bankrupt Act.

Lugton applied for sequestration of the estate of William Molle, W. S., of Maines, under the Bankrupt Act, alleging that Mr. Molle "is, or very lately was, an insurance-broker, or proprietor of the stock of the Hercules Fire and Life Insurance Company of Scotland, as well as a seed-merchant, having, in the latter character, for many years sold grass-seeds by retail; and that he is also a proprietor of the joint stock of the Waterloo Tavern and Hotel." In the mean time Mr. Molle had executed a private trust; and he and his trustee lodged answers, stating that they did so, merely to put the Court in full possession of the circumstances under which the application was made; that the shares in the Hercules Assurance Company had been seized under a writ of extent in November last, and sold by the Crown, and the shares transferred to the purchasers, in the company books, in February last; that in certain farming operations on his own property, Mr. Molle had at one time raised rye-grass, which he sold just as he did his other farm-produce; that he had subsequently let his land, after which he occasionally sold seed in the market,

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1st Division.
D.

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but it was merely for behoof of his tenants, and without either profit or loss to himself; and that it was true he was a joint proprietor of the Waterloo Hotel. They further alleged that Lugton had acceded to the private trust, and therefore submitted, 1. That Lugton was barred from applying for sequestration; and, 2. That Mr. Molle did not fall under the Bankrupt Act. In reference to the former of these pleas, Lugton answered that a large number of creditors had not acceded to the private trust, and therefore he was not bound by his accession from applying for sequestration, as it was an implied condition in every such trust that all the other creditors should accede.

Lord Craigie intimated a doubt whether Lugton was not barred by personal exception from applying for sequestration.

Lord Gillies.—My difficulty does not rest on that ground. I have always understood it to be an implied condition in every private trust that all the creditors shall accede within a reasonable time; and if not, that it does not bind up the hands of any of them from diligence. If it were not so, no individual would accede to a trust, since he would thereby prevent himself from protecting his own interests, when other creditors, who refused to accede, were using separate diligences. I therefore do not rest on the personal exception, and I can easily see that it may be very much for the benefit of all persons concerned, that sequestration should be awarded.

Lord President.—The share in the joint stock property of the Waterloo Hotel does not bring Mr. Molle within the statute. He is not said to be the hotel-keeper. Looking to the other circumstances, however, and being unwilling to narrow the benefit of this statute, unless on clear grounds, I incline to award sequestration.

The Court awarded sequestration accordingly.

Petitioner's Authorities.—Grant, May 20. 1830, (ante, VIII. 778,) and authorities there referred to.

G. Logan, W. S.—G. Turnbull, W. S.—Agents.

No. 352.

Kembles, Masterman, and Johnston, and Mandatary, Pursuers.—*D. F. Hope—Forsyth—Robertson—Thomson.*
Alexander Mitchell, Defender.—*Skene—Moir.*

Cautioner.—A party having written a letter to another, stating that "in the event of any reference being made to you regarding the responsibility of my esteemed friend A. S. &c., I shall feel much obliged by your stating that he is in excellent credit, and possessed of capital for carrying on an extensive business;" and goods having been sold to A. S. eighteen months afterwards on a reference to the holder of the letter, and on the faith of it—Held that the writer was liable for the price, although it was not alleged that the statement was false at the time the letter was written.

May 31. 1831.

1st Division.
Ld. Corehouse.
R.

Mr. Mitchell, manager of the Town and County Bank of Aberdeen, addressed the following letter, on the 24th of January 1827, to Messrs. Jones, Lloyd, and Co., bankers, London:—"Dear Sirs—In the event of any reference being made to you regarding the responsibility of

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my esteemed friend Alexander Shand jun., Esq. merchant in this city, I shall feel much obliged by your stating that he is in excellent credit, and possessed of capital for carrying on an extensive business. I am," &c. In October 1828, Shand wrote to Kembles, Masterman, and Co., sugar-dealers, London, proposing to purchase sugar from them, and he referred them to Jones, Lloyd, and Co. Kembles and Co. went to Jones, Lloyd, and Co., who read to them Mr. Mitchell's letter; and in consequence they agreed to sell sugars to Shand to the amount of £955. 14s. 9d., for which Shand, on the 27th, granted his promissory note.

In the mean while Shand's credit had been considerably impaired, and the Bank, after requiring that he should limit his discounts, had declined, in September 1828, to do further business with him. On the 8th of November, Mr. Mitchell wrote Mr. Lewis Lloyd, of Jones, Lloyd, and Co., in these terms:—"My dear Sir, About three years since, I granted a letter to Mr. Alexander Shand jun., of this place, addressed to your house, requesting that if reference was made as to his responsibility, you might give a favourable opinion. From various circumstances unnecessary to detail, I should wish this letter recalled, and will feel obliged by your not acting upon it in future, if any after reference is made. If you do not object to return the letter, I will thank you to send it in the public letter," &c. Mr. Lloyd immediately answered—"Your note of the 8th instant, respecting A. Shand jun., I have received, and it shall be duly attended to. Your former letter on the same subject, dated 24th January 1827, we cannot return to you, as it is a document upon the authority of which we have spoken of Mr. Shand to various parties who have been referred to us for information respecting him; but we shall consider that letter as cancelled by your present communication." Before this withdrawal of the letter, Shand had applied to Bedwell and Yates of London for sugars, and referred them to Jones, Lloyd, and Co. After calling on Jones, Lloyd, and Co., who showed Mitchell's letter, Bedwells and Yates wrote to Shand, that "we found their knowledge of you was only through a friend, and that of no recent date;" that they had made subsequent inquiries, the result of which was, that they declined the order.

Shand having failed to retire his promissory note to Kembles and Co., (which they intimated to Mitchell,) and his estates having been sequestrated, they raised an action against Mitchell, libelling on his letter of recommendation or guarantee, and concluding that, as the sugars were furnished in reliance on it, he was liable in payment.

In defence, Mitchell stated, 1. That as his letter was not one of guarantee, but merely a recommendation, containing a representation which at the time was perfectly true, and falsehood was not alleged, he was not liable; and, 2. That the pursuers were not entitled to rely on a letter of so old a date, and ought to have made inquiries, as had been done by Bedwells and Yates; and therefore, as the loss had arisen from their own negligence, they could not make a claim against him.

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To this the pursuers answered, That the date of the letter had not been shown to them; but if it had, Mitchell was still bound, since his letter operated as a current mandate, so long as unrecalled, to recommend Shand as a person of credit and capital.

The Lord Ordinary "decerned against the defender," with expenses.*

The defender reclaimed.

Lord Gillies.—If an order had been accepted in London on the faith of this letter as soon as the letter arrived there, and if Shand had failed before paying for that order, it would indisputably have inferred responsibility against Mr. Mitchell. But if this be the case, the only remaining question is, whether the time was passed during which the recommendation was to operate in Shand's favour? At what time was its operation to cease? I hold it to be a current mandate, valid until recalled, so that the date when it was granted becomes immaterial.

Lord President.—I conceive the mandataries of Mr. Mitchell in London were bound to consider this to be a letter with a current date, left in their hands for the purpose of being used in recommending Mr. Shand. They were warranted to act on the letter, which expressed a continuously-sustained direction by Mitchell until it was recalled by him.

Lord Balgray.—The pursuers have maintained that the date of Mitchell's letter was not shown to them, and that they did not know it. But I conceive they were bound to notice the date of the letter, and must be dealt with as if they had done so. I concur in thinking that it was a letter which operated as

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* "Note.—Although the defender's letter to Jones, Lloyd, and Co., of 24th January 1827, was not a proper guarantee, it was a mandate to them to represent Alexander Shand as a person in excellent credit, and possessed of extensive capital. Not being limited to any particular time, it authorized them to make that representation as long as the defender allowed it to remain in their hands. Accordingly they acted upon it in October 1828, when the pursuers referred to them; and relying on their statement, the sugar in question was sold to Shand. The representation made by the defender's authority must have the same effect as if it had been made by the defender himself. But if the defender had vouched for the credit and capital of Shand in October 1828, in terms of his letter to Jones, Lloyd, and Co., there can be no doubt that he would have been liable to the pursuers for the price of the sugar; for Shand's credit had by that time become more than doubtful, not only with the Town and County Bank at Aberdeen, but with the public there. This is proved by the admission of the defender in the 12th article of his counter statement, and by various documents produced. The defender, as cashier of that Bank, must have been well aware of the circumstance; and although there is no ground to suspect him of fraud, yet it was gross negligence on his part not to recal the authority he had given to Jones, Lloyd, and Co., on which it appeared they continued to act. The defender himself became sensible of this, and did recal it, but not till some time after the sale of the sugar in question had been completed. No blame seems to attach either to the pursuers or to their agent at Aberdeen. They acted with due vigilance, both for their own interest and that of the defender, but, at the same time, with the caution and delicacy requisite in the circumstances of the case."

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a running mercantile mandate to the London bankers, to represent Shand's credit and capital in favourable terms. It is impossible to hold that such a letter was intended to be used merely for a specific time—a week or a month. It would have been of little or no use to a mercantile man, if it were to have so limited a term of operation, and accordingly there is no such limit assigned to it. Then, if the terms of Mr. Mitchell's letter of the 8th of November are attended to, together with the answer of Mr. Lloyd, they show very clearly in what light mercantile men of their standing and experience viewed the use and import of this letter. Mr. Mitchell writes—"About three years since, I granted a letter, &c. From various circumstances unnecessary to detail, I should wish this letter recalled, and will feel obliged by your not acting upon it in future, if any after reference is made. If you do not object to return the letter, I will thank you to send it in the public letter." This clearly shows the view of the writer to have been, that his letter was not meant for any special transaction, or for a limited term. He wishes the letter recalled—he wishes it not acted on in future. Now, if he had known that it was only to be operative for a week or a month, or a given term which had elapsed, there was no need to recal it. Its terms would have been already a dead letter. But he took a very different view of their import, and so also did his correspondent. Mr. Lloyd answers—"Your former letter we cannot return to you, as it is a document on the authority of which we have recommended Mr. Shand to various parties who have been referred to us for information respecting him; but we shall consider that letter as cancelled by your present communication." So that it is only of this date that Mr. Lloyd considers this letter recalled; and he says he has been acting upon its authority on repeated occasions of reference. Looking, then, to the light in which this mandate was all along viewed by the parties, as well as to the other considerations stated by your Lordships and the Lord Ordinary, I am for adhering.

Lord Craigie was understood to assent.

Defender's Authorities.—Fell on Merc. Guar. 234; Gainsford, June 9. 1818; 6. Price's Exchcq. Rep. p. 36; 1. Bell, 371.

J. Martin,—Gordon and Barron, W. S.—Agents.

No. 353.

John Bell, Pursuer.—*More.*

J. Morton and C. Johnstone (Moir's Trustees), Defenders.—*Deas.*

Trust.—Circumstances in which a creditor was held not precluded from constituting his debt against a trust-estate by transacting with the truster, independently of the trustees, during the subsistence of the trust.

May 31. 1831.

2d Division. Lord Medwyn. R.

The late John Moir, manufacturer in Dundee, executed, in March 1826, a trust-deed for behoof of his creditors in favour of the defenders Morton and Johnstone, who were empowered by the deed to appoint himself, either singly, or jointly with some other person, manager or factor to conduct his business, subject to such conditions and control as they might think necessary. Prior to the date of the trust-deed, Moir had been engaged in a course of transactions with the pursuer Bell, mer-

No. 353.

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chant in Glasgow, to whom he had consigned goods to be disposed of chiefly abroad, and who had made advances by bills, to a certain extent, on the goods consigned. A considerable amount of the goods were consigned by Bell to a branch in America of the Glasgow house of John Fyfe and Co., and bills in Bell's favour had been transmitted in payment of the proceeds. Two of these bills were dishonoured about the time of executing the trust-deed; and Bell, while ignorant of the existence of the trust, had been corresponding with Moir as to taking renewals from Fyfe and Co., and, with his concurrence, had agreed to accept renewals. He first became aware of the trust by a letter from the trustees, dated 1st July 1826; and on the 6th of the same month he took the renewals from Fyfe and Co. Thereafter Fyfe and Co. became insolvent, and executed a trust-deed in favour of their creditors. Before acceding to this deed, Bell wrote to Moir's trustees for their approval. They authorized him to accede, and they had previously acceded thereto as individual creditors of Fyfe and Co. Ultimately the estate of Fyfe and Co. was found inadequate to pay their debts, so that Bell remained a creditor of Moir for advances on the goods consigned. In the mean time Bell had corresponded with and received from Moir repeated renewals of bills, whereby a considerable sum became due for discounts and stamps. This system continued till Moir's death in January 1829, the whole correspondence being carried on with Moir alone. On Moir's death, Bell brought an action against the trustees for payment of the balance due to him by Moir. The trustees admitted that to a certain extent they had allowed Moir to act as manager of his business; that the object of the trust-deed was not to impose on them any other duty than that of assisting him to pay off his debts; and that they had no account to produce, showing intromissions by them with his estate. But they defended chiefly on the grounds,—1. That Bell, by transacting and communicating with Moir alone, had lost or abandoned all claim against the trust-estate; and, 2. That the loss by Fyfe and Co. was owing to Bell having, without the concurrence of the trustees, taken the renewals in July 1826, and thereafter obtained their consent to accede to the trust-deed on an erroneous statement as to its nature, instead of doing diligence against Fyfe and Co. The Lord Ordinary, "in respect that there does not appear to be any neglect upon the part of the pursuer in not communicating with the private trustees of Mr. Moir, which ought to preclude him from constituting his debt against the said John Moir's estate," remitted to an accountant to report on the state of accounts.*

The trustees reclaimed; but the Court adhered.

W., A. G., and R. Ellis, W. S.—Brown and Miller, W. S.—Agents.

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* "Note.—The defenders plead that the trust-deed was not intended to deprive Mr. Moir of the means of making a competent living; that there was not the slightest

JOSEPH M'CHRISTIE, Suspender.—*Whigham.*
MRS. HELEN KEA or FISHER, Charger.—*Gillies.*

No. 354.

May 31. 1831.
M'Christie v. Fisher.

Process—Suspension.—A bill of suspension and liberation having reference solely to the incarceration as irregular in respect of a previous sist; but the expede letters being so framed as to apply to objections to the decree and horning on which the caption proceeded; and the letters having been suspended simpliciter in general terms, but which were afterwards explained to apply solely to the liberation—Held that the process was exhausted, and that the merits of the decree and diligence were not still in dependence under it.

May 31. 1831.

2D DIVISION.
Bill-Chamber.
Ld. Mackenzie.
F.

MRS. FISHER having charged M'Christie, her tenant, for payment of rent, on a decree obtained against him, and having taken out letters of caption, he presented a bill of suspension, without caution, on which the Lord Ordinary pronounced an interlocutor sisting execution, and ordering answers in fourteen days. She gave in no answers; but, on the lapse of a year, and M'Christie not having applied to have the bill passed in respect of no answers, (she, assuming the bill and sist to have fallen,) put the caption in execution, and apprehended M'Christie. He thereupon presented a bill of suspension and liberation, which was confined, both in the narrative and the prayer, to the matter of liber-

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necessity for their interfering further than they thought proper, (Statement, Art. 1); that Mr. Moir was employed by them as their manager and factor on the trust-estate, to a limited extent at least, (Art. 2); and they admit that they have produced no accounts showing their intromissions with Moir's estate, (Condescendence, Art. 22, and Answer.) The trust-deed is dated 4th March 1826. If they had intended to supersede Moir, and assume the active direction of his affairs, as they could not but know that the pursuer had acted for several years as his consignee, and had large investments of goods under his charge at the time, they would have instantly notified the trust-deed to him, and have intimated that hereafter he was to correspond with them. Their letter of 1st July 1826 first incidentally apprized him of the trust; but, neither by this nor any subsequent letters, did they require the pursuer to correspond with them. The correspondence produced shows how constant it went on with Moir; that, so far as appears, there never was any at all with the defenders; so that it is absurd in the defenders to treat the correspondence with Mr. Moir, under these circumstances, as an underhand correspondence. It must be held that he was corresponding for and on behalf of his trustees.

"It is not inconsistent with this view that the pursuer required a special mandate from the defenders to subscribe Fyfe and Co's. trust-deed, with the terms of which they must have been perfectly acquainted, as both had previously subscribed it in other capacities, and therefore could not have been misled by any inaccurate account of it given by the pursuer.

"There seems no blame imputable to the pursuer relative to the American shipment of goods; he seems to have acted as any other prudent man in his situation would have done; and as to renewals of bills, they must either have been renewed, or retired by the defenders or Moir."

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May 31. 1831. M'Christie v. Fisher.

ation, and referred to the sist in the former bill as rendering the execution of the caption illegal. This bill having been passed, letters were expede, the will of which was made to apply to the merits of the decree and diligence, and to conclude for suspension of the letters of horning and caption generally.

The Lord Ordinary sustained the reasons of suspension, and suspended simpliciter; and the Court adhered, as mentioned ante, VIII. 481; but afterwards explained that the judgment had reference solely to the matter of liberation.[1] Thereafter the original bill of suspension was allowed to be answered;[2] and the Lord Ordinary having refused it, M'Christie reclaimed, and contended—That as the judgment in the other process was held to relate to the matter of liberation only, and the letters of suspension embraced the merits of the decree and diligence, the merits must necessarily still be depending before the Lord Ordinary, and consequently the process must be considered as subsisting, to the effect of having these determined; and that as the present bill regarded the same matter, the only proper course to be adopted was to pass it, in order that it might be conjoined with the other process.

To this it was answered—That although the will of the letters in the other process was so framed as to embrace the merits of the decree and diligence, there was no warrant for this in the bill, and therefore the will to this extent was null;[3] that accordingly nothing was discussed but the regularity of the incarceration; and the interlocutor, which has been held to apply solely to that matter, was a general interlocutor exhausting the whole cause; that therefore that process was now out of Court, and consequently the present bill must be dealt with on its own merits, in regard to which it was not disputed that the Lord Ordinary's interlocutor was right.

The Court adhered.

R. W. Niven, W. S.—W. Spalding, S. C. C.—Agents.

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[1] See ante, 232, and VIII. 1006. [2] Ante, 232. [3] Campbell v. Fotheringham, June 28. 1826, (ante, IV. 766.)

No. 355.

May 31. 1831.
Napier v. Spiers' Trustees.

Sir W. M. NAPIER, Bart., Pursuer.—*D. F. Hope—Rutherfurd—Paterson.*

R. M'GAVIN and Others (SPIERS' TRUSTEES), Defenders.—*Ld. Adv. Jeffrey—G. G. Bell.*

Superior and Vassal—Irritancy—Interest—A vassal being taken bound by a contract of feu to erect dwellings within a certain period from his entry, under an irritancy; and the superior, after the lapse of many years, during which the vassal possessed without building, having raised an action of declarator of irritancy, in which he obtained an interlocutor recognising the conditions of the contract, but not immediately irritating the feu; and the superior having represented against this interlocutor, but thereafter abandoned further procedure—Found, in a new action raised by a succeeding superior many years thereafter for implement of the same contract, —1.—That in respect of the termination of the procedure in the former action, the superior could not now maintain an irritancy, or claim damages;—but,—2.—That the superior was entitled to claim arrears of feu-duty, and also repetition of the public and parochial burdens paid by him.—3.—That the building clause in the contract must now be implemented under penalty of the forfeiture.—4.—That interest was not due upon arrears of feu-duty, unless expressly stipulated in the contract.

May 31. 1831.

2D DIVISION.
Ld. Fullerton.
R.

MRS. JEAN MILLIKEN or NAPIER, the author of the pursuer Sir William Napier, by contract of feu, dated the 30th of December 1777, disponed certain portions of the lands of Kilbarchan to Alexander Spiers, for a feu-duty of £17. 8s. 5½d. yearly, together with minister's stipend, and other public burdens thereto effeiring. Spiers bound himself to "build dwelling-houses upon the foresaid front of 401 feet towards the high road, and that in a straight line with the houses already built in that corner of the town, and to have said houses finished betwixt and the term of Martinmas 1787; and when built, he obliges him and his foresaids to keep up said houses in all time coming; and in case he or his foresaids shall in any time fail in payment of the said feu-duties, and shall suffer two years to remain unpaid, or in case they shall fail in building and keeping up said houses, then and in either of these events this feu-right, in the option of the said Mrs. Jean Milliken alias Napier, or her foresaids, shall become void and null, and it shall be lawful to them to enter to the possession of said subjects, as if these presents never had been granted; only it is hereby specially provided and declared, that the said Mrs. Jean Milliken alias Napier is to abate and give down to the said Alexander Spiers and his foresaids the first two years feu-duty, as an encouragement for their building the foresaid houses." Spiers entered into possession of the subjects, and was allowed to retain the feu-duty for the first two years; but he did not build dwelling-houses. In the year 1793, Mrs. Napier sold the estate of Kilbarchan, including the superiority of the feu in question, to the trustees of the late James Milliken.

No. 355.

May 31. 1831. Napier v. Spiers' Trustees.

In 1807, the trustees raised a declarator of tinsel of the feu against Spiers, founding on the irritancy attached by the contract to the failure to build. In this action, after various proceedings, the Lord Ordinary Craig (June 14. 1808) pronounced this interlocutor:—"In respect of the long delay in bringing forward the present process of declarator, refuses to decern in the declarator of irritancy hoc statu; but finds that the defender must still implement the conditions incumbent upon him to perform, as stipulated in the feu-contract libelled on, and ordains him to implement these conditions between and Whitsunday next; with certification to him, if he fails, that the Lord Ordinary will immediately thereafter decern in the declarator, conform to the conclusions of the libel." Against this interlocutor the trustees gave in a representation, praying for decree in terms of the libel, or at least in terms of an offer of compromise. This representation was ordered to be answered; but no further steps were taken in the action in consequence of a proposal to arrange matters extrajudicially, which, however, was unsuccessful.

In the year 1811, Spiers executed a general conveyance of his property, without mention of the feu, for behoof of his creditors, in favour of the defenders M'Gavin and others, and died some time thereafter.

Milliken's trustees having wound up the trust, and denuded in favour of Sir William Napier, he raised the present action in 1826, concluding against Spiers' trustees for payment—1. Of the feu-duty since 1809, (up to which period the feu-duty had been paid,) together with the legal interest due upon each year's feu-duty since the respective dates when it fell due, and until paid. 2. Of £1000 of damages for not building. 3. For payment of £34. 16s. 11d., being the amount of the two years feu-duty which Spiers was allowed to retain as an inducement to build. 4. Of the minister's stipend, and public and parochial burdens; and, 5. To have the defenders ordained to build dwelling-houses upon the feu.

In defence against this action, Spiers' trustees pleaded—1. That they had no concern with the feu, which, they alleged, was abandoned by Spiers before he executed the trust. 2. That, at any rate, Spiers was not liable in damages, as the superior's remedy, in terms of the contract, was a declarator of irritancy, and accordingly such a process had been raised. 3. That any claim of damages which might have been competent was waived by the proceedings under the declarator, as well as by the long acquiescence of the superior in the delay to build.

Sir William, on the other hand, denied the averment that his authors had acquiesced in the failure to build, or that Spiers' trustees had not possessed the feu; and he maintained that the defenders, to whom the whole property of Alexander Spiers was made over for the payment of his debts, were bound to perform his obligations under the feu-contract, and to make good the damage which the superior had sustained by the delay or refusal to perform those obligations.

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May 31. 1831. Napier v. Spiers' Trustees.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:*— "In respect that the feu-contract libelled has not been extinguished, either by declarator at the instance of the superior, or by surrender on the part of the vassal accepted by the superior;—finds that the said feu-contract, and the obligations therein contained, were binding on the late Mr. Spiers, and are now binding on his representatives, the trustees; therefore finds the defenders liable in payment, in the first place, of the feu-duty, as libelled, for the two first years of the feu-contract retained by Mr. Spiers in consideration of erecting certain buildings on the feu, which buildings never were erected; secondly, of the feu-duty as libelled due at Whitsunday 1809, and the subsequent years since that term, in so far as the same has not been already paid; thirdly, of the minister's stipend and parochial burdens from the year 1777, in so far as the same have been paid by the pursuer or his authors; and in regard to the conclusion for damages, remits the case to the Jury Court."

Spiers' trustees having reclaimed, the Court ordered Cases, and granted a diligence under which evidence was recovered to establish that Spiers and the trustees had possessed the feus. Thereafter, the Court pronounced this interlocutor:—"Recal the Lord Ordinary's interlocutor complained of;—find that the feu-contract libelled on is still obligatory, and binding on the defenders, qua trustees of the late Mr. Spiers: Of consent, allow them two years from the date hereof to build the dwelling-house upon the feu, as specified in the feu-contract;—find that neither the late Mr. Spiers, nor the defenders as his trustees, were or are liable in any damages or compensation to the pursuer, on account of not having hitherto erected the said buildings;—that the defenders, as trustees foresaid, are liable to the pursuer for the feu-duties of the subjects in question due at Whitsunday 1809 and since, but without interest thereon;—that the defenders are also liable to the pursuer for the minister's stipend, and other public and parochial burdens for the said feu, so far as the same have been paid by the pursuer or his authors, the trustees of the late James Milliken, with interest thereon, and that the defenders, as trustees fore-

* "NOTE.—If the declarator of tinsel of the feu brought against Mr. Spiers in 1807 had been allowed by him to proceed to judgment, the claim now founded by the superior on the feu-contract might have been excluded. But the declarator was opposed by Mr. Spiers, the feuar; and in consequence of that opposition no judgment ever was obtained. In these circumstances, the Lord Ordinary does not think that the mere raising of an action of declarator, which action was resisted by the pursuer, can be considered as barring the pursuer from now recurring to the other alternative, of which he had unquestionably the option, namely, that of enforcing the obligations in the feu-right; and holding the feu-right to be in force, the claim of damages for the breach of the obligations contained in it must be disposed of in the usual way. A claim of damages of the very kind now raised seems to have been in the view of the Court, and recognised in the case of the Marquis of Abercorn v. Marnoch's Trustees, June 26. 1817."

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In 1807, the trustees raised a declarator of tinsel of the feu against Spiers, founding on the irritancy attached by the contract to the failure to build. In this action, after various proceedings, the Lord Ordinary Craig (June 14. 1808) pronounced this interlocutor:—"In respect of the long delay in bringing forward the present process of declarator, refuses to decern in the declarator of irritancy hoc statu; but finds that the defender must still implement the conditions incumbent upon him to perform, as stipulated in the feu-contract libelled on, and ordains him to implement these conditions between and Whitsunday next; with certification to him, if he fails, that the Lord Ordinary will immediately thereafter decern in the declarator, conform to the conclusions of the libel." Against this interlocutor the trustees gave in a representation, praying for decree in terms of the libel, or at least in terms of an offer of compromise. This representation was ordered to be answered; but no further steps were taken in the action in consequence of a proposal to arrange matters extrajudicially, which, however, was unsuccessful.

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In defence against this action, Spiers' trustees pleaded—1. That they had no concern with the feu, which, they alleged, was abandoned by Spiers before he executed the trust. 2. That, at any rate, Spiers was not liable in damages, as the superior's remedy, in terms of the contract, was a declarator of irritancy, and accordingly such a process had been raised. 3. That any claim of damages which might have been competent was waived by the proceedings under the declarator, as well as by the long acquiescence of the superior in the delay to build.

Sir William, on the other hand, denied the averment that his authors had acquiesced in the failure to build, or that Spiers' trustees had not possessed the feu; and he maintained that the defenders, to whom the whole property of Alexander Spiers was made over for the payment of his debts, were bound to perform his obligations under the feu-contract, and to make good the damage which the superior had sustained by the delay or refusal to perform those obligations.

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May 31. 1831. Napier v. Spiers' Trustees.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:*— "In respect that the feu-contract libelled has not been extinguished, either by declarator at the instance of the superior, or by surrender on the part of the vassal accepted by the superior;—finds that the said feu-contract, and the obligations therein contained, were binding on the late Mr. Spiers, and are now binding on his representatives, the trustees; therefore finds the defenders liable in payment, in the first place, of the feu-duty, as libelled, for the two first years of the feu-contract retained by Mr. Spiers in consideration of erecting certain buildings on the feu, which buildings never were erected; secondly, of the feu-duty as libelled due at Whitsunday 1809, and the subsequent years since that term, in so far as the same has not been already paid; thirdly, of the minister's stipend and parochial burdens from the year 1777, in so far as the same have been paid by the pursuer or his authors; and in regard to the conclusion for damages, remits the case to the Jury Court."

Spiers' trustees having reclaimed, the Court ordered Cases, and granted a diligence under which evidence was recovered to establish that Spiers and the trustees had possessed the feus. Thereafter, the Court pronounced this interlocutor:—"Recal the Lord Ordinary's interlocutor complained of;—find that the feu-contract libelled on is still obligatory, and binding on the defenders, qua trustees of the late Mr. Spiers: Of consent, allow them two years from the date hereof to build the dwelling-house upon the feu, as specified in the feu-contract;—find that neither the late Mr. Spiers, nor the defenders as his trustees, were or are liable in any damages or compensation to the pursuer, on account of not having hitherto erected the said buildings;—that the defenders, as trustees foresaid, are liable to the pursuer for the feu-duties of the subjects in question due at Whitsunday 1809 and since, but without interest thereon;—that the defenders are also liable to the pursuer for the minister's stipend, and other public and parochial burdens for the said feu, so far as the same have been paid by the pursuer or his authors, the trustees of the late James Milliken, with interest thereon, and that the defenders, as trustees fore-

* "NOTE.—If the declarator of tinsel of the feu brought against Mr. Spiers in 1807 had been allowed by him to proceed to judgment, the claim now founded by the superior on the feu-contract might have been excluded. But the declarator was opposed by Mr. Spiers, the feuar; and in consequence of that opposition no judgment ever was obtained. In these circumstances, the Lord Ordinary does not think that the mere raising of an action of declarator, which action was resisted by the pursuer, can be considered as barring the pursuer from now recurring to the other alternative, of which he had unquestionably the option, namely, that of enforcing the obligations in the feu-right; and holding the feu-right to be in force, the claim of damages for the breach of the obligations contained in it must be disposed of in the usual way. A claim of damages of the very kind now raised seems to have been in the view of the Court, and recognised in the case of the Marquis of Abercorn v. Marnoch's Trustees, June 26. 1817."

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May 31. 1831. Napier v. Spiers' Trustees.

In 1807, the trustees raised a declarator of tinsel of the feu against Spiers, founding on the irritancy attached by the contract to the failure to build. In this action, after various proceedings, the Lord Ordinary Craig (June 14. 1808) pronounced this interlocutor:—"In respect of the long delay in bringing forward the present process of declarator, refuses to decern in the declarator of irritancy hoc statu; but finds that the defender must still implement the conditions incumbent upon him to perform, as stipulated in the feu-contract libelled on, and ordains him to implement these conditions between and Whitsunday next; with certification to him, if he fails, that the Lord Ordinary will immediately thereafter decern in the declarator, conform to the conclusions of the libel." Against this interlocutor the trustees gave in a representation, praying for decree in terms of the libel, or at least in terms of an offer of compromise. This representation was ordered to be answered; but no further steps were taken in the action in consequence of a proposal to arrange matters extrajudicially, which, however, was unsuccessful.

In the year 1811, Spiers executed a general conveyance of his property, without mention of the feu, for behoof of his creditors, in favour of the defenders M'Gavin and others, and died some time thereafter.

Milliken's trustees having wound up the trust, and denuded in favour of Sir William Napier, he raised the present action in 1826, concluding against Spiers' trustees for payment—1. Of the feu-duty since 1809, (up to which period the feu-duty had been paid,) together with the legal interest due upon each year's feu-duty since the respective dates when it fell due, and until paid. 2. Of £1000 of damages for not building. 3. For payment of £34. 16s. 11d., being the amount of the two years feu-duty which Spiers was allowed to retain as an inducement to build. 4. Of the minister's stipend, and public and parochial burdens; and, 5. To have the defenders ordained to build dwelling-houses upon the feu.

In defence against this action, Spiers' trustees pleaded—1. That they had no concern with the feu, which, they alleged, was abandoned by Spiers before he executed the trust. 2. That, at any rate, Spiers was not liable in damages, as the superior's remedy, in terms of the contract, was a declarator of irritancy, and accordingly such a process had been raised. 3. That any claim of damages which might have been competent was waived by the proceedings under the declarator, as well as by the long acquiescence of the superior in the delay to build.

Sir William, on the other hand, denied the averment that his authors had acquiesced in the failure to build, or that Spiers' trustees had not possessed the feu; and he maintained that the defenders, to whom the whole property of Alexander Spiers was made over for the payment of his debts, were bound to perform his obligations under the feu-contract, and to make good the damage which the superior had sustained by the delay or refusal to perform those obligations.

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Spiers' trustees having reclaimed, the Court ordered Cases, and granted a diligence under which evidence was recovered to establish that Spiers and the trustees had possessed the feus. Thereafter, the Court pronounced this interlocutor:—"Recal the Lord Ordinary's interlocutor complained of;—find that the feu-contract libelled on is still obligatory, and binding on the defenders, qua trustees of the late Mr. Spiers: Of consent, allow them two years from the date hereof to build the dwelling-house upon the feu, as specified in the feu-contract;—find that neither the late Mr. Spiers, nor the defenders as his trustees, were or are liable in any damages or compensation to the pursuer, on account of not having hitherto erected the said buildings;—that the defenders, as trustees foresaid, are liable to the pursuer for the feu-duties of the subjects in question due at Whitsunday 1809 and since, but without interest thereon;—that the defenders are also liable to the pursuer for the minister's stipend, and other public and parochial burdens for the said feu, so far as the same have been paid by the pursuer or his authors, the trustees of the late James Milliken, with interest thereon, and that the defenders, as trustees fore-

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said, are bound to relieve the pursuer of the said stipend and burdens in time coming;—that the defenders, as trustees foresaid, are not liable, hoc statu, for the two first years feu-duty abated by the superior as an encouragement for erecting the said buildings, in respect that the pursuer has not proved that he is the party in right to demand the said two years feu-duty;—find the defenders liable to the pursuer in expenses, subject to modification, and allow an account thereof to be given in; remit to the Auditor to tax the same, and report; and decern accordingly."

Lord Justice-Clerk.—I think it is sufficiently established that Spiers and his trustees did take, and continued to use, possession of this feu. Then we come to the question of the declarator of irritancy, and I must say that I cannot entirely put out of view the proceedings that took place before Lord Craig. It is quite clear that Lord Craig kept in view the benefit intended by this building clause in the contract, to the village of Kilbarchan, which at that time was flourishing, whatever it may be now; and he pronounced a judgment accordingly. But then Sir William gave in a representation against this interlocutor; he or some person in his right opposed this judgment of Lord Craig's, and I do not think he can come now and say the feu is irritated, or claim damages; but our present interlocutor must bear that now the condition in the contract shall be implemented within a reasonable time, or the irritancy take place. I see no materials for a jury trial.

Lord Glenlee.—I entirely concur. There are no materials for a jury trial. Sir William could not go further back in his claim of damages than to the period when he departed from the action of declarator before Lord Craig. This is curious too—not only is there a specific claim for damages, but also that the contract shall be implemented. Under the circumstances, I think there is no room for damages, though the contract may have to be implemented now.

Lord Cringletie.—I agree. I find this libel only claims feu-duty since 1809; so it is clear that the right must have been acknowledged down to that period. As for the interest, it is my opinion that, according to law, feu-duties do not bear interest, unless it be so stipulated in the contract.

Lord Justice-Clerk.—I am of that opinion too.

Lord Meadowbank concurred.

Pearson, Wilkie, and Robertson, W. S.—Wotherspoon and Mack, W. S.—Agents.

A. Speirs and Others (Heritors of Neilston), Pursuers.—*D. F. Hope —Cuninghame.*

Rev. Alex. Fleming and Others, Defenders.—*Murray—Penney.*

No. 356.

June 1. 1831. Heritors of Neilston v. Fleming &c.

Poor.— A kirk-session having for some time, in addition to the usual plate at the church-door for collecting alms for the poor, allowed certain extra plates to be placed in the church-yard for the purpose of receiving contributions towards carrying on a litigation with the heritors, the object being always intimated from the pulpit previous to dismissing the congregation, when the collection for this purpose was made, and the plates being distinguished from that for the poor—Held that the members of session who received these collections were not bound to account therefor to the poor's funds.

June 1. 1831.

2d Division. Ld. Fullerton.

A dispute having taken place in the parish of Neilston, between the heritors on the one hand, and the minister and elders and certain of the parishioners on the other, regarding the right of the heritors to let the seats in the parish church, it gave rise to proceedings both in the Civil and Church Courts. To meet the expenses attendant thereon, the kirk-session, in August 1826, in addition to the usual plates in the church-yard on Sundays for the collection of alms for the poor from persons entering to divine service, caused or allowed others to be placed there for the purpose of receiving, after service, collections in aid of the proceedings regarding the church-seats. There was no minute entered in the session-books of a resolution of session to have these additional plates so placed; but it was done with their sanction, and the collections were taken charge of and received by individual members of the session; and it was always intimated by the minister from the pulpit, prior to the dismissal of the congregation, that such collection would be made, and that the contributions for the object mentioned would be received in the particular plates, marked by a white cloth, as stationed for that purpose. After this practice had continued for some time, the heritors obtained from the Lord Ordinary an interdict against it, as contrary to law, in a process still in dependence; and they further brought the present action against the minister and elders, concluding for count and reckoning as to the whole sums collected by them on Sundays since August 1826, contending that the kirk-session were bound to account for the sums received in the extra plates, as well as in those received in the ordinary plate put out for behoof of the poor.

In support of this demand the heritors pleaded—

The poor have an exclusive privilege of having money collected for them at church-doors in time of public worship. The kirk-session are intrusted with the charge of the collection, and it is illegal for them to collect for any other purpose, except perhaps on particular occasions authorized by the superior Church Courts; and accordingly the practice of the kirk-session here, of collecting for other purposes, has now been found illegal by the judgment of the Lord Ordinary. Whatever, therefore, might be the case in a question with the donors, it is impossible for the kirk-session to plead their own illegal act and breach of trust in de-

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fence against this action. They cannot be allowed to maintain that they collected for any other purpose than that for which the law authorized them,—and this the more especially, as there was no minute of session sanctioning the collection in aid of the legal proceedings.

To this it was answered—

It has always been the practice of the several Church Courts, including kirk-sessions, to authorize collections at the church-doors for other purposes than that of the support of the poor. But supposing that the kirk-session were not entitled to make the collections in question, the only remedy is that which was resorted to, viz. an interdict; and there can arise no right to the heritors to claim for the poor the sums received avowedly for a different purpose. The question is one as to the intention of the donors; and it having always been specially notified, before dismissing the congregation, that such collection would be made, and the plates in which it was received being put out at the end of the service, and marked as different from those for the poor which stood at the commencement, and in a different situation, there could be no possibility of mistake, and no doubt as to the intentions of the donors. In these circumstances, it is impossible to divert the funds contributed by them to a purpose different from that to which they had devoted them.

The Lord Ordinary pronounced this interlocutor, and added the subjoined note:* — "Finds that, since August 1826, the minister and kirk-

* "NOTE.—The summons concludes for an account not only of the weekly collections since August 1826, but of the sessional fines and exactions since 7th February 1825. It was, however, admitted by the pursuers, on the question being put to them by the Lord Ordinary, that on this latter point they were satisfied with the accounts furnished; and that the only point truly in dispute was the right to call the defenders to account for the collections at the extra plates.

"Although the collections at the church-door are generally applicable to the maintenance of the poor, there seems to be a right claimed by the Church Courts, and recognised, as the Lord Ordinary believes, in practice, of occasionally directing collections to be made for other charitable purposes. This right, however, cannot well be considered as unlimited; and it is possible that the heritors would be found entitled to prevent, by legal measures, the undue frequency of such collections, or the appointment of them for purposes not truly falling under the description of charitable. At all events, an objection on either of those grounds would form a fit subject of complaint against the Kirk-session to the Presbytery and the superior Church Courts. If such questions had arisen, the Lord Ordinary thinks that it would have been difficult to defend, either on the score of charity or propriety, the taking occasion of the assembling of the parish for public worship to raise funds in order to support measures of hostility adopted by one set of the parishioners against the other. But no such questions are here raised. No steps were taken in due time by the pursuers, either in the Civil or Ecclesiastical Courts, for preventing what is now alleged to have been an abuse. The only question then seems to be, whether or not the contributions in question actually received since August 1826 can be considered as now forfeited to the benefit of the poor—a purpose confessedly different from that for which they were intended by the donors? And the Lord Ordinary has been unable to discover any legal ground on which the affirmative of this question can be maintained."

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session of the parish of Neilston have frequently authorized or permitted certain plates for receiving contributions to be placed at or near the entrance to the church on occasions of public worship, which plates were distinguished from that appropriated to the receipt of contributions for the poor;—that the declared object of the collections made at those extra plates was to defray the expenses incurred by the kirk-session and several of the parishioners in the litigations then depending between them and the heritors;—that on the occasion of placing those extra plates, sufficient intimation was given that the sums there collected were intended for purposes different from the maintenance of the poor;—that the only sums which appear to be unaccounted for by the defenders are the collections made at those extra plates;—that whatever question might have been raised respecting the right of the defenders to place those extra plates for receiving contributions for such purposes, they are not now bound to account to the heritors, the pursuers, for behoof of the poor of the parish, for the collections received by them, and contributed by the donors for a different purpose;—and therefore assoilzies the defenders from the conclusions of the action, but finds no expenses due; and decerns."

Both parties reclaimed,—the heritors on the merits, and the minister and elders in regard to expenses not having been found due to them. The Court ordered Cases, on advising which, their Lordships adhered to the Lord Ordinary's interlocutor, and refused the reclaiming notes of both parties.

Lord Justice-Clerk.—On carefully attending to the summons, however clearly I might be of opinion that the practice in question was illegal, I consider that the demand in this process of accounting is not well founded. There is no conclusion for declaring this proceeding illegal—the conclusions being for accounting, &c. Notwithstanding all the statements in the record, it is just an action of count and reckoning for the proceeds of the plates, to be applied for behoof of the poor. However illegal the practice, there was no attempt to disguise what was done; but while there were plates for the poor, the others were placed also, intimation being made that the collection in them was for carrying on the litigation. Then, in this process of count and reckoning, are there grounds to award for the poor the contents received in these extra plates? We are driven to this—Are there any principles of law for awarding the contents to be paid over to the poor, as a forfeiture or fine? After the fullest consideration, I do not see any legal grounds for declaring this forfeiture, and appropriating to the poor what was given by the donors diverso intuitu. I am clearly of opinion that the practice is most indecorous and improper; yet I cannot find any legal grounds for forfeiting what the donors gave for a different purpose, and therefore I think that the interlocutor is right. I once thought that as there was a material diminution of the ordinary collections, in consequence of the establishment of the extra plates, there might be a principle for finding that the previous average receipts for the poor must be accounted for; but under the summons there is no ground for that.

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LORDS GLENLEE and CRINGLETIE concurred.

LORD MEADOWBANK.—I cannot arrive at the same opinion. I doubt exceedingly if kirk-sessions, or other church judicatories, can legally authorize collections for any other purpose than for the poor; but certainly, without such authority, the collecting for other purposes is illegal. The collections here, therefore, were made contrary to law. The presumption of law being that the collection was for the poor, can we admit proof of the fact of the defenders' illegal act to justify their retention? I think not; and if right in that, the summons is broad enough to oblige them to account for the money, which the law assumes they got for the poor. If the donors were claiming repetition, they might have good grounds. There is, however, no question with them, but only with the kirk-session attempting to avail themselves of their own illegal act, which I hold they cannot be permitted to do.

W. PATRICK, W. S.—J. MURRAY, W. S.—Agents.

No. 357.

CAMPBELL WINTON, Pursuer.—*Rutherfurd—Ivory.*

GIBSON and WINTON, Defenders.—*Skene—Cuninghame.*

Bill of Exchange — Proof — Holograph Writ. — 1. — The acceptance of a bill presumed to be for value until otherwise proved, although it was admitted that the precise value,—viz. 'plumber work,' which appeared ex facie of the bill, had not been received. — 2. — Circumstances in which a holograph letter not admitted to prove its own date.

June 1. 1831.

2D DIVISION. Ld. Mackenzie. F.

THE pursuer Campbell Winton accepted a bill, dated 14th November 1825, for the sum of £160, at four months, drawn upon him by the company of Gibson and Winton, bearing to be for value 'in plumber work.' Winton, having retired the bill when it fell due in the hands of indorsees, raised an action of relief against the company of Gibson and Winton, now dissolved, and Gibson and James Winton, the individul partners, on the allegation that it was accepted solely for their accommodation. The bill was in the handwriting of James Winton, who was Campbell Winton's brother; and while it was admitted that value had not been received by Campbell Winton in plumber work, as stated in the bill, it was averred, in defence, that the bill was a latent transaction between the two brothers, for their private accommodation, without the privity of Gibson, the other party, and having no reference to the company. After the record was closed, the agent for Campbell Winton, under an examination as a haver at the instance of the defenders, produced the following letter signed by the company firm, and holograph of James Winton:—"Edinburgh, 14th November 1825.—Mr. Campbell Winton—Dear Sir, We acknowledge to have this day received from you your bill, at four months date, for £160 sterling, which bill is for our accommodation, and falls to be paid by us when due. We are, dear Sir, your most obedient servants," (signed) "Gibson and Winton, builders, Edinburgh." This,

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however, wanted the half of the sheet containing the address, and had no post-mark to confirm the verity of the date; and the defenders alleged that it was got up ex post facto between the two brothers to support their present action, not having been founded on or mentioned in their summons, or in the record; and they pleaded that in such circumstances it could not prove its own date, so as to establish against the company that the bill was truly granted for their accommodation, and consequently that Campbell Winton, being debtor on the face of the bill, could not have relief against the company, without at least proving aliunde the verity of the date of this new production.

The Lord Ordinary pronounced this interlocutor:—" Finds that the bill libelled being accepted by the pursuer, the legal presumption is, that the acceptor received value for the same, and that the said presumption is not done away by the admission that the special value mentioned in the bill was not received by the pursuer;—that the holograph acknowledgment founded on by the pursuer ought not, in the circumstances of the case, to be held probative of the date when the same was granted, or consequently to be probative of its import against the defenders, unless the date thereof be instructed by other evidence;—therefore appoints the cause to be enrolled, that an order may be made for proof or trial."

The Court adhered.

P. Crooks, W. S.—Grsig and Morton, W. S.—Agents.

No. 358.

Trustees of David Earl of Cassillis, Petitioners.—*Baird*—*Speirs*.
Quintin Kennedy, Respondent.—*Cowan*.

Writ—*Erazure*—*Stat.* 1696, *c.* 15.—(1.)—Where the testing clause of a disposition dated 1775 bore that it was written 'on this and the *six* preceding pages,' and the letter *x* in the word *six* was written on an erazure, and the deed consisted of seven pages—Held,—1.—That the vitiation was, under the circumstances, not fatal to the deed;—and,—2.—That it was no objection to it that the pages were numbered at the top with arithmetical figures instead of words.

June 2. 1831.

1st Division. Ld. Moncreiff.

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The Parliamentary Trustees of the late David Earl of Cassillis having applied to the Court to sanction a proposed purchase of land to be entailed, a remit was made to Mr. Thomas Cranstoun, W. S., to report on the titles. The reporter stated the following objection to the progress of part of the lands derived through the Kilkerran family:—" The lands of Newlands first came into the Kilkerran family by a disposition dated the 18th of September 1775, granted by Macmurrie's trustees to Sir Adam Fergusson, and the testing clause runs thus, 'In witness whereof, we have subscribed these presents, consisting of this and the *six* preceding pages

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of stamped paper,' &c. The word *six* is, however, written upon an erazure," &c.; and he then stated his views, as in the subjoined note.*

The whole word *six* was not written upon an erasure, but only *x*, the last letter of it.

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* "If the erazed word were held pro non scripto and omitted, the clause would run thus—'In witness whereof, we have subscribed these presents, consisting of this and the —— preceding pages,' &c., thus leaving it altogether unascertained of how many pages the deed consists; and yet the statute 1696, c. 15, makes it an express regulation and condition, in deeds written book-ways, that 'the end of the last page make mention how many pages are therein contained.' The question, therefore, for the consideration of the Court is, what shall be the effect of the above erazure?

"Mr. Ross, in his Lecture on the Testing Clause, Vol. I. p. 145, has adverted to the hazard of any sort of erazure or vitiation in an essential part of the deed, and has given some examples of the manner in which the Court had in more early days been in use to deal with such objections. He says that there was a solemn decision, 1511, 'that writings being razet (erazed) in any substantial part should make no faith, although a proof was offered of its being done by the party or notary.' Again, in 1671, it 'was decided that a bond being vitiated in substantialibus, and suspected of its being intentionally done, the Lords again refused a proof by the instrumentary witnesses that the vitiation was done at the time of subscribing.' Several other modes of vitiation are noticed by Mr. Ross, with the procedure thereon, whereby it appears that, except in very favourable cases, the objection has always been listened to, and annulled the whole deed. It is needless, however, to refer further to decisions of an old date, because the Court have very recently had the subject under their consideration. In the case of Adam, June 12. 1810, a writ was vitiated by erazure of a word, and the insertion of another in its place, but without fraudulent intention; the word upon the erazure was held pro non scripto, but the rest of the writ was sustained. In the more recent case of Innes against the Earl of Fife, March 10. 1827, part of the name of the lands in an instrument of sasine, having been written on an erazure, was found to be a vitiation in substantialibus, which rendered the sasine null and void; and this decision was affirmed in the House of Lords.

"Taking these decisions in their mildest form, and applying them to the case in hand, it plainly follows that, by leaving out the word written on the erazure, the deed of 1775 does not show of how many pages it consists; and thus the statute not being satisfied, the disposition must of course be rejected, and held to be null and void.

"The other party, however, attempts to evade the effect of the above decisions by denying that the mention of the number of pages is an essential part of the deed, because the statute 1696 does not make the want of it an express nullity. Mr. Ross (Vol. I. p. 138), however, lays down the practice to be otherwise, and affirms that 'the act is in every case literally complied with,' except where the deed consists of only one sheet, which the Court has at different times found not to come within the range of the statute, which had for its object only to regulate deeds of greater length.

"It may therefore be said that both the direct and negative evidence is in favour of the objection. By the repeated absolvitors on the score of single sheets, there arises an irresistible impression that the decision would have been different, had the deed consisted of two or more sheets. The objectors, respondents in this case, next advert to the case of Gaywood, June 19. 1828, which is reported both by the Faculty and Mr. Shaw, and they concur in the result. The deed challenged consisted of more sheets than one, and *twelve* was the word which, in terms of the statute 1696, the testing clause should have specified, and did ex facie specify; but it was supposed to be wrote

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The deed consisted of two sheets of paper, each containing four pages. The first sheet terminated in the middle of the clause containing the procuratory of resignation, which was continued in the second; and, at the foot of every page, the catchword corresponded with the first word of the new page. The numeration of the pages was made by arithmetical figures, 1, 2, &c. to 7 inclusive. Each page contained the signature of three of Macmurrie's trustees. Upon the page marked with the figure 6 there was a marginal addition, the only one in the deed; and in the testing clause it was stated—"the marginal addition on the sixth page being written by me the said James Fergusson, the above-mentioned witnesses being also witnesses to the said marginal addition." The testing clause was written on the page immediately following that which contained the marginal addition, and both were in the second sheet.

Sasine followed on the disposition, and was recorded on the 13th of October 1775. The superior granted a charter of confirmation on the 26th of September 1777; and Sir Adam Fergusson possessed on these titles till his death. No renewal of the investiture took place till Sir James Fergusson, having been served heir in 1814, obtained infeftment in 1820. The land being afterwards excambed with Mr. Quintin Kennedy, was sold by that gentleman to the Parliamentary Trustees of the late David Earl of Cassillis, with whom the question arose.

On considering the objection stated by the reporter, the Lord Ordinary ordered minutes of debate.

Pleaded for the Earl's Trustees, Objectors—

1. As the deed was written on more than one sheet, it was essential that the testing clause should state the number of pages composing it, otherwise it was null in terms of the statute 1696, c. 15. The erazure in the word six made the number of pages blank in the testing clause. It

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on an erazure, and of course the deed was objected to. After careful examination, however, the Court came to be of opinion that the objection should be repelled, not because the mention of the pages was not an essential part of the deed, but because it appeared that only one letter, *v*, was wrote on the erazure, and that the rest of the word was sound; and therefore the deed was sustained, because, after dropping the vitiated letter, what remained of the word sufficiently specified and ascertained the number of the pages of which the deed consisted, and therefore the statute 1696 was not violated.

"In the last place, it has been argued, that independently of all other reasoning, the objection is sufficiently met and answered by the plea of prescription; and so it would, if there had been a legitimate base on which to ground such a plea. But the respondent assumes the disputed disposition 1775, and the infeftment following on it, as the grounds of the prescriptive right, which is evidently fallacious. The investiture on which you are to rear a prescriptive title must be ex facie sound, which is not the case here; and, by casting the eye over the analysis, it will be seen that there is no subsequent infeftment of an older date than 1816, so that the defence of prescription seems altogether fallacious."

The reporter afterwards stated that his views were confirmed by the decision in the case of the Earl of Rosebery, Dec. 19. 1829, relative to a parliamentary trust.

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was impossible to supply the place of this blank by any supposed equipollents, such as the reference to the marginal addition, the correspondence of catch-words from page to page, &c. But if the deed laboured under this ex facie nullity, it could not become the foundation of prescription; and notwithstanding the subsequent charter of confirmation, still the vitiated disposition remained the radical foundation, to which alone a course of prescription was referable; but if so, it was insufficient to sustain prescription; and,

2. As the pages were merely numbered at the top by arithmetical figures, such as 1, 2, &c., and not by numerical words, such as first, second, &c., this was a contravention of the same statute, and of universal practice; and as it deprived parties of an important check against interpolations, the deed should not be sustained.

Pleaded for the Respondent—

1. The letter *x* is the only part of the word *six* written on an erazure; and if that letter were taken pro non scripto, still enough remained in the testing clause to satisfy the statute, as it could only be read in one way. But the intrinsic evidence of the deed was decisive; it consisted of two entire sheets, regularly numbered and signed, and connected by the clause containing the procuratory of resignation; the catch-words corresponded throughout; and on the seventh and last page, where the testing clause occurred, reference was made to the marginal addition 'on the sixth page.' There was only one marginal addition, which was on the same sheet with that containing the testing clause, and on the page immediately preceding; so that there was in substance a positive statement in the testing clause of there being six preceding pages. But, independently of this, as sasine had followed on the disposition in 1775, and a charter of confirmation in 1777, which operated retro, it was not necessary now for the respondent to produce the disposition of 1775 as the warrant of his infeftment; he was entitled to found on his sasine and the confirmation, and plead prescription as fortifying his title.

2. In regard to the numbering of pages by figures instead of words, the statute had not enjoined the use of words; the practice at the present day was not admitted to be as alleged by the objectors, and still less to have been so at the date of the deed.

The Lord Ordinary reported the cause, and added the subjoined note.*

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* "NOTE.—Though it was certainly the duty of the reporter to point out the fact of the erazure in the testing clause of the disposition of 1775, and to state his opinion concerning the objection arising from it, the Lord Ordinary must confess that he would have great difficulty in holding that objection to be good. Supposing it to be clear that from the form of the statute 1696, c. 15, it imports, though it does not express, a declaration of nullity in any deed written bookways, in which the number of pages is not expressed, he is not able to think that the slight erazure which occurs in this case ought to have the effect of inferring that the statute has not been complied with. The question whether an erazure is material or not, must always depend on

The Court, for the reasons mentioned in the Lord Ordinary's note, "repelled the objections for the trustees of Lord Cassillis."

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Objectors' Authorities.—1. Ross, 138 and 145; Adam, June 12. 1810, (F. C.); Innes, March 10. 1827, (ante, V. 559); 1696, c. 15.

Respondent's Authorities.—Porteous, Feb. 4. 1757, (Supp. V. 855); Henderson, Jan. 31. 1797, (15444); Dickson, March 3. 1829, (ante, VII. 503); Wright, Feb. 8. 1672, (11540); Henderson, Feb. 20. 1802, (17059); Morton, Dec. 10. 1828, (ante, VII. 172); Gaywood, June 19. 1828, (ante, VI. 991); Morison, June 30. 1829, (ante, VII. 810); Robertson, Jan. 1742, (16855); M'Donald, Feb. 14. 1778, (16942); Scrymgeour, Dec. 20. 1705, (3785); Maxwell, April 30. 1725, (Roberts. App. 539); Dict. v. Prescription, Part II. c. 3. § 1.

HUNTER, CAMPBELL, and CATHCART, W. S.—J. DONALDSON, W. S.—Agents.

JAMES COOK, Pursuer.—*Jameson—Neaves.*

WILLIAM JEFFREY and Others, Defenders.—*D. F. Hope—More.*

No. 359.

Bankrupt—Sequestration—Expenses.—A creditor, who had applied for sequestration of the estates of a bankrupt, having been involved in a litigation as to the bankrupt's liability to sequestration; but sequestration having been awarded—Held that this creditor had a claim of relief against all the other creditors who ranked on the estate, including those who had opposed the application, for payment of the expenses incurred by him in the litigation.

June 2. 1831.

2D DIVISION.

Ld. Fullerton.

THE pursuer Cook, a creditor of Cuthill, writer in Glasgow, having presented a petition, under the Bankrupt Act, in February 1827, for sequestration of his estates as a builder, appearance was made for the trustees of Mrs. Cuthill, as creditors of her husband, who opposed the application on the grounds,—1. That he was not a builder, and not liable to sequestration; and, 2. That proper diligence had not been used for rendering him bankrupt. A long litigation ensued, in the course of which the Court, after the cause came into the Inner House on a closed record, appointed an additional condescendence by Cook as to the special circumstances averred as establishing that Cuthill was a builder. Ultimately the Court found that Cuthill was liable to sequestration,[1] and

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the circumstances of the case. Here it is quite clear that the only erazure is in the letter *x* of the word '*six*,' the letters *si* being clearly written without erazure. The pages are numbered, the last being 7; and the catchwords are so particular, that there could be no fraud. And further, the reference to the marginal note on the sixth page, which does stand on the last but one, is conclusive of the fact that the word '*six*' is the true numeration of the pages, as the deed stood when it was signed and witnessed. The Lord Ordinary, therefore, thinks that the erazure in the place where the letter *x* stands is not material in this case,—more especially in a deed on which sasine and a charter of confirmation followed above forty years ago, though the ingenious argument on the positive prescription does not appear to be solid; and he sees no ground to apprehend any danger in such a decision as a precedent, because he should consider it as depending entirely on the special facts of the case. It would surely draw the requisites of the statute too tight to hold, without any such enactment, that the numeration of each page must be in letters, and not in figures."

[1] See ante, VII. 452.

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awarded it accordingly, but found no expenses due by Mrs. Cuthill's trustees. The defender Jeffrey was thereafter appointed trustee on the estate. Shortly after this, Campbell and Macdowall, S. S. C., who had conducted these proceedings for Cook, presented an application, under the A. S. Feb. 6. 1806, for having their accounts audited and decerned for against Cook and Jeffrey. The expenses were, by direction of the Court, distinguished into the ordinary expenses requisite to obtain sequestration, and those arising out of the litigation with Mrs. Cuthill's trustees. For the former, decree was given against Jeffrey as trustee, and for the latter against Cook, reserving all claims of relief competent to him, and the defences thereto. Thereafter (but before sufficient funds had been realized out of the estate to pay these expenses) Cook raised an action against Jeffrey as trustee, and also against the several creditors who had ranked on Cuthill's estate, (the principal of whom were Mrs. Cuthill's trustees,) concluding for payment from them of the expenses paid by him to Campbell and Macdowall, and also of an account incurred by him to his Glasgow agent, part of which related to the ordinary business of the sequestration, and part to the litigation. The creditors defended themselves on the general ground that they were not parties to the litigation, and had not authorized it; and Mrs. Cuthill's trustees, that they had, on the contrary, opposed it, and consequently that they could not be made personally responsible for the expenses incurred, whatever claim might be competent against the estate; and they and Jeffrey also objected that Cook had misconducted the litigation, so as to require a second condescendence in the Inner House, showing the insufficiency of that originally given in. The Court having, before further answer, remitted to the Auditor, a report was returned by him, stating, that having gone over the papers, he did not consider that Cook was chargeable with any neglect or misconduct in the litigation; and that although the Court had subsequently required a more explicit condescendence, that originally given in was as specific as could have been expected from Cook's sources of information at the time. On this the Court repelled the special objections to the account, and, on the general point, while they decerned for payment against Jeffrey, qua trustee, out of the first proceeds of the estate he should realize, they also decerned against the creditors, in proportion to the sums for which they had ranked, with relief to them against the estate.

Lord Justice-Clerk.—The question before us is, Whether this is a good claim on the part of Cook? Is he not entitled to his relief? Now, in the first place, I think nothing has been hitherto decided in the case to settle this claim as affects Mr. Cook; and the question just comes to be the common one in a sequestration, whether all claiming under it are not subsidiarie liable? I think they are. If there are funds, the expense must certainly come out of them; but if not, these parties must just pay each their proportion, according to the extent of their claims, large or small.

Lord Cringletie.—I agree. The creditors here cannot get rid of expenses.

LORD GLENLEE.—I am of the same opinion.

LORD MEADOWBANK.—I also agree. There may be hardship, but so there always is wherever the estate is not able to pay.

CAMPBELL and MACDOWALL, S. S. C.—MOWBRAY and HOWDEN, W. S.—Agents.

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DUCHESS DOWAGER of ROXBURGHE and Others, Pursuers.—*Jameson—A. Dunlop.*
MAGISTRATES and TOWN COUNCIL of DUNBAR, Defenders.—*Rutherfurd—Ivory.*

No. 360.

June 2. 1831.
Duchess of Roxburghe &c. v. Magistrates &c. of Dunbar.

Burgh Royal—Process—Parties to a Suit—Poor.—In an action at the instance of the landward heritors of a parish containing a royal burgh, to have it declared that the Magistrates of the burgh were bound to maintain their own poor; or otherwise, in the event of failing in that conclusion, that the burden of maintaining the poor must be laid equally on the whole inhabitants in burgh and to landward, according to their substance—Held—1.—That any heritor had a title to pursue; and,—2.—That it was sufficient to call as defenders the Magistrates and Council, and that it was not necessary to call the proprietors within burgh, or certain landward heritors who had disclaimed the action.

June 2. 1831.

2D DIVISION.
Ld. Fullerton.
R.

THE parish of Dunbar includes the royal burgh of that name, and a considerable landward district. For a long period the poor of the burgh and landward district have been supported out of a common fund, whereof one-sixth is in use to be contributed by the burgh, and the remaining five-sixths to be assessed on the heritors and tenants in the landward district. Almost all the principal heritors being desirous of trying the question how far the Magistrates of the burgh were not obliged to support their own poor, separately from that of the landward district; or if not, whether the inhabitants of the burgh were not liable to be assessed equally, and on the same rule, with those in the landward part of the parish; several meetings of heritors were held, at which a resolution was finally adopted to raise an action for having the points in question determined. A summons was accordingly raised in name of the whole landward heritors, including several who had voted against the resolution, setting themselves forth, as with the town of Dunbar, the whole heritors of the parish, and as "having individually and collectively, and by their legal majority, good and undoubted right to raise and insist in this action,"—and calling as defenders the Magistrates and Town Council of Dunbar, and also the Kirk-session of the parish. The summons concluded to have it declared, "that the management and maintenance of the poor of the landward district, and of the burgh, are separate and distinct, and that the pursuers, as heritors of the landward district, with their tenants, and other inhabitants thereof, are not liable for the support of the poor of the burgh, but for that of the poor resident within the landward district allenarly," and to have the Magistrates and Town Council ordained to sustain and manage the poor of the burgh; or, alternatively, in the event of failure in these conclusions, to have it declared "that the power of taking up the lists of the aggregate poor, determining the assessments, and managing the funds, belongs to the meeting of heritors, provost,

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minister, and elders; and that the assessments to be imposed for support of the aggregate poor shall be laid on the whole inhabitants of the parish equally, whether in burgh or to landward, 'according to the estimation of their substance, without exception of persons.'"

To this summons the Magistrates and Town Council of Dunbar gave in preliminary defences, objecting—

1. That the pursuers had no title to pursue.

2. That all the proper parties were not in the field, in as much as the proprietors within burgh had not been called as defenders.

3. That in so far as the action was laid at the instance of the heritors collectively as a body, it was inept; and, besides, it was not authorized by the legal majority of the meeting on whose authority it was raised.

To avoid discussion on the third objection, the pursuers delete from the passage of their summons above quoted the words "individually and collectively, and by their legal majority;" and as to the other two they answered—

1. Any individual heritor has sufficient title and interest to sue an action like the present; and,

2. In an action against a burgh, it is sufficient to call the Magistrates and Council as representing the community,—and this more especially in an action relative to the management of the poor, as to which the Magistrates are expressly, by statute, intrusted with the sole administration.

The Lord Ordinary, in respect of the deletion of the words above mentioned, found it unnecessary to discuss the third preliminary defence, but repelled the first and second.

The Magistrates reclaimed; and on the day before their reclaiming note was to be advised, they lodged in process a disclaimer by a considerable number of the heritors, whose names were used in the summons as pursuers; and they contended, in addition to their former pleas, that these parties not being now in the field as pursuers, it was necessary they should be called as defenders.

To this it was answered, that the Magistrates could not, by procuring this disclaimer, introduce, at the advising, a new preliminary defence; but, at any rate, that the conclusions of the action being truly against the burgh, there was no necessity for calling as defenders any of the landward heritors.

Lord Justice-Clerk.—The object of this action is to have it declared that the Magistrates of the burgh are bound to take steps for laying the burden of supporting their own poor on the inhabitants; and it cannot be listened to, that in addition to the Magistrates and Council, it is necessary to call every proprietor or inhabitant within the burgh. It is clear that the Magistrates and Council are bound to answer for the community. Then as to the heritors who have disclaimed the action, there is no necessity for calling them as defenders, and any one heritor is entitled to pursue.

The other Judges concurring, the Court adhered.

J. and W. Ferrier, W. S.—Gibson-Craigs, Warblaw, and Dalziel, W. S.—Agents.

ALEXANDER RODGER, Pursuer.—*Keay—A. Dunlop.*
LIEUT.-GEN. DARROCH &c., Defenders.—*Jameson—J. S. Stewart.*

No. 361.
June 2. 1831.
Rodger v. Darroch &c.

Title to Pursue.—Creditors of a defunct, who was alleged to have been insolvent at the time of executing a discharge of a claim, have no title to sue reduction of such deed on the ground of its having been obtained from the defunct by fraud and circumvention, but must first vest themselves with the jus actionis competent to the defunct.

June 2. 1831.
2D DIVISION.
Ld. Moncreiff.

RODGER, as trust-assignee of certain creditors of the late Angus Darroch of Gourock, holding constituted claims of debt against him, but not having confirmed as executors-creditors, instituted an action, setting forth, that shortly prior to his death, Darroch (who was then pursuing a claim for legitim to the extent of £40,000 against the trustees of his deceased father) was by them induced to execute a discharge of his action and claim by means of fraud and concealment as to the amount of the consideration he was to receive therefor; that, at the date of this deed, he was in a state of insolvency; and that the pursuer's cedents, had been thereby precluded from effecting payment of their debts. He therefore concluded for reduction of this discharge, and of the titles made up by the defender General Darroch to certain lands purchased by the trustees with the legitim, and conveyed by them to the General, on the grounds,—1. Of style. 2. That the discharge had been obtained from Angus by means of fraud and circumvention on the part of the trustees. 3. That, at all events, it was granted by Angus while under essential error as to the counterpart of the agreement; and 4. That it was objectionable, as in fraud of his creditors, both under the act 1621, and at common law. The summons further concluded to have it declared that the lands held by General Darroch, and purchased with the legitim, were liable to be adjudged for payment of Angus's debts.

Preliminary defences were given in, pleading that the pursuer had no right to found on the second and third reasons of reduction, in respect he had "no title, by diligence or otherwise, to state himself as representative of the said Angus Darroch."

The Lord Ordinary found "that the pursuer has not, by the rights now founded on, any title to insist in the action, so far as the same is founded on the grounds stated in the second and third reasons of reduction;" and to that extent sustained the defences.

The pursuer reclaimed to the Court, who ordered Cases.

Pleaded for the Pursuer—

1. It is not disputed that the creditors of an insolvent debtor have a direct and immediate title at common law, independently of the statute 1621, to pursue a reduction of a fraudulent conveyance by their debtor to their prejudice. Their title in this case arises not from the fact of

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their debtor having been guilty of fraud, but from the simple fact of their having been prejudiced thereby, and precluded from effecting payment of their debts. The fraud is the ground of reduction; but their title rests on the injury done to them, and the same title enables them to found on the fraud of a third party taking the conveyance, as, for instance, where a prior creditor has been preferred, in which case it is absolutely necessary for them to found on his fraud, as that of the debtor alone will not vitiate the transaction. The same interest arising from direct injury would in like manner give creditors of a party insolvent a title to pursue reduction of a conveyance to their prejudice on the head of defect in solemnity, insanity of the granter, or the like. In the same way, although the ground of reduction here is fraud and circumvention by third parties, the title of the pursuer is equally strong. He avers that the deceased was insolvent at the time of executing the discharge, and that his creditors were thereby directly prejudiced, and precluded from effecting payment of their debts. This is sufficient to entitle them to sue reduction of the deed to their prejudice on any nullity in respect of which it is liable to challenge; and it is of no consequence that the deceased, or his executor, may also have had a title to pursue a similar action, as being also injured thereby; for the existence of this right in the deceased can never take away the title arising to his creditors from being, as well as him, directly defrauded by the deed challenged, or render it necessary for them to take up that right in addition to the separate and independent right already existing in their own persons.

2. Even supposing that no direct right of action arose to the creditors themselves, independent of that existing in the person of their debtor, still it has been repeatedly found that creditors, without doing diligence, are entitled to avail themselves of pleas personal to their debtor, in order to reduce deeds which bar their diligence, to the effect of having their debtor's estate declared liable to be affected thereby. Thus creditors of an heir apparent are, without adjudication, entitled to pursue reduction ex capite lecti of deeds granted by his ancestor,[1] —creditors of a minor to reduce on the head of minority and lesion[2] —of an heir to set aside decrees obtained intra annum deliberandi[3] —of an ancestor to challenge conveyances by the heir within the year[4] —and the like. Nor can the death of the debtor make any difference; for although creditors of an heir-apparent cannot insist in a reduction ex capite lecti, after his death; that arises from the circumstance peculiar to the case of deathbed, that all right of action dies with the heir; and the same rule does not extend

[1] Ersk. 3. 8. 100; Bankt. 3. 4. 44; 1. Bell, 98, (5th edit.); Creditors of Balmerino, Feb. 16. and Nov. 25. 1669, (10421—3203.) [2] Herbertson v. Stuart, Feb. 27. 1685, (16098); Dunbar v. Leslie, Feb. 23. 1628, (10419.) [3] Ersk. 3. 8. 55; Summers v. Gardner, Dec. 23. 1757, (6882.) [4] Taylor v. Lord Braco, Nov. 26. 1747, (3218); Bell v. Lothian, Feb. 25. 1773, (3134.)

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to a right of action, which descends to the debtor's representatives, as a right to reduce on the head of fraud and circumvention undoubtedly does; and no right which was not exclusive in the person of the party himself, can possibly be exclusive in the person of his representative, whose right can in no respect be different from, or more extensive than, that of the person he represents. The pursuer, therefore, on this ground also, and in addition to the direct and independent right arising to him in consequence of the insolvency of his debtor, is entitled to pursue the present reduction, to the effect of having his debtor's estate declared liable to his diligence, without which any confirmation as executor-creditor could carry nothing, and could consequently give no better title than he has now.

Pleaded for the Defenders—It is no doubt true that creditors, simply as such, have a title to reduce fraudulent conveyances by their insolvent debtor to their prejudice; but this arises from the circumstance that they are directly defrauded. The case, however, is different where the fraud is practised against their debtor. It is to him alone that a right of action in such a case arises; and to enable creditors to challenge the deed fraudulently obtained, it is not enough that they will indirectly suffer, (for the interest arising from mere consequential injury will not afford a title);[1] but they must take up, by diligence or otherwise, the jus actionis competent to their debtor. The cases quoted for the pursuers do not apply. In that regarding the reduction ex capite lecti, it is doubtful whether the creditors had not adjudged; and, at all events, it was decided in a subsequent case that the creditors of an heir apparent could not carry on such action after his death, unless they had previously vested themselves with his right of action by adjudication.[2] As to the others, they chiefly regard statutory nullities, which may be founded on by any one having interest; and besides, although creditors, in the lifetime of their debtor, may have been allowed to carry on actions primarily competent to him, there is no authority for extending that privilege to them after his death. The right of action here has either been taken up by the executrix of Angus Darroch, who holds it in trust for all having interest, and who may be obliged to exercise it for the benefit of his creditors; or, if not taken up by her, it is still open to the creditors to vest themselves with it by confirmation ad omissa. Until, however, they take up this right, they can have no title to pursue reduction of the deed, on the ground of its having been obtained by fraud and circumvention practised against the granter.

Lord Glenlee.—Instead of at once sustaining this defence, I would have inclined to allow the production to be satisfied, reserving consideration of it. It is most material that the pursuer should be entitled to found on this alleged fraud; for it would be very extraordinary if the deed could be at the same time

[1] Douglas v. Somervell, July 22. 1713, (16107.) [2] Trotter v. M'Kello, Feb. 18. 1676, (10422.)

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fraudulently obtained, and yet for just, true, and onerous causes. Under the other reasons, however, he will be entitled to found on it; and I therefore do not see what interest he has to maintain his present plea. My reluctance to recal the interlocutor is from fear of sanctioning the idea that creditors of dead persons have a right to pursue all sorts of actions which were competent to their debtor. If the party be alive, it now seems admitted that they may bring their action on grounds competent to him, without adjudging; but I know of no authority for this when the party is dead. As to the case quoted regarding deathbed, the only dispute was between the personal creditors of the heir apparent; and it was held that they had a title to have it found that the estate was liable to be attached, unaffected by the deathbed deed. The present case is different from those depending on informality, or on defect of diligence, for it is never jus tertii to object to these. I see no sufficient ground to alter, but would supersede the question of title.

Lord Cringletie.—I do not see how the pursuer can make up a title, the aunt having confirmed executrix. If a party insolvent makes a deed to defraud his creditors, he cannot challenge it, because he cannot found on his own fraud; and if they do not pursue directly, they never can pursue at all, because they cannot pursue in his name; and it is the same thing to the creditors whether the debtor is fraudulent himself, or is defrauded. I cannot distinguish between the two cases, or between this and the case of deathbed, and therefore am for sustaining the title.

Lord Justice-Clerk.—The interlocutor is special as to the second and third reasons. It is plain that every right and interest to prosecute in respect of insolvency is reserved entire. But the nice question is, whether the pursuer is entitled to prosecute on these reasons? And we are to attend to this, that the aunt is confirmed executrix. If the right to reduce has not been taken up by her, this is an omission. She may be either obliged to prosecute, or the pursuer may confirm ad omissa. But there is no attempt to make up a title, and I am decidedly of opinion that there is no authority to show that, without a title, any such action may be sustained. Deathbed is quite different, and the decisions as to other matters do not apply. The case of statutory nullities is very different from this, where the nullity is on alleged personal injuries to the debtor individually. I cannot see what the object of the pursuer is. If he make out that the party was insolvent, and that there was no just and proper cause for the deed, he will succeed; but I cannot differ from the Lord Ordinary.

Lord Meadowbank.—I agree.

Lord Glenlee now also concurring in adhering to the interlocutor—

The Court adhered.

J. Patten, W. S.—A. Clason, W. S.—Agents.

MRS. M'GREGOR, Pursuer.—*More—Hamilton.*
JAMES FORRESTER, Defender.—*Jameson—Russell.*

No. 362.
June 3. 1831.
M'Gregor v. Forrester.

Fee or Liferent—Clause.—A disposition in an antenuptial contract, by which the husband conveyed property to himself and wife, 'in conjunct liferent during all the days of their lifetime, and to the longest liver of them, and their heirs or assignees in fee,' held to vest the fee in the surviving wife.

June 3. 1831.

1ST DIVISION. Lord Meadowbank. D.

JAMES FORRESTER acquired a portion of land, which was thus described in the disposition in his favour: "All and haill the just and equal half of the 9s. 9d. land of old extent, in the Garth quarter, extending to a 4s. 10½d. land of old extent, commonly called Bullshill, with houses," &c. He afterwards married the pursuer Mary M'Gregor, and, by their antenuptial contract, he, in contemplation of the marriage, and in consideration of the sums contracted on the part of Mary M'Gregor, disponed and conveyed "to and in favours of himself and the said Mary M'Gregor, his promised spouse, in conjunct liferent during all the days of their lifetime, and to the longest liver of them, and their heirs or assignees in fee, heritably and irredeemably, all and haill the just and equal half of the said James Forrester's 9s. 9d. land of old extent in the Garth quarter, commonly called Bullshill, with the houses," &c. He bound himself "to infeft and seise himself and the said Mary M'Gregor in conjunct liferent during all the days of their lifetime, and the longest liver of them, and their heirs or assignees in fee," &c.; and granted a procuratory to resign "all and haill the just and equal half of the foresaid 9s. 9d. land of old extent in the Garth quarter, commonly called Bullshill, and whole pertinents," &c. Mary M'Gregor, on the other part, assigned to him generally all debts and sums of money belonging to her.

On the death of Forrester in 1801, leaving a family, she entered into possession of the 4s. 10½d. land of Bullshill. After she had possessed for nearly thirty years, a dispute arose between her and her eldest son, James Forrester, regarding their respective rights under the marriage-contract. He maintained that she had nothing but a right of liferent, and that the liferent extended only to one half of the 4s. 10½d. land of Bullshill; while she contended that she was fiar; that the terms of the antenuptial contract imported a conveyance of the fee to her; and that though it related only to the half of the 9s. 9d. land of old extent in the Garth quarter, yet it was on that very account the whole of the 4s. 10½d. land of old extent, commonly called Bullshill. To have this found, she raised a declarator; and the Lord Ordinary ordered Cases to the Court, who, almost without observation, decerned in the declarator.

Pursuer's Authorities.—3. Ersk. 8. 35 and 36; Murray, May 17. 1826, (ante, IV. 589.)

Defender's Authorities.—3. Ersk. 8. 36; Muirhead, Jan. 16. 1824, (ante, II. 617); Murray, May 17. 1826, (ante, IV. 589); Aiton, Nov. 10. 1609, (4198); White, Dec. 9. 1630, (4199); Justice, Jan. 23. 1668, (4228); Fergusson, June 22. 1739, (4202); Supp. III. 242.

J. CAMPBELL, W. S.—WOTHERSPOON and MACK, W. S.—Agents.

No. 363.

June 3. 1831. Balfour v. Officers of State &c.

LIEUT.-GEN. BALFOUR, Raiser.—*D. F. Hope—Alison.*
OFFICERS of STATE, Claimants.—*Ld. Adv. Jeffrey—Robertson.*
J. and R. DOUGLAS (MARQUIS of TWEEDDALE'S COMMISSIONERS), Claimants.—*Murray—Ivory.*

Heritable Office—Clause—Regality.—The heritable bailie of a regality having, by his charter, right to a fee of eight bolls of meal, termed therein 'firmæ molendinales,' out of lands subject to a feu-duty to the Crown of eight bolls four pecks; and the bailie fee having been paid out of this feu-duty by the King's Chamberlain, on collecting the same, till the date of a lease of the Crown duties of the regality in favour of the bailie, who thereafter drew the whole feu-duty without distinction—Held, after the expiry of the lease, that the lands were subject only to the feu-duty specified in the titles, but that eight bolls thereof were payable to the bailie as his bailie fee.

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2D DIVISION. Ld. Fullerton. T.

BY a charter dated in 1580, the Commendator of the Abbey of Dunfermline, with consent of the convent, instituted the office of Heritable Bailie of the Abbacy in favour of David Durie of that ilk, granting to him and his successors "omnes et singulas nostras firmas feodifirmarias monetæ et victualium subscript. et alias divorias inferius specificat. omnium et singularum nostrarum terrarum, et villarum particulariter subscript. ad nos et nostrum monasterium spectan. et pertinen." including, inter alia, "firmas molendinales villæ de Kinglassie, extenden. ad octo bollas farinæ." These 'firmæ molendinales' were enumerated in the charter, along with certain other farms or duties of the mill of Milldeans, and 'villa' of Gaitmilk, situated in the same parish, (viz. Kinglassie,) in the following order:—"Firmas victuales molendini de Myldanis, extenden. ad duas celdras duas bollas farinæ avenaticæ; firmas molendinales villæ de Kinglassie, extenden. ad octo bollas farinæ; firmas molendinales villæ de Gaitmilk, extenden. ad octo bollas farinæ." The amount of these three sets of duties or farms was three chalders two bolls, and they constituted the whole of the bailie fee payable out of this parish.

In 1589, James VI., on the occasion of his marriage with Anne of Denmark, erected the abbey lands of Dunfermline into a temporal lordship, and conferred the same, as a 'morrowing gift,' on her Majesty in liferent. A few years after this, Durie, the original bailie, resigned his office into the Queen's hands for a new infeftment in favour of Alexander Seton Lord of Urquhart, afterwards Earl of Dunfermline, who obtained from her Majesty a charter of resignation and novodamus in the same terms with that granted to Durie by the commendator of the abbey. On the Queen's death in 1619, the rents &c. of the lordship of Dunfermline were assigned to Charles Prince of Wales, who, some years after his accession to the Crown, viz. in 1641, granted to the then Earl of Dunfermline a tack of the lordship, with the "teinds, farms, duties, feu-farms, teind-duties, profits and emoluments," &c., for three 19 years from 1639. Shortly after the date of this tack, the Marquis of Tweeddale adjudged from the Earl of Dunfermline the tack, and the heritable

office of bailie; and on the 23d of March 1693, and 6th June 1749, renewals of the tack were obtained by the Tweeddale family, the last of which expired in 1780.

The original tack to the Earl of Dunfermline was expressly declared to be without prejudice to the other rights belonging to his Lordship, and the renewals to the Tweeddale family contained a declaration to the same effect, besides proceeding on the narrative that the bailie fees would in a great measure be lost, if the tack were not renewed.

Among the lands holding of the abbey of Dunfermline were those of Kinglassie, which had come by progress into the person of General Balfour of Balbirnie. The earliest titles possessed by him were a precept of sasine proceeding from Chancery in 1649, and a Crown charter in 1668, in which the reddendo was thus expressed:—"Reddendo &c. nobis et successoribus nostrisque camerariis &c. ut sequitur, viz. pro dictis terris de Kinglassie principaliter disposit. summam viginti quinque librarum quinque solidorum et quinque denariorum usualis monetae regni Scotiæ, una cum octo bollis quatuor peccis farinæ avenaticæ mensuræ foralis que mercimonii et duobus duodenis pultrearum &c. nomine feudifirmæ," &c. During the subsistence of the tacks, the proprietor of Kinglassie paid to the Earl of Dunfermline, and thereafter to the Marquis of Tweeddale, the whole duties specified in this charter.

On the expiry of the last renewed tack in 1780, a new one was obtained from the Crown, in favour of the heritors of the lordship of Dunfermline, of the duties payable out of their lands respectively; and since that period no duties were paid by General Balfour, either to the Crown or to the Marquis of Tweeddale.

In 1802, an action was raised against General Balfour by the Commissioners of the Marquis of Tweeddale, concluding for payment of arrears of his Lordship's bailie fee of eight bolls of meal out of Kinglassie. After some procedure, in the course of which the tack from the Crown in favour of the heritors expired (1811), the Court directed the Officers of State to be called. In consequence of this, a multiplepoinding was raised in name of General Balfour, in which appearance was made for the Officers of State, and also for the claimants James and Robert Douglas, Commissioners for the Marquis of Tweeddale, who gave in a condescendence of the fund in medio in the hands of General Balfour, as being the whole arrears of eight bolls per annum since 1780, which they claimed as belonging to the Marquis in virtue of his office of heritable bailie of the lordship of Dunfermline.

In support of his Lordship's claim they pleaded—

The lands of Kinglassie must have been held of the Abbey for the same duties as those expressed in the charter from the Crown, (which came in place of the Abbey,) viz. £25. 5s. 5d. in money, and 8 bolls 4 pecks (or 1 firlot) of oatmeal. In instituting the office of bailie, it is clear that these 8 bolls of meal (leaving the four pecks payable to the Abbey) were assigned as the bailie fee from these lands under the terms 'firmas molendinales.' The true interpretation of these words was 'meal ferms,'

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and not 'mill-dues,'—the word 'molendinarias' being that which would have been used to signify 'relating to a mill,' and which was so used several times in the charter creating the office. Nor does the circumstance that these 'ferms' are said to be 'villæ de Kinglassie,' lead to the inference that the dues were not payable from the 'lands' of Kinglassie, as the term 'villa' is used to express generally a manor or estate, and does not necessarily imply a town or village. Accordingly, from a series of accounts of the rents and duties of the lordship of Dunfermline, between 1615 and 1632, kept by the Chamberlain of the Queen, and, after her death, by the Chamberlain of Charles I., both while Prince of Wales, and after his accession to the Crown, it appears that there was a separate head of the accounts entitled 'Chairge of ferme meal.' Under this head was set down, inter alia, 'the chairge of ferme meale within Kinglassie parochine,' amounting to five chalders and upwards, in the enumeration of which were included these items:—Kinglassie 8 bolls 1 firlot; Gaitmilk 8 bolls, and Milldeans 2 chalders 2 bolls; 'Kinglassie toune' 4 bolls 2 pecks; while on the opposite side of the account, headed 'Dischairge of meale,' there was the following entry—'Item, the comptar discharges him with the meale assignit to the bailie benorth Forth in his bailie fee, cropt comptit,'—3 chalders 2 bolls,—being the exact amount of the ferms assigned to the bailie from this parish. The claimants therefore contended,—1. That these accounts showed clearly that 'firmæ molendinales villæ de Kinglassie,' amounting to 8 bolls, mentioned in the bailie's charter, were truly so much of the duties payable to the Abbey, and thereafter to the Crown, by the vassal in the lands of Kinglassie; and, 2. That this gift, having been confirmed by the charter of novodamus after the Abbacy fell into the hands of the Crown, must still be payable to the bailie, although the whole duties had been necessarily drawn together, and without distinction, after 1641, when the first tack was granted,—the same party being entitled as bailie to the bailie fee, and, as Crown's tacksman, to the reserved duties to the Crown.

On the other hand, it was contended by General Balfour, that he could only be liable in payment of the single amount of 8 bolls 4 pecks of feu-duty specified in his titles, but not for any additional bailie fee not stipulated therein; that the 8 bolls granted to the bailie out of Kinglassie, and described as 'firmas molindinales villæ de Kinglassie,' could not be the duty payable as feu-duty by the vassal of Kinglassie for these lands, because, 1. The amount of the feu-duty was 8 bolls 4 pecks, while the dues assigned to the bailie were only 8 bolls; and, 2. The duty payable by General Balfour was, in the charter, declared to be a feu-duty, and was payable to the Crown alone, and in respect of the 'lands;' while in the bailie's charter the dues assigned to him are termed 'firmæ molendinales,' (which it was alleged meant mill-dues,) and are declared to be dues, not of the 'lands,' but 'villæ de Kinglassie,' and so were probably dues to a mill at Kinglassie; and, at all events, that they were not shown to have been these feu-duties. He therefore claimed to be preferred to the fund in medio, so far as it consisted of arrears of duty during the

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subsistence of the tack in favour of the heritors of the lordship of Dunfermline.

The Officers of State claimed the Crown duties fallen due since the expiry of the tack in 1811; and besides supporting the pleas of General Balfour, they contended that even although the Marquis of Tweeddale should substantiate a right, as bailie, to a fee of 8 bolls from the lands of Kinglassie, it did not follow that this was to be paid out of the feu-duty payable to the Crown, but that the Crown was entitled to draw the duties stipulated for in General Balfour's charters, without deduction.

The Lord Ordinary reported the cause on Cases.

Lord Justice-Clerk.—I mean to lay out of consideration the whole discussion previous to the Officers of State being called, as the case resolves into a competition between the Crown and the Marquis of Tweeddale; and General Balfour has no interest in the question, as he has just to pay the feu-duty stipulated in his charter. It is clear that from 1649 the lands have been held by Crown titles, under payment of a feu-duty to the Crown; and there is no evidence of eight bolls, over and above, as a fee to the Bailie; and the only question is, Can the Marquis demand eight bolls to be paid to him out of the feu-duties? I can see no evidence of such right; and while I hold that no more is exigible from the vassal than the feu-duty in the reddendo of his charters, I also think there is no right established by the Marquis, as Bailie, to get a fee of eight bolls out of it.

Lord Glenlee.—It is clear Balfour has no interest in the competition. As to the right of the Bailie, however, there is in the original charter a mere assignation to the duties. There is no right in the land, but an explicit assignation of the duties. In that state of matters, it is plain that the Chamberlain would collect the whole dues, and pay over the fee to the Bailie; and after the lordship of Dunfermline was erected, it is evident from the accounts that the Chamberlain of the Lord of Erection discharged himself by payment of this fee as in the charter, while he charged himself with the whole dues collected. The Crown approbated the right of the Bailie to draw the fee out of the feu-duty. The confirmation of this charter acknowledged the fee, and it was approbated by allowing payment till the lease was granted. The charter carried the right to the fees to the Bailie; and in the leases all right to the Bailie is specially reserved, so that they cannot injure the right. The Bailie never levied his fees directly from the vassals; but there was a virtual assignation by the Crown, who were bound to make effectual the fee of eight bolls in question; and therefore the interlocutor should just find that, to the extent of eight bolls, the right to collect is made over to the Bailie; that it has been followed by possession without interruption, and that Balfour's payment to him will pro tanto discharge the duty payable to the Crown. As to the meaning of 'firmæ molendinales,' I should suppose the whole multures might not go to the miller, but that part was payable to the Abbey; that the person who collected got a lease of the multures, and paid rent for them; and that the rent might be called 'firmæ molendinales.' That may have been the origin, or not; it is all one and the same thing. Whatever was the original subject, the Crown confirmed it by charter, giving the Bailie a certain fee, and

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by long usage acknowledged his right to draw the fee, charging it on the feu-duties.

LORDS CRINGLETIE and MEADOWBANK concurred with Lord Glenlee.

THE COURT accordingly pronounced the following interlocutor:—"Find that the raiser is liable in only once and single payment of the fund in medio, being certain arrears of duties payable out of the lands of Kinglassie, and others belonging to him, with interest due thereon;—that the Marquis of Tweeddale, as heritable bailie of the regality of Dunfermline by grants from the Crown, fortified by immemorial usage, has been provided to, and is entitled to payment of 8 bolls of oatmeal yearly furth of the lands of Kinglassie, as his fee in respect of the said office;—that said 8 bolls of oatmeal constitute a burden upon, and a deduction from the feu-duties payable to the Crown from the said lands of Kinglassie;—therefore prefer the said James and Robert Douglas, as commissioners foresaid, to the fund in medio, consisting of the arrears of said feu-duty, amounting annually to 8 bolls of oatmeal, after satisfying the Crown, or the grantees of the Crown, for the surplus of the said feu-duty; and decern."

STEVENSON and YULE, W. S.—F. WILSON, W. S.—GIBSON-CRAIGS, WARDLAW, and DALZIELS, W. S.—Agents.

No. 364. MRS. WILSON or TAIT and HUSBAND, Pursuers.—*Ld. Adv. Jeffrey—Cuninghame—Milne.*

PHILIP WILSON, Defender.—*Skene.*

Arbitration—Husband and Wife—Res Judicata.—Where a wife who had a claim of legitim, and her husband for his interest, entered into a submission of all questions, disputes, &c.; and the arbiters assoilzied, and ordained the wife and her husband to sign a discharge of the claims; and the husband did so, but the wife refused till after an imprisonment of thirty days—Held,—1.—That the arbiters had power to order a discharge to be executed;—but,—2.—That, under the circumstances, the wife was entitled to reduce the discharge executed by her.—3.—That the judgment of a Lord Ordinary in the Bill-Chamber, refusing a bill of suspension and liberation offered by the wife during her imprisonment till she should execute the discharge, was not res judicata, so as to bar a reduction of the discharge thereupon executed by her.

June 4. 1831. 1st DIVISION. Ld. Moncreiff. D.

THIS was an action of reduction by Mrs. Wilson or Tait of a decree-arbitral, and a relative discharge, and concluding for damages on the ground of wrongous imprisonment. The facts and the nature of the case appear from the subjoined note of the Lord Ordinary, who reported it to the Court on Cases.*

* "NOTE.—This case resolves into two or three short points of law. The pursuer made a claim of legitim against the defender, and, along with her husband, brought an action for establishing it. The case was submitted to arbitration; and by the submission the parties submitted 'all questions, claims, disputes, and differences, subsisting and depending, or which may arise between the said parties in relation to the foresaid actions, differences, and disputes, in any manner of way,' &c., with power to the

Lord Craigie was understood to say that he saw no ground for reduction, as the claim submitted was for the woman's legitim, and the submission was entered into by her, and her husband for his interest. The arbiters were entitled to decern that a discharge should be executed at Wilson's expense, and

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arbiters or oversman to take proof, and to decern for whatever sum should be found due by the one party to the other, to order production of writs, to find expenses due, &c.; and the parties bound themselves that whatever the arbiters should determine in the 'premises,' they should acquiesce in, implement, and fulfil. The arbiters accepted, and pronounced a decree-arbitral, by which they found that at the death of the father there were not funds sufficient to pay his debts, and consequently there was no fund of legitim; assoilzied the defender from the action, 'and absolved and discharged the said Philip Wilson junior from all questions, claims, disputes and differences, subsisting and depending between the said parties in relation to the foresaid action.' The decree then goes on to ordain the pursuer and her husband to execute and deliver a formal discharge to the above effect.

"A discharge was prepared and revised by the pursuers' agent, though he recommended that it should not be extended. It was extended, however, and was signed by the husband; but the pursuer, the wife, peremptorily refused to sign it. A charge of horning was given, and she, persisting in her refusal, was imprisoned. After being some time in jail, she presented a bill of suspension and liberation, which bill, on being advised, with answers, was refused by the Lord Ordinary in the Bill-Chamber on the 21st of July 1828; but the case was never before the Court.

"The pursuer now brings a reduction of the decreet-arbitral and the discharge, evidently for the purpose of supporting the further conclusion for damages; and the grounds taken are, 1. That it was ultra vires of the arbiters to ordain the pursuers to grant any discharge; and, 2. That it was at any rate incompetent and oppressive to execute personal diligence against the pursuer, a married woman, in order to compel implement of a personal obligation.

"The Lord Ordinary is of opinion that there is no solidity in the objection made to the decree-arbitral; for though the submission does not expressly empower the arbiters to ordain the parties to grant a discharge, it gives them full power to decide every thing relative to the claim made, and the differences between the parties; and though it might not be necessary that a discharge should be granted, it seems to have been clearly within the power of the arbiters to order it, if they thought it necessary for the defender's safety, or that it would be useful to him.

"But if the matter be quite open, the Lord Ordinary does not think it quite so clear that the defender was warranted in executing the caption against the pursuer. For though it is quite competent generally to imprison a married woman ad factum præstandum, it must depend on the nature of the case whether this may be legally done. The pursuer had no legal interest indeed to refuse to sign the discharge; but if she chose obstinately so to refuse, the defender seems to have had no legitimate interest to insist upon it. For, besides that the decreet itself was to all purposes a good discharge, it is evident that though the wife's name was necessarily used in making the claim of legitim, the right itself as a claim to personal funds belonged exclusively to the husband jure mariti, and therefore, when he had subscribed the discharge, the defender could have no legal interest to demand any thing more. His discharge was an effectual discharge for the wife; but if the defender had not a real and true interest to require the wife to sign the discharge, it appears to the Lord Ordinary that it could not be a lawful use of the decerniture of the decreet-arbitral, in so far as it applied to the wife, to execute ultimate diligence against her person, in order to force her to discharge a personal claim of debt, which, if there had been a real debt, would

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signed by both the wife and her husband. The diligence done against the wife, ad factum præstandum, was therefore regular and unreducible.

Lord President.—The debt claimed was due to the wife, but it fell under the jus mariti, and the discharge by the husband was all that the defender had any interest to ask. I would, under all the circumstances, reduce the discharge, so far as signed by the wife.

The other Judges concurred with the Lord President, Lord Gillies observing that the judgment in the Bill-Chamber was not res judicata.

The Court therefore "sustained the reasons of reduction as far as respects the discharge by the pursuer Janet Tait, and reduced, &c.; quoad ultra, repelled the reasons, &c.; found the pursuers entitled to expenses," &c.

J. Melville, W. S.—G. Logan, W. S.—Agents.

No. 365.

New Clyde Shipping Company, Petitioners.

Process — Admiralty. — 1. *Wm. IV. c.* 69. § 25. — An action being raised in the late Court of Admiralty against two defenders residing in separate jurisdictions, and decrees obtained there against them, and the pursuer being desirous to extract against both—Process ordered to be transmitted to the Clerk of the Court of Session.

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1st Division.
Ld. Moncreiff.
Admiralty.

The Clyde Shipping Company brought an action in the High Court of Admiralty, and obtained decrees in absence against John Murray, residing in Edinburgh, and William Robbie, residing in Dumbarton, for sums due by them respectively. The Admiralty Court being now abo-

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have belonged exclusively to her husband, and was validly discharged by himself alone. At least the Lord Ordinary doubts very much the legality of this proceeding; and if the Court should entertain this opinion, it will be difficult to support the discharge, in so far as it is admitted to have been signed by the pursuer under protest, and by the force of an imprisonment which had lasted for thirty days. Whether the pursuer would obtain much advantage from any reduction on this ground, seeing that it was her duty to sign the discharge in implement of the decreet, and that her doing so could have done her no injury, is another question, on which the Lord Ordinary perhaps does not entertain much doubt;—the parties appear to have been equally unreasonable.

"But there is a preliminary question involved in the case, in consequence of the judgment of the Lord Ordinary in the Bill-Chamber, refusing the bill of suspension and liberation on the merits of the question. It is true that there was no reduction brought at the time, and the interlocutor may be no bar to a reduction of the decreet-arbitral. But besides that the bill would probably have been passed, if the validity of the decreet had been thought doubtful, as the present Lord Ordinary is of opinion that there is no ground for reducing the decreet, the judgment refusing the bill of suspension and liberation appears to be conclusive of the merits as to the imprisonment in other respects, in so far as any judgment of a Lord Ordinary in the Bill-Chamber can be considered as conclusive. It is rather thought, however, that such a judgment, though of weight in the matter, ought not to be held absolutely conclusive; and it does not appear that the authorities are sufficient to make it be so held.

"As the record is short, and one of the parties on the poor's roll, the Lord Ordinary thinks it most expedient to report the cause with the above statement of it, and his opinion on the points involved."

lished, and the pursuers being desirous to extract decree against the defenders, but being doubtful as to the Court to which the process should be transmitted, so as to enable an extract to be taken out against each of the defenders, applied to the Lord Ordinary on the Bills for direction, in terms of 1. Wm. IV. c. 69, § 25. As his Lordship's direction is made final by that act, he reported the application to the Court.

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Ewing v. Reid.

Linton v. Aytoun &c.

Lord President.—The defenders reside in different counties, and it would not be proper to transmit to the Sheriff Court of either county, as his jurisdiction is limited. The process should be transmitted to a Clerk of this Court.

The Lord Ordinary then pronounced this interlocutor:—"Having consulted with the Lords of the First Division of the Court, ordains the Clerk of the Admiralty Court to transmit the process and decrees referred to, to one of the Principal Clerks of the Court of Session, to be thereafter proceeded with according to law, or under the orders of the Court."

Scott and Rymer, Agents.

William Ewing, Suspender.—*Jameson—Monro.*
J. T. Reid, Charger.—*Stoddart.*

No. 366.

Process.—Question as to the regularity of a charge for arrears of an assessment for erecting a church in virtue of several decrees, but without specifying under which decree the arrears were claimed.

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2d Division. Bill-Chamber. Ld. Mackenzie. F.

The Presbytery of Edinburgh having given four several decrees for different sums for the erection of the parish church of North Leith, Reid, the collector, charged Ewing for payment of £12. 4s., described generally as arrears under letters of horning, which recited all the decrees, but did not set forth under which decree the sum in question was due. Ewing presented a bill of suspension, alleging that he had paid all the instalments assessed upon him, and contending that the charge was inept, as not setting forth the decree in virtue of which the sum charged for was sought to be recovered. The Lord Ordinary refused the bill, except as to a matter of interest; but, on a reclaiming note by Ewing, to oppose which no appearance was made by Reid, the Court altered, and remitted to pass in toto.

J. Burness, S. S. C.—P. Couper, W. S.—Agents.

Joseph Linton, Suspender.—*Jameson—G. G. Bell.*
R. Aytoun and J. Patten, Chargers.—*H. J. Robertson—Aytoun—A. Dunlop.*

No. 367.

Process—Bill-Chamber—A. S. June 14. 1799.—The lodging of answers to a bill of suspension not having been intimated to the suspender's agent in terms of the A. S. June 14. 1799—Held that the interlocutor pronounced on advising the same was null.

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2d Division. Bill-Chamber. Ld. Mackenzie. F.

Linton having been charged for payment of the expenses of the process Aytoun and Patten v. Dougall and others, (mentioned ante, 194,) as being the mandatary of Dougall, presented a bill of suspension, to which answers were ordered. Answers were accordingly lodged; but the

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lodging of them was omitted to be intimated to the suspender's agent, as required by the A. S. June 14. 1799, which provides that if the lodging of a paper shall not be intimated, "the said paper shall not be laid before the Lord Ordinary who is to advise the bill."

The bill, with the answers, was sent to avizandum to Lord Mackenzie officiating on the bills, who refused the bill, with expenses. Linton thereupon reclaimed; and besides his pleas on the merits, he contended that the interlocutor refusing the bill having been pronounced on advising answers, which ought not to have been laid before the Lord Ordinary, it was null and void. To this it was answered, that although the Act of Sederunt prohibited the clerks from laying before the Lord Ordinary papers, the lodging of which had not been intimated, it contained no declaration annulling the interlocutor when this provision had been neglected. The Court, however, holding (with the exception of Lord Cringletie) that the interlocutor was inept, recalled it, and remitted to the Lord Ordinary on the Bills to advise the case of new.

R. Welsh, S. S. C.—Pearson, Wilkie, and Robertson, W. S.—Agents.

No. 368.

Peter M'Ara, Suspender.—*Neaves.*

Michael Gilfillan, Charger.—*Skene—Russell.*

Settled Account—Agent and Client.—1.—Circumstances held to amount to a settlement of accounts between agent and client.—2.—After a settlement, the accounts cannot be opened up for investigation or taxation, but ex facie errors may be corrected.

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2d Division. Lord Fullerton. T.

The charger Michael Gilfillan, writer in Glasgow, had, in October 1824, two accounts against the suspender M'Ara for business alleged to have been done on his employment,—the one of £84, incurred prior to the date on which M'Ara had executed a trust-deed,—and the other of £79. 12s. 4d., incurred during the existence of the trust. As to the first, a composition of 4s. per pound had been agreed to be taken. This amounted to £16. 16s., which made the whole charge £96. 8s. 4d. It appeared that, on the 28th of October 1824, M'Ara paid Gilfillan £30 in cash, and granted a bill for £66. 12s. 11d., being exactly the balance of this total amount, with the bill-stamp added. When this bill fell due in March 1825, another payment of £30 was made, and a new bill granted for the balance. When this again fell due, £20 was paid by M'Ara, and for the balance Gilfillan raised an action before the Magistrates of Glasgow. In defence, M'Ara alleged that the bill had been granted for Gilfillan's accommodation; and, at all events, that Gilfillan's accounts were grossly overcharged, and contained on the face of them errors, and repetitions of the same charges. The Magistrates having decerned against M'Ara, he brought a suspension, in which he craved a remit to the Auditor generally to investigate and tax Gilfillan's accounts. To this it was answered, that the bill granted in 1824 was a settlement

of the accounts between the parties; and that after this, and the subsequent partial payments and renewals, it was impossible to allow the accounts to be opened up.

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The Lord Ordinary pronounced this interlocutor:—"Finds that the bill founded on by the charger had been granted by the suspender in payment of a balance of certain business-accounts due by the suspender to the charger;—that, in the year 1824, a settlement took place between the parties, by which one part of these accounts was compounded at the rate of 4s. in the pound;—that this settlement was confirmed by various partial payments, and the granting of successive bills for the balances remaining due, of which bills that now held by the charger is the last;—that, in these circumstances, the suspender is barred from demanding the taxation or general investigation of these accounts;—but in respect that the suspender alleges the existence of various errors appearing ex facie of the accounts themselves, remits the said accounts to the Auditor of the Court of Session, in order that he may report upon the amount of these errors, if any such exist.

he Court adhered.

J. Cullen, W. S.—Wotherspoon and Mack, W. S.—Agents.

Mrs. Helen Gibson and Others, Pursuers.—*More.*
Robert Auld and Spouse, Defenders—*Stoddart.*

No. 369.

Process.—Circumstances in which a party was reponed against a decree in absence, only on consigning part of the amount, and paying expenses.

The Lord Ordinary having approved of an accountant's report in a process between these parties, in respect of the defenders' failure to appear and support objections thereto, they presented a note craving to be reponed. The Court thereupon remitted to his Lordship, who reponed them accordingly, but only on condition of their consigning a certain sum in dispute, and payment of expenses.

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The Court adhered.

R. Wilson,—W. Robertson, W. S.—Agents.

Mrs. Hotson and Husband, Suspenders and Pursuers.—*Maitland.*
Henry Paul, Charger and Defender.—*Keay—Shaw—J. Paterson*

No. 370.

Proof—Heritable Bond.—Where a heritable bond was granted for £900, on the narrative that the sum was 'actually received of the date of these presents;' but the creditor, while he admitted that that sum had not been advanced, alleged that he had advanced £300, and the debtor admitted only an advance of £5—Held that the bond afforded no proof of the payment of the £300, and therefore charge suspended, except for the £5.

On 6th November 1811, Agnes Hamilton or Hotson, with consent of her husband, granted an heritable bond over her property to Charles Walker for £900 sterling, which sum she thereby declared she borrowed,

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S.

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and "had actually received, of the date of these presents." At this time her husband was bankrupt, and his estates were under sequestration. In May 1812, Mrs. Hotson wrote to Mr. Walker:—"Dear Sir, Necessity compels me to beg of you a little money, for the support of the family, upon the bond I granted you at Martinmas last. When I signed that bond, I was flattered with the prospects of being regularly supplied with money for the use of the family. Instead of that, I have got only £5, with which I paid the servant's wages, and some little necessaries, &c. I therefore earnestly entreat you would let me have £20, or a little more, if you judged it prudent; and, if necessary, I'll come down to Glasgow, and give you what acknowledgment is necessary."

Infeftment was taken on the bond in 1814, and in 1818 Walker's estates were sequestrated. Mr. Henry Paul was named trustee. Prior to this, Walker had claimed no interest under the bond. Mr. Paul having advertised the subjects for sale under a power of sale contained in the bond, Mrs. Hotson and her husband presented a bill of suspension of the sale, alleging that no further advance had been made under the bond than the sum of £5. Mr. Paul admitted that £900 had not been instantly advanced, but averred that the sum of £300 had been so at the time, and that Walker had originally intended to make further advances to the amount of £600, but desisted on discovering the inadequacy of the heritable subject as a security. The Second Division passed the bill without caution or consignation.[1] The suspenders then raised a reduction of the bond, in which they repeated their reasons of suspension.

A diligence having been granted in the reduction, it appeared that there was no trace in Walker's books of the advance of any such sum as £300; nor was there any evidence, independently of the bond, and the above letter, of that or any other advance by Walker.

The Lord Ordinary found "that it is admitted by the charger that the bond and disposition in security on which the charge proceeds was not granted by Agnes Hamilton for the sum of £900, borrowed and received by her as its narrative bears, lent for advances made or to be made by Charles Walker, the disponee, for her behoof;—that there is no evidence of any advance being made by Charles Walker to Agnes Hamilton, or for her behoof, on account of the said bond and disposition, further than the sum of £5 sterling;—therefore, in the suspension, found the letters orderly proceeded for the said sum of £5, with the legal interest thereon from the date of the advance, and, quoad ultra, suspended the letters, and decerned; and in the reduction, repelled the reasons of reduction, assoilzied the defenders, and decerned; found the charger liable in the expenses incurred in the suspension, and in no other expenses," &c.

Both parties reclaimed,—Paul on the merits, and Hotson as to expenses.

[1] Feb. 26. 1829, (ante, VII. 479.)

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LORD BALGRAY.—The Lord Ordinary's interlocutor is quite right. The narrative of the advance inserted in the bond was false; and I look on the bond as a mere letter of credit put into the hands of Walker for his security, and that Mrs. Hotson might draw on him, as occasion required, for the amount of its contents. In these circumstances, Walker, or his trustee, must instruct the amount of advance made by him under the bond. I see no evidence of this adduced to a greater value than £5, and therefore I would adhere in the suspension. I also concur as to the absolvitor from the reduction, as I think it was an improper form of action to be resorted to. Mrs. Hotson should have brought an action of exhibition and delivery of the bond, on paying the advance made by Walker.

LORD GILLIES.—The charger avers that there was an advance of £300 made under the bond. Where is the evidence of this? Not a trace of it appears in the alleged creditor's books, nor is there any proof before us of an advance on account of the bond, except the admission of the suspenders that £5 was received. I have no hesitation in adhering.

LORD PRESIDENT.—When the terms of Mrs. Hotson's letter, written as early as 1812, are attended to, I think we ought to adhere. She distinctly sets forth, "When I signed that bond, I was flattered with prospects of being regularly supplied with money for the use of the family. Instead of that, I have only got £5," &c. Where is the evidence to rebut this, or even the allegation that Walker had ever contradicted the statement? The narrative of the bond is confessedly false, and the defender adduces no evidence to prove the amount of his alleged advances.

LORD CRAIGIE was understood to concur with the Court on the merits of the question.

When the note for Mrs. Hotson was advised, it was stated by her that the diligence which was granted in the reduction, which had been of material use in the suspension, had occasioned considerable expense, which, however necessarily incurred, would be entirely lost to the suspenders by the interlocutor as it stood, as the suspenders had been allowed no part of the expenses of the reduction.

THEIR LORDSHIPS, "so far as regarded expenses, altered the interlocutor, and of new found the charger liable in the expenses incurred in the suspension, and also in obtaining and executing the commission and diligence granted by the interlocutor of 20th May 1830, but in no other expenses; and, quoad ultra, adhered."

J. CULLEN, W. S.—C. FISHER,—Agents.

No. 371.

MRS. GRAY WATSON and Others, Pursuers.—*Keay—Gillies.*

LIEUT.-COL. GEORGE TURNER, Defender.—*Gordon — H. J. Robertson.*

Reparation — Warrandice.—Circumstances in which the representatives of a party were found not entitled to revive, and insist in an action of damages, which had been raised by their author upon a clause of warrandice in his subtack, pending a threatened removal, which was ultimately prevented by an arrangement betwixt the principal tenant and the landlord.

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Ld. Mackenzie.
R.

Watson &c.
v. Turner.

WATSON, whom the pursuers Mrs. Scott and others represented, acquired right, in 1794, to the subtack of Tipperty, a farm on the entailed estate of Turnerhall, from the trustees of one Mackenzie, who held his subtack, containing the usual clause of warrandice, under the principal tenant Robert Turner, father of the defender Lieut.-Colonel Turner. Robert Turner was one of Mackenzie's trustees, and became bound to warrant the subtack to Watson, his heirs, assignees, and subtenants. In 1802, the heir of entail in possession of the estate of Turnerhall, raised an action of reduction of the tack of Tipperty, as granted in contravention of that entail. Shortly thereafter he brought an action of removing against the tenant and subtenant, which was conjoined with the reduction. After various proceedings, occupying several years, the Court decerned in terms of the reductive conclusions, and remitted to the Lord Ordinary to hear parties quoad ultra. An appeal was then taken, during which Robert Turner died, and the action was transferred against Colonel Turner. The House of Lords having affirmed the judgments of the Court of Session, (July 12. 1813,) a lengthened discussion took place on claims for violent profits on the one hand, and meliorations on the other. In the mean time proceedings in the removing were suspended; but Watson took various steps, by inhibition and otherwise, to protect himself from the consequences; and he also raised an action of relief and damages against Colonel Turner. This action proceeded on the assumption that the defender was unable to protect Watson from eviction, and it was allowed to lie over for some years, during which a negotiation betwixt the landlord and Colonel Turner was on foot to secure the subtenant in his possession till the expiry of the sublease. Watson again moved in his action of relief in 1819; and on the 6th July of that year, Lord Glenlee, Ordinary, found "that the warrandice has been incurred by the reduction of the pursuer's sublease, and that the defender must relieve the pursuer of all the consequences thereof." An arrangement for a new lease, however, had now been effected by Colonel Turner with the landlord, in consequence of which he secured to Watson a subtack for the same period, and on the same terms, with the original; and thereupon Watson wrote to the defender, agreeing to pay up the arrears of rent which he had retained in security, under deduction of public burdens, and law expenses incurred by him in the action at the landlord's instance. Watson survived this transaction for five years, and continued in possession of the farm; but it did not appear that he took any further steps in the action of damages, although extrajudicially he always maintained his claim for the personal expenses incurred by him in travelling to Edinburgh &c. pending the litigation with the landlord. In 1829, his representatives came forward to insist in the conclusion for damages, which they alleged to have arisen from the precarious nature of Watson's right for many years after eviction had occurred by reduction of his right, and for the expenses above mentioned.

The Lord Ordinary having ordered Cases to the Court on the 4th of

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February 1831, on the question whether the case ought to be sent to a jury, Watson's representatives maintained that the warrandice having been incurred by eviction of the right, they were entitled to be heard on their claim of damages, and to be allowed to show that damage had really been sustained; while Colonel Turner contended that Watson never having lost possession, there were no termini habiles for a claim of damage.

Lord Justice-Clerk.—I must say I have formed no favourable opinion of this claim. I think that Lord Glenlee's interlocutor, pronounced in 1819, was, in that stage of the proceedings, an extremely proper one. If I considered it as intending to fix the claim of damages in all events, I would not agree with it. But this is not res judicata. Now, what do we find? The tenant set about obtaining a new lease from his landlord, and succeeded in his arrangement for the protection of the subtenant. There was no eviction, and it is material to observe Watson's own conduct. As to damages and solatium, it is clear that, after the arrangement, he had nothing of the kind in contemplation. His personal expenses of coming to Edinburgh &c. might be a very fair demand; but upon what pretext can his representatives revive the action of damages? There are not materials for a jury trial. What sort of issue could be framed? There was no eviction, and no damage.

Lord Cringletie.—All that is asked here, is the right to show that there was damage. This party was not removed; but he remained in precario for a long course of years. For fifteen years at least, he could do nothing with his right. He could neither assign nor subset. It does appear to me a strong proposition to say that the right to instruct damage is excluded. Lord Glenlee's was a very proper interlocutor, and is the basis of my opinion. If the parties can show damage, they are entitled to it under the warrandice.

Lord Glenlee.—This appears to me an unconscionable claim. To be sure, I pronounced an interlocutor in 1819, sustaining the claim under the warrandice, and Mr. Watson might then have come forward and instructed his damage; but before there was time to make the claim, there is a new lease—the party takes back the subject. Watson might have a claim for personal expenses; but can claims of what he might have made by the lease be now listened to? Was it ever heard of, that a party was entitled to more than the subject itself restored? We all recollect the story of the dreamer who built castles in the air upon his basket of glass. Suppose a passer-by had engaged to restore the value of the glass which the dreamer had kicked over, would that mean more than the actual value? Surely not the princess, or the empire of his dreams.

Lord Meadowbank.—I am of the same opinion with Lord Glenlee. If Mr. Watson got nervous about his right, he took ample security. I have no idea that there is a claim of damages. But does the party wish to be heard as to the question of Watson's personal expenses? I confess my mind is not made up on that point.

The pursuers having intimated a wish to be heard on this point, the Court remitted to the Lord Ordinary to hear them thereon; but, quoad ultra, assoilzied the defenders.

Ker and Dickson, W. S.—P. Irvine, W. S.—Agents.

No. 372.

June 7. 1831. Gordon v. Fraser.

LIEUT.-COL. JOHN GORDON, Pursuer.—*Cuninghame—A. Dunlop.*
JAMES JOHN FRASER, W. S. Defender.—*Robertson.*

Process—Reponing.—Circumstances in which the Court refused to repone a party against an interlocutor pronounced on failure to obtemper, by the day appointed, an order for answers to a condescendence.

June 7. 1831.

2D DIVISION. Ld. Mackenzie. T.

IN an action of count and reckoning at the instance of Colonel Gordon of Cluny against Fraser, W. S., who had formerly been his agent, concluding for a large balance alleged to be due on his intromissions, after a preliminary defence had been repelled, (see ante, 328,) the Lord Ordinary, on the 27th of January, ordered a condescendence by the pursuer, and answers by the defender, within fourteen days each. The time for lodging the condescendence was subsequently prorogated to the 20th of February, when they were duly lodged; and, on the 22d, the period for lodging answers was prorogated to the first box-day in the then ensuing vacation, and an order was also obtained for revising these papers by the second box-day and third sederunt-day respectively. No answers were lodged by the defender on the box-day, nor were they prepared at the meeting of the Court in May. Thereupon the pursuer enrolled the cause, and gave notice of a motion for a remit of the defender's business accounts to the Auditor, and of his cash-accounts to an accountant. No appearance was made for the defender, and the remit was granted accordingly. On the last of the reclaiming days, however, the defender gave in a note to the Inner House, accompanied by the answers which should have been lodged on the box-day, and praying to be reponed, as against an interlocutor by default, in terms of the 57th section of the A. S. 11th July 1828.

In opposition to this, it was contended that the A. S. did not give an absolute right to a party to be reponed against interlocutors pronounced on failure to obtemper orders, but that this was discretionary with the Court; that the true object of the provision in the 57th section of the A. S. was for forwarding the cause; and that, by reponing a party against interlocutors pronounced in virtue of it, this object was defeated, as the party was really enabled to gain more delay than otherwise would be possible, while, in the present case, there was no excuse for the failure; and the order was perfectly competent, actions of count and reckoning being 'extraordinary' actions, (A. S. § 103), in which it was not required to follow out the strict order of the new form of process.

The Court refused the note with expenses, but without prejudice to the Lord Ordinary remitting certain further accounts which the defender stated he had to produce.

J. G. BARR, S. S. C.—J. J. FRASER, W. S.—Agents.

R. M'GAVIN &c. (SPIERS' TRUSTEES), Pursuers.—*Ld. Adv. Jeffrey—Jameson.*
SIR W. M. NAPIER, Bart., Defender.—*D. F. Hope—Rutherfurd—Paterson.*

No. 373.
June 7. 1831.
Spier's Trustees v. Napier.

June 8. 1831.
2D DIVISION.
Ld. Fullerton.

Special Case, in which Spiers' trustees pursued Sir William Napier for the recovery of six years rent of the house of Glentyan. The Lord Ordinary remitted the cause to the Jury Court, with an exception as to certain payments which he found to be already sufficiently established by Sir William.

Spiers' trustees reclaimed, and maintained that the question of these payments should be sent to a jury with the rest of the case; but the Court, finding sufficient evidence in the process, and under the hand of the trustees, that the rents had been so far paid, adhered.

WOTHERSPOON and MACK, W.S.—PEARSON, WILKIE, and ROBERTSON, W.S.—Agents.

ARCHIBALD WALKER, Objector.—*Deas.*
JOHN PHIN, Respondent.—*Skene—Marshall.*

No. 374.
June 8. 1831.
Walker v. Phin.

Agent and Client—Writer's Hypothec.—1.—Circumstances not establishing employment of an agent by a burgh, so as to subject their title-deeds to hypothecation for payment of law accounts.—2.—Country agent's right of hypothec covers the accounts of the Edinburgh agent employed by him for his client.

June 8. 1831.
2D DIVISION.
Ld. Mackenzie.

THE burgh of Auchtermuchty having become insolvent, the Magistrates, in 1818, executed a trust-deed, whereby a preference was given to certain of their own number, creditors of the burgh. Of this trust-deed a reduction was brought by other creditors, chiefly on the ground of this preference. The defence was conducted in name of the Magistrates, as well as of the trustees, by agents in Edinburgh, employed by the objector Walker, town-clerk and agent of the burgh. The trust-deed was ultimately reduced, and an adjudication brought, which was opposed also in name of the Magistrates, but in which decree was pronounced, although, in a ranking and sale subsequently brought, they obtained the town-house, bell, and petty customs struck out of the sale, (see ante, V. 690.) In this ranking Walker claimed a preference, in virtue of his hypothec, over the title-deeds &c. of the burgh in his hands, for his business accounts, including those incurred in defending against the reduction of the trust-deed and the adjudication. Phin, the common agent, refused to rank him for those expenses, on the ground that he had not been employed by the Magistrates and Council, but by the individual members of Council, who were personally interested in the matter; and he also refused to rank him preferably for other accounts, for which the burgh was liable, incurred to Edinburgh agents, on the plea that the Edinburgh agents having themselves no right of hypothec, Walker could not give them the benefit of his right to cover their accounts. Thereupon Walker

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M'Crone v. Bell.

gave in objections, in which he attempted to show that he had been employed by the Magistrates in regard to the reduction and adjudication; but the minutes of council referred to by him merely showed a resolution to oppose the adjudication, so far as concerned the town-house &c., but no intention to interfere in the reduction at all, or in the adjudication, to any further extent; and the only other evidence was an ex post facto certificate by the individuals who had been in office at the time; while, on the other hand, there was produced a letter from himself to the agents in Edinburgh, expressly stating that he was not authorized by the Magistrates to any further extent than above mentioned; that he took the responsibility of using their names further on himself; and that as to the reduction, the individuals who were to have had a preference under the trust-deed were to bear the expense. As to his other claims, again, he contended that he being liable to the Edinburgh agents, their charges for law business done on his employment, as agent for the burgh, properly became items of his account, and were covered by his right of hypothec.

The Lord Ordinary, without pronouncing any express decision on this last point, found that the title-deeds &c. of the burgh were not hypothecated for the expenses of the reduction and adjudication.

Walker having thereupon reclaimed, the Court pronounced this interlocutor:—"Adhere to the interlocutor complained of, in so far as it sustains generally the objections of the common agent in relation to the expenses of the reduction and adjudication in question claimed by Mr. Archibald Walker, but under an exception in his favour of such part of the expenses of said process of adjudication as relate specially to such portions of the property of the burgh of Auchtermuchty as were ultimately struck out of the memorial and state in the subsequent process of ranking and sale;—repel the objections stated by the common agent to all the other accounts claimed by the said Archibald Walker, and find that his right of hypothec operates in favour of all the accounts hereby allowed, including the expenses incurred in Edinburgh, or elsewhere, under his employment, subject always to the taxation of the Auditor."

T. Leburn, S. S. C.—J. Phin, S. S. C.—Agents.

No. 375.

Andrew M'Crone, Advocator.—*D. F. Hope—Cowan.*
Agnes Bell, Respondent.—*Sol.-Gen. Cockburn—Tait.*

Proof—Semiplena Probatio.—Questions of semiplena probatio as to filiation depend upon their own circumstances, and cannot be held ruled by precedent.

June 9. 1831.

1st Division.
Lord Newton.
H.

Advocation by M'Crone of a judgment of the Justices of the Peace of Ayrshire, which allowed Agnes Bell her oath in supplement, and decerned against him as the father of her natural child. The Lord Ordinary reported the cause on Cases; and the Court, by a majority, repelled the reasons of advocation, and allowed the respondent her expenses. In

reporting the cause, the Lord Ordinary subjoined a note to the effect that he was doubtful whether the evidence amounted to semiplena, and added, "It further appears to him that the decisions of the Court on this point are by no means very clear or uniform, and that in some cases much slighter evidence than he would incline to think necessary has been sustained." No. 375. June 9. 1831. M'Crone v. Bell. Fife Bank v. Holliday.

Lord President.—It is scarcely possible to quote the reports of former cases of semiplena probatio as laying down precedents to guide us in this question or any other of the same class. Every such case depends on its own circumstances.—His Lordship added, that in this case he inclined to repel the reasons of advocation.

Lord Gillies.—A semiplena probatio is something less than proof, and more than suspicion; but it is difficult to define its limits more exactly. I cannot see the use of quoting former cases, where the facts were held to be, or not to be, a semiplena probatio, as fit to govern our judgment here. The facts of one case never can be identical with those of another; and where these vary, each successive case is truly a new one, and must be tried by itself. On the merits, his Lordship, as also Lord Balgray, concurred with the Lord President.

Lord Craigie dissented on the facts of the case.

J. Gemmell, S. S. C.—Tait and Young, W. S.—Agents.

William Drummond (for Fife Bank), Pursuer.—*H. J. Robertson.* No. 376.
John Holliday, Defender.—*Ivory.*

Partnership.—Circumstances in which extraordinary calls for contribution being made on the partners of a banking concern on the allegation of severe losses, the Court held a partner entitled to further investigation by a remit to an accountant, before decerning for these calls.

The Fife Banking Company, which was instituted in 1802, subscribed a capital of £30,000, by paying up £500 on each share. The contract was renewed for five years, in 1822, by the greater number of the partners; but in December 1825, the embarrassments of the concern obliged it to have recourse to two Edinburgh Banks for assistance, who required that the partners should advance £500 per share additional, and give a bond for £50,000 more. Mr. Holliday paid £500 on his share, and some of the partners granted the bond required. Subsequently, on an allegation of the great extent of losses which the concern had to meet, a committee of partners of the Fife Bank ordered a second call of £500 to be made, and action to be raised against those who refused. Afterwards a third call was made for £500 on each share; and a fourth for £1000. Action was raised against those creditors who refused compliance with those calls, of whom Mr. Holliday was one. In January 1826, a considerable proportion of the partners entered into a submission to Mr. Patrick Cockburn, accountant, authorizing him to determine all dif- June 9. 1831. 1st Division. Lord Newton.

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ferences concerning the copartnery, and the business thereof, with full power to him to ordain the partners to pay up to the Bank cashier such sums as he should think proper by his decrees, interim or final. All the calls pursued for had been successively ordered by Mr. Cockburn, by interim decrees, to be made on those partners who were parties to the submission. The third call was also made pursuant to a resolution at a meeting of the company, and the fourth, pursuant to a resolution by a committee of management named by the company. Mr. Holliday was not a party to the submission.

In defence, he stated an objection to the title which was repelled,[1] and afterwards, inter alia, denied that the losses of the concern were so great as to render these calls necessary; and pleaded that he was entitled to insist on the company's satisfying the Court that these calls were justifiable, by their obtaining a report from an accountant, before the Court could interpone its authority to enforce such extraordinary calls.

To this it was answered, that the calls had only been made after the fullest investigation before Mr. Cockburn; that two Edinburgh Banks, which had made large advances to relieve the Fife Bank, were urgent that these calls should be made; that the affairs of the Bank had been carefully scrutinized for years, and all the partners might and should have been acquainted with them; that the third and fourth calls had been sanctioned by resolutions of the partners, or of their committee of management; and that if these last calls were necessary, the second call was much more so.

The Lord Ordinary "found that the pursuers are not entitled, in hoc statu, without further investigation, to interim decreet for payment of the sum of £500 sterling, with interest, &c. being the amount of the third call made upon the partners of the Fife Bank; and remitted to Mr. B. Watson, accountant, to examine the process, and report to the Lord Ordinary as to the necessity of the sums concluded for being paid by the defender, with power to him to make an interim report as to the third call." A similar judgment was pronounced in the action for the other calls; but the remit was made to Mr. Cockburn, accountant.

The pursuer reclaimed in both actions; but the Court adhered, under the qualification of remitting to Mr. Cockburn instead of Mr. Watson, the former gentleman being already acquainted with the affairs of the Bank.

Pursuer's Authority.—Douglas, Heron, and Co. July 24. 1778.

J. Shand, W. S.—J. Thorburn, S. S. C.—Agents.

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[1] Ante, p. 284.

Sir M. Bruce and Others, Pursuers.—*Keay—A. Wood—Paterson.*
Mrs. Bruce and Others, Defenders.—*Bell—H. Bruce.*

No. 377.

June 9. 1831.
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Bankrupt—Provisions to Wives and Children.—Where a father gratuitously disponed his estate to his son, mortis causa, under the burden of provisions to his widow and younger children, payable after his death; and the son was infeft on the disposition, but the estate subsequently proved unequal to the debts—Found (notwithstanding Remington and Co. Dec. 10. 1829) that the onerous creditors of the father were preferable to the widow and younger children.

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1st Division. Ld. Moncreiff. H.

The late Mr. Patrick Crawfurd Bruce of Glenelg died in 1820. He had executed two deeds of settlement, mortis causâ, in favour of his eldest son Mr. Michael Bruce. One of these conveyed English property—the other his Scottish estate of Glenelg, under the burden of an annuity of £2000 (conditionally restrictable to £1500) in favour of his widow, a provision of £20,000 to his eldest daughter, and £15,000 to his younger son Robert Nicolson Bruce. It was declared that, by acceptance of this disposition, Mr. Michael Bruce should become personally bound to pay these provisions. He served heir to his father, and was infeft under the disposition on the 10th of September 1821. He also proved the English will, the personal effects there being sworn as not exceeding £70,000.

The property left by Mr. Bruce was of various sorts, consisting partly of heritage, and partly of moveable estate, stock or shares in mercantile concerns, &c. It was of considerable magnitude; but he also left debts to a large amount. In June 1823, Mr. Michael Bruce conveyed the estate of Glenelg to trustees, with a view to its being sold for behoof of the creditors of his father; and, in April 1824, it was sold to the Right Honourable Charles Grant for £82,600, payable at Whitsunday 1825. At a meeting of the creditors in July of that year, it was resolved to adopt measures for the speedy conversion of the property still remaining unsold, as the interest of the debts so far exceeded the returns from the property, that "an annual loss is occasioned to the estate, which, if not put a stop to, must, in the course of a short period, annihilate all chance of any reversion—an event, the probability of which there cannot be a stronger illustration of, than by comparing the situation of the debts and funds, as they stand at present, with what they would have been, if Mr. Bruce's funds had been realized in the course of a year after his death, and applied in liquidation of his debts, matters being now at least £20,000 worse than they appear to have been at that period." The creditors then requested the widow and younger children to discharge their provisions, so far as affecting the estate of Glenelg, in order that the price might be recovered from Mr. Grant. As there was now the prospect of a shortcoming, they refused to do this, unless their provisions were paid or secured; and Miss Bruce raised an action against her brother, to have

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it declared that the provision in her favour was a real burden on the estate, and to have him decerned to pay its amount to her. The Court found him "not liable, ultra valorem, of the estate and effects of his deceased father."[1] The creditors also raised actions of constitution against Mr. Michael Bruce, and arrested in Mr. Grant's hands. Messrs. Remington and Co. (being one set of the creditors) brought a reduction of the provisions in favour of the widow and younger children, libelling on the act 1621, c. 18, and on the common law, in respect that these were gratuitous provisions in a mortis causâ deed, and could not compete with the onerous creditors of the granter. The widow and younger children pleaded in defence that the late Mr. Bruce had died not only solvent, but leaving a large reversion.

In the course of the process, Remington and Co. abandoned the reason of reduction founded on the act 1621, c. 18; and a remit being made to an accountant to ascertain the state of affairs at Mr. Bruce's death, Remington and Co., after some investigation, put a minute into process, with a view to supersede further inquiry. They thereby "entered on the record their distinct and unqualified admission that Mr. Bruce, at the time of his death, was possessed of funds not only sufficient to pay his just and lawful debts, but also to leave a reversion to his family, the amount of which can be afterwards ascertained; that as there was now an insufficiency of funds to pay the creditors, the pursuers conceived that the merits of this action were totally unconnected with the fact of Mr. Bruce's solvency; and at all events, as they were willing to argue the case on the footing of the above admission, they humbly craved his Lordship to dispose of the question of law," &c.

Parties thereupon proceeded to argue on the assumption that Mr. Bruce was solvent, and left a reversion at his death; but that his estate, as eventually realized, was insufficient to satisfy his debts. The Court, on the 10th of December 1829, sustained "the bonds of provision granted by the late Mr. Bruce to the defenders, to the extent of the reversion of Mr. Bruce's funds, as the same shall be ascertained to have existed at the time of his death; and to that extent assoilzied the defenders," &c.[2]

After the date of the admission by Remington and Co. being entered on the record, Sir Michael Bruce and others (who were also creditors of the deceased Mr. Bruce) raised a new action of reduction and declarator against the widow, the daughter, and the second son, stating that the admission of solvency in the action of Remington and Co. had been made without the consent of the general creditors, was inconsistent with the facts of the case, and prejudicial to their claims; and concluding for reduction of the provisions, because "they being gratuitous annuities, and provisions made by a husband and father to his widow and children, and not

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[1] Dec. 13. 1826, (ante, V. 119.)

[2] Ante, VIII. 215.

payable till after his death, are, like legacies, due only deductis debitis, and were not demandable from the estate of the deceased till after payment of all the debts due to his onerous creditors; and therefore the said real securities, created as aforesaid, can be of no avail or effect to the prejudice of the pursuers, or the other just and lawful creditors in the recovery of their debts, or at least to the prejudice of the pursuers in the recovery of the debt due to them, and cannot be retained by the said widow and children, unless they shall make payment of the said debts or debt, which they refuse to do;" and to have it declared that the disposition and sasine thereon were null, "to the extent and effect that they shall not be held as creating any preference in favour of the said defenders to the prejudice of the said pursuers &c., nor be any bar to the said Charles Grant making payment of the balance of price due to him." Or otherwise, that it should be declared, "that the said annuities and provisions being mortis causâ donations, not payable till after the granter's death, they cannot compete with, or operate to the prejudice of his just and lawful creditors in the recovery of their debts; and that the said defenders cannot hold the foresaid securities, without being obliged to make payment to the pursuers, and the other just and lawful creditors, of the debts due to them, or at least without being obliged to make payment to the pursuers of their foresaid debt; and therefore that the said defenders are bound either to pay the said debts, or to renounce and discharge the said encumbrances, to the satisfaction of the said Charles Grant, so as that the same may not prejudice or interfere with the pursuers, and the other creditors as aforesaid, in recovering payment of their debts from the balance of price of the said estate of Glenelg."

In regard to the point of solvency, the pursuers stated, "that the outstanding funds which belonged to the estate of the deceased are not now sufficient for payment both of his onerous debts, and of the annuities and provisions settled on his widow and younger children. On the contrary, they are not more than equal to the amount of the debts due by him." The defenders denied this statement of the affairs; and they averred that a great deterioration in the estate had occurred since the death of Mr. Bruce, at which period the creditors might have obtained full payment, without impediment from their provisions, had they acted with due diligence.

The Lord Ordinary ordered Cases. The pursuers then explained, that although at the death of Mr. Bruce there was an apparent or visible reversion, on a rational estimate of his effects, (to which alone, they said, the former minute of admission was meant to refer,) still his affairs were in such a posture that they could not be immediately wound up, and the proceeds turned into cash; and before their conversion could be effected, though no undue delay occurred on their part, a deficiency arose on the proceeds of the estate. The defenders answered, that had immediate steps been taken at the death to sell the heritable properties, there would have been a considerable free reversion; and that although the whole estate

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was not instantly convertible, this must happen in all extensive concerns, which, in any subsequent competition, must nevertheless be valued at the time of the party's death, to ascertain his solvency,—that being the period when the provision became lawfully due.

The Lord Ordinary reported the cause.*

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* "NOTE.—After hearing this case very fully debated, the Lord Ordinary became sensible that it would be his duty to report it to the Court.

"The cause appears to him to involve a question of very great importance. The subject of it was formerly before the Court in the case of Remington and Co. v. Bruces. The decision in that case does not form res judicata against the present pursuers; and therefore, even although the cases had stood precisely on the same data in point of fact, the Lord Ordinary, in the view which he has of the importance of the question, would have thought it necessary that the Court should have an opportunity of reconsidering it. But the cases do not stand precisely on the same footing, an admission having been put on the record in that case, which is not made in the present case, and that admission having been maintained to import a state of the fact which does not appear to be consistent with the actual state of it, according to the representation of either party.

"The Lord Ordinary, in considering the case on its merits, would have great difficulty in sustaining any of the pleas of the defenders.

"It will be observed that this is not a reduction on the Act 1621; neither is it a reduction upon fraud at common law. It is an action containing, alternatively, a conclusion for reducing the real burden or security, which, in point of form, still subsists under the disposition of the late Mr. Crawford Bruce, in so far as the refusal of the defenders to discharge that real burden prevents the creditors from giving an unencumbered title to Mr. Grant, the purchaser of the estate, and obtaining payment of the balance of the price; and a conclusion of declarator that the defenders cannot come into competition with the onerous creditors of Mr. Crawford Bruce, and are bound either to pay the debts, or to renounce the encumbrances. This form of action is the same which would have been competent if the estate had been sold within a month after the testator's death, and the defenders, claiming a preference by the real lien, had declined to renounce it. The provisions are not impeached as fraudulent, either actually, or constructively on the statute. But the pursuers say that they are ineffectual, because they are gratuitous and mortis causa, and the deceased's estate is insufficient to pay his debts.

"The deceased had power to grant the provisions, and to make them a burden upon the disposition to his son. But as the first burden was the payment of the granter's debts, it is certain that as they were not so constituted as to take effect in his life, they were of no effect against his creditors at his death. They were merely burdens on the heir, and the estate, as it might belong to him, after payment of the granter's debts; and when the son took infeftment on this disposition, though the security thereby constituted through his person was a good security against him, and against his own proper creditors, over any actual reversion of the estate, it is difficult to see how it could have any effect as a security against the creditors of the granter, to whose debts the provisions were undoubtedly postponed by their own nature. Whatever might be the effect of Mr. Michael Bruce's infeftment in this respect, it must have had precisely that effect the instant it was taken, that is, immediately after his father's death, at which time the defenders could certainly have had no competition with the creditors of the deceased.

"It is further a settled point that Mr. Michael Bruce did not become personally

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LORD BALGRAY.—On considering the note of the Lord Ordinary, I became satisfied that the nature of the children's right had not been sufficiently attended to by us on a former occasion. These provisions were not to take effect till after the father's death. The family were therefore not creditors of his;

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liable for these provisions, but was only liable, as a trustee, to account for his intromissions. He was trustee for both parties—for the creditors first, and for the defenders as to the reversion of the estate. The Court decided this, Dec. 13. 1826; and after reading the report of the case, the Lord Ordinary is unable to understand how the defenders can maintain that it did not exclude all personal liability, except an obligation to account as a trustee. It follows that the defenders never did become the proper creditors of Michael Bruce individually.

"The unfortunate state of the case which gives rise to the present question is, in truth, very simple; and though the parties use different forms of expression, they do not really differ about it. Mr. Crawford Bruce believed that he had an immense estate, and though his schedules contain evidence of an extravagantly sanguine imagination in the matter, it was believed, even at his death, that he had left an estate which would be sufficient to pay both his debts and the provisions. His son served heir to him in this belief. But, in order to pay the debts, the funds were to be realized, which necessarily required some time. It was a question of prudence how to proceed in realizing them, and in particular at what time and in what manner to sell such an estate as Glenelg; and the more the belief as to the amount of the funds is enlarged, the feeling of the necessity of great urgency in the sale must be lessened. Now, on the one hand, the pursuers do not dispute that at Mr. Bruce's death the estimate made of his funds and estate was such as to show a considerable reversion; and, on the other hand, the defenders, though they speak in general terms of his having died solvent, really mean no more than the same thing, that his estate was estimated to be more than sufficient to pay his debts.

"The estate after a time was sold, and then it turns out that the whole funds are not sufficient even to pay the onerous debts of the testator.

"In this simple state of the case, the Lord Ordinary can see very well how the defenders might have claims against the creditors, if they could show that it was by the positive fault and misconduct of these creditors that this difference between the estimate and the result has arisen; but at present he is at a loss to see any principle on which it should otherwise be held that the defenders have got a preference, or a right of competition, by means of the difficulty or delay in realizing the estate, which they had not at the testator's death.

"The whole estate which ever existed is still extant, or the proceeds are in place of it. Mr. M. Bruce is bound to account for his intromissions, so are the trustees to whom he disponed, and both are at least equally accountable to the creditors of the deceased as they are to the defenders. In other respects the whole estate is extant. The difficulty arises from the defalcation in the result of the sales at last, and the over-estimate made at first. This is surely not a very uncommon case.

"The present question does not arise from the bankruptcy of the heir. It is so represented in the beginning of the defenders' case. But this is clearly erroneous. It has been settled that the heir was a mere trustee, and if he had no separate estate, neither are there any creditors of his here interfering to create a bankruptcy of the ancestor's estate. It is not here in the record that the heir was or is a bankrupt.

"The defenders insist strongly that the creditors used no diligence. But it humbly appears to the Lord Ordinary that it lay rather with the defenders to force the sale. Being the parties postponed at the testator's death, it should seem that it lay with them to insist on an immediate sale, if they were apprehensive that by delay the funds

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and although these provisions have been made a real burden on the right of Mr. Michael Bruce, yet that right does not arise to him, except after paying the debt of his father. Then I hold him to be substantially a trustee, according to our former judgment, which found him liable only ad valorem of the estate. How could his liability be thus limited, if he were any thing else than a trustee? If this were a question merely among creditors deriving right through him, it would be in a different shape. But, as it comes before us, the question is between the onerous creditors of the deceased and his gratuitous legatees; and I hold that the creditors are preferable.

Lord President.—In the case of Remington, the ladies were found en-

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would be lessened. To assume that the defenders were absolutely secure, is to assume the point in controversy, and what could not have been stated at the date of the heir's infeftment; or, at the least, the parties are on an equal footing on this point.

"In so far, therefore, as the case depends on pure law, it humbly appears to the Lord Ordinary that all the authorities and cases quoted by either party, except the decision in the case of Remington, equally establish the leading point maintained by the pursuers, which seems to him to amount to no more than this, that the onerous creditors of a man deceased must be preferable to his gratuitous mortis causa donees over his actual realized estate. He sees no question on the Act 1621, and is unable to think that the question is affected by any analogy to be derived from the principle of that act. The statute relates to voluntary deeds, and the question of solvency must be determined as an ordinary question of evidence, as at the date of doing the deed, in order to rebut the presumption of fraud. But here there is no question of fraud at all, either actual or presumptive. The voluntary act was well done, but, beyond all doubt, it was not effectual against creditors. The whole question is, whether funds were left sufficient to pay both parties, or at least the creditors, with a reversion. And surely that is not a question which can depend on estimates or conjectural values of indefinite subjects, when the fact is ascertained by the result that the whole funds, when realized, are not sufficient even to pay the proper debts.

"Neither can the Lord Ordinary see any question on the Act 1661. The defenders are not creditors of the heir, as the judgment of the Court has already determined. And it would be a singular result, if the gratuitous donees of the deceased, who have no personal claim against the heir should, by means of the Act 1661, be made preferable to the ancestor's own creditors. The error in the reasoning of the defenders is manifest, that though they might have been preferable on this estate against the heir's own creditors, they could not even compete with them in any other manner, if the estate which he so held as a trustee had been well accounted for.

"On the whole, the Lord Ordinary humbly thinks the argument of the pursuers insuperable. And as to the supposition of some fault on the part of the creditors, he doubts whether there is a sufficient condescendence for trying such a question. He does not find it averred that the estate might have been sold more advantageously sooner; or that the creditors prevented a sale; or that the defenders demanded a sale; or that any part of the estate has not been accounted for by the fault of the creditors. But if the Court should think that, on the averments made, this requires investigation, it is plainly not ready for decision, because all the material averments are denied. As to the law of the case, taken as it is, the Lord Ordinary is unable to distinguish it in principle from that of Grierson against Wallace. The provisions in that case were not indeed payable at the moment of the death, but they bore interest from that date, and the parties were instantly creditors as much as in the present case. The impossibility of demanding immediate payment should rather have put the children in that case in a more favourable position for maintaining their right to rely on the security."

titled to the surplus; but if there be no surplus, the admission of the pursuers in that case cannot create one.

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Bell for Defenders.—The admission was, that there existed a surplus at the time of the decease. The legal consequence which the defenders deduced from that admission was, that they were creditors for the surplus, and, being heritably secured, were preferable creditors to that extent. Though the same admission is not repeated in this case, we are ready to prove the whole that was there admitted; and on the relevancy of this offer of proof, we contend that this case is, hoc statu, identical with the former.

Lord President.—Even if your averments be well founded, the former existence of a surplus does not alter the essential nature of the defenders' right. They are but legatees of the deceased, competing with his onerous creditors. Their provisions may be a burden on the reversion of Mr. Michael Bruce, but that reversion cannot arise until his father's debts are satisfied.

Lord Balgray.—Had the funds of the deceased been extant at his death in pecunia numerata, and the defenders averred that there was a surplus then, perhaps the legal inferences which they would deduce from that averment might be well founded. But the estate did not exist in a tangible shape at his death. Valuators may have estimated it at such or such a sum; and this may show us that the deceased was in the reasonable belief of his possessing a reversion when he made his provisions, and when he died. Still all that will not make the children his creditors, when the fact is that his estate, when converted, will not satisfy his onerous debts. Suppose that a man has a stone-quarry which yields him £8000 a year, and a proportionate value is put upon it by a valuator;—he owes certain debts, and, calculating reasonably on a large surplus, he makes provisions for his family, payable after his death;—after his death, the fact turns out to be, that his quarry yields no more than £800 per annum, and his funds are inadequate to pay his creditors;—can it be maintained, in such a case, that the children can compete for their provisions with the creditors on the estate of the deceased?

Lord Craigie.—I take a different view of this case. It is averred that at the date when the provisions were made, and when the father died, he had sufficient funds to satisfy his debts, and leave a surplus for the family provisions. I think this a relevant averment to entitle the defenders to a proof; and if they prove it, I would sustain their claims to the extent of the surplus. Suppose that Michael Bruce had predeceased his father, the provisions to the rest of the family would not have been thereby recalled. I would add, that I do not think the Court formerly held him to be accountable as trustee; they merely found he had not subjected himself passive. I think the proper course to take would be to investigate the fact whether there were funds left at the death of Mr. Bruce for his onerous debts, and for the family provisions.

Lord Gillies.—On perusing the note of the Lord Ordinary, which is full and satisfactory, and considering its bearing on the facts of the case, I felt convinced that the view taken by his Lordship was well founded, and that the Court ought to adopt it. I remain of that opinion still. Where a man, at his death, leaves a large estate of various sorts, and also considerable debts, it is argued by the defenders, that if there be an apparent reversion, nothing but immediate diligence done by the creditors against the estate of the deceased,

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can protect them from a competition with the children for the amount of their provisions, though these have been only made payable after the granter's death. It is contended that where the creditors do not do diligence, any subsequent defalcation must fall wholly or partly on them. I do not think this a well-founded doctrine, and its reception would lead to most pernicious results. Immediately on any man's death, his creditors would notify to the heir to make instant payment, under pain of diligence. In this question, I think, if diligence were due by any of the parties having claims against the estate, it was due rather by the postponed parties, the gratuitous legatees of the deceased, than by his creditors. The loss that has accrued must fall, not on the creditors, but on the legatees. The heir we have found to be a mere trustee, and accountable for his intromissions only. As to the heir, the rest of the family may be creditors, to whom he is accountable, under the limitation now mentioned; but as to the ancestor, they are merely legatees.

Lord Craigie.—Had the family obtained payment of their provisions at the time when the estate showed a clear reversion, sufficient to satisfy them and the creditors also, a subsequent defalcation would not have entitled a creditor to claim restitution from them as of a debt indebite solutum. No condictio indebiti would have lain against them. But if this be the case, they must have been creditors; and if so, their taking real security should be as complete a protection against subsequent defalcation, as their taking payment would have been.

Lord Gillies.—Undoubtedly what the family claim is due to them; but still the question remains, whether their debts are, or are not, preferable. On that point I have already expressed my opinion.

The Court then found "that the pursuers, and the other onerous creditors of the deceased Patrick Crawfurd Bruce, are preferable to the defenders, the widow and children of the said Patrick Crawfurd Bruce, for the provisions settled on the said widow and children, and contained in the deeds under reduction; and that such provisions cannot come into competition with the debts of the said onerous creditors, nor be founded on to their prejudice; and, with this finding, remitted the cause to the Lord Ordinary to proceed," &c.

Pursuers' Authorities. — Ballingall, Jan. 31. 1759, (12919); M'Kenzie, Feb. 2. 1792, (12924); 1. Bank. 5. 17; 3. Ersk. 8. 39. and 40; Russell, Convey. p. 53; 1. Bell, 639-40; Brown, Feb. 1. 1820, (F. C.); 3. St. 8. 70; Marshall, Dec. 23. 1709, (Dict. 48); Dess, Dec. 7. 1710, (Dict. 921); Robertson, July 29. 1760, (8087); Wallace, May 16. 1821, (ante, I. 13, and see note, ante, VIII. 217); Grant, Jan. 24. 1617, (12887); Murray, March 1686, (12895.)

Defenders' Authorities. — Creditors of Strachan, July 1. 1754, (Dict. 996); Creditors of Dewars, Dec. 21. 1710, (923); 4. Ersk. 1. 34; 2. Bell, 193. and 197; 1. Bell, 643; 1. St. 9. 15; Creditors of Mousewell, Dec. 11. 1679, (963); Creditors of Kinfauns, Jan. 12. 1697. (970); Clarke, June 30. 1675, (917); Creditors of Meldrum, Dec. 11. 1717, (928); Creditors of Hay, July 21. 1742, (929); Creditors of Cult, Aug. 5. 1783, (974); 4. Ersk. 1. 44; Callender, Nov. 10. 1680, (932.)

J. Renton, W.S.—Bowie and Campbell, W. S.—Agents.

A. HUNTER and MANDATARY, Pursuers.—*D. F. Hope—Currie.*
GENERAL DUFF and Others (MAJOR DUFF'S TRUSTEES), Defenders.—*Skene—Rutherfurd.*

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Hunter &c. v. Duff's Trustees.

Proof—Payment—Sexennial Prescription—Sale.—Circumstances where, in an action to substantiate claims against a trust-estate, it was found,—1.—That the interest of a bond, prior to the death of the granter, had been extinguished by a gratuitous annuity from him to the creditor.—2.—That the prescription of a bill of exchange was not interrupted by a correspondence, in which the creditor's agent in England notified claims, including the bill, to the agent of the trust in Scotland; nor by a process before the King's Bench, alleged to have saved those claims from the Statute of Limitations.—3.—That a correspondence acknowledging the receipt of pictures, and requesting to be informed of the prices set upon them, was not sufficient evidence of a contract of sale.

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2D DIVISION.
Ld. Mackenzie.
F.

THE pursuer Hunter raised an action against the trustees of the late Major George Duff of Milton, to constitute the following claims against his estate:—

1. The sum of £600 sterling, contained in an bond, dated 30th August 1821, with alleged arrears of interest thereon since its date.

2. The sum of £478 sterling, with interest, contained in a bill accepted by Major Duff to Hunter, payable twelve months after date—30th August 1821.

3. The sum of £200 sterling, with interest, contained in another bill, also accepted by Major Duff, at twelve months after date—25th May 1825.

4. The sums of £1050 sterling, and £105 sterling, with interest, being the price of pictures alleged to have been sold by Hunter to Major Duff in 1822.

The claim of £600, with interest since Major Duff's death, was admitted; but, in defence against the rest of the claim, the trustees produced a very voluminous correspondence betwixt the parties, by which it appeared that Major Duff had, from the date of the bond at least, paid annually to Hunter the sum of £120 sterling, being £60 more each year than the interest on the £600. It also appeared from many grateful expressions in Hunter's letters produced, that this excess over and above the interest was paid by Major Duff, not in consequence of any obligation, but gratuitously, and from affection to Hunter, and received by the latter upon those terms.

With respect to the claim on the bill of £478, it appeared that, in September 1828, the term of the sexennial prescription expired. Major Duff died in April 1828, without any demand or process instituted by Hunter. After Major Duff's death his trustees advertised for claims against his estate, and Hunter transmitted a claim, including this bill, to the agents in the management of the trust-funds in Scotland; but no legal measures were adopted by Hunter in Scotland till the present action was brought in August 1829, though, on the 27th of August 1828, Hunter had instituted a process in England against Mr. George Duff,

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as a representative of Major Duff, and also against General Duff, the father of George, and one of Major Duff's trustees in Scotland.

With regard to the bill for £200, the correspondence proved that, in May 1826, Major Duff enclosed an order for £265 to Hunter, out of which it was admitted that £200 had been applied to retire an acceptance of his for Major Duff's accommodation to that amount; but it was not admitted that this was the bill of £200 libelled, although no other bill was produced in process.

The pictures which gave rise to the other claim upon the trust-estate were admitted to have been sent by Hunter to Major Duff; but the amount of the evidence that they had been purchased by him was comprehended in the following expression in a letter of his to Hunter:—"I also request you will let me know the price you set upon the pictures of David," &c. The trustees, on the other hand, denied that there had been any concluded bargain on the subject, and they offered to restore the pictures.

The Lord Ordinary pronounced the following interlocutor:—"In respect to the bond for £600 libelled, finds that it is not now disputed that the principal thereof is due, with interest thereon from the period of the death of Major Duff, viz. April 1820; and therefore finds the defenders, as trustees libelled, liable for the said principal and interest, and decerns accordingly. But, in regard to the interest on the said bond prior to the death of Major Duff, finds it sufficiently appears from the writings and admissions in process that the said interest was paid, or the claim for the same extinguished, by payments made in each year by Major Duff to the pursuer, and that the same did not constitute an arrear of interest due between the parties; therefore, in respect to the same, assoilzies the defenders, and decerns. In respect to the bill for £478, finds that the same has fallen under the sexennial prescription of the law of Scotland; and in respect no offer is made to prove that the sum therein is due by the oaths of the defenders, therefore, in regard to this bill, assoilzies the defenders, and decerns. In respect to the bill for £200, finds it proved by the correspondence in process, and admitted to be genuine by the pursuer, that the same was retired with money remitted by Major Duff for that purpose; and therefore, in regard to this bill, also assoilzies the defenders, and decerns. In respect to the price of the pictures libelled, finds it appears that the same were sent to Major Duff, not in consequence of any prior contract of sale, but, at the furthest, in the hope that a sale of them might be made;—finds no evidence that any such sale ever was completed; and therefore finds it unnecessary to decide in regard to the defenders' plea of the quinquennial prescription. And in respect the defenders offer to restore the said pictures, assoilzies them from that part of the conclusions of the libel, and decerns."

Hunter reclaimed; but the Court adhered.

D. Campbell, W. S.—H. Inglis and Donald, W. S.—Agents.

A. and G. Fowler and Miss Fitzmaurice, Advocators.—*Jameson—H. J. Robertson.*

A. Macartney (for Commercial Bank), Respondent.—*D. F. Hope—More—Speirs.*

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Fowlers &c. v. Commercial Bank.

Property—Servitude.—Circumstances in which the feuar of building-stances in a town was bound, by a reference in his contract, to a plan as to the line of the street, and in which other feuars were held entitled to object to the deviation.

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2d Division. Ld. Mackenzie. R.

In the plan prepared by Mr. Gillespie, and adopted by the Earl of Moray, for feuing the ground belonging to his Lordship, now forming Moray place &c., Edinburgh, there was one space laid off to be bounded as follows—on the east, by a road or street running from Queen street to Heriot row, on the line of an old lane leading to Stockbridge by the west end of Queen street gardens; on the north, by a prolongation of Heriot row, to be called Darnaway street; on the north-west, by a part of Moray place; and on the west, by a street to be called Forres street, leading from Moray place to Queen street. This space did not touch Queen street, except at the south-west corner, being separated therefrom by a piece of ground whereon Albyn place now stands, which, at the eastern extremity, where it was bounded by the lane above mentioned, was about the depth of two houses, but which gradually ran to a point, forming an acute angle near the western extremity of what is now Albyn place. This piece of ground belonged to a Mr. Scott, who, in July 1822, entered into an agreement with Lord Moray, whereby he agreed to take from his Lordship the whole of the feuing-stances in the space above described; becoming bound, at the same time, to build the houses both on the ground so feued, and on that which previously belonged to himself, in conformity to the plans which his Lordship should adopt for his property, and to comply with the feuing articles. It was further provided, that as it would be necessary to allow 20 feet off the property fronting Queen street gardens to widen the road or street leading from Queen street to Heriot row, and as this would preclude Mr. Scott from building on 20 feet on the east of his own original property, Lord Moray should, to compensate him, give him, without payment of any duty, back-ground for his own feuing-stances fronting Queen street, his original property not having breadth sufficient for this, together with certain stances fronting Queen street gardens. This agreement was reduced into the form of a minute, in implement of which a feu-contract was entered into between Scott and Lord Moray—whereby, after a recital of the agreement, Lord Moray feued out to him "all and whole that plot or piece of ground &c. lying between Queen street and Moray place, as delineated and marked on the said feuing-plan made out by the said James Gillespie, approved by the said Earl, and subscribed by him as relative to the articles of roup, and sale of the several areas &c., dated 7th August 1822, &c.; and which piece or plot of ground consists of the foresaid 18 stances, and the stable-ground comprehended within the plot or piece of ground hereby disponed,

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as also part of the stance of the house marked on the said plan No. 125, and of part of the stances of the four houses immediately on the east thereof, and also of two stances and part of another stance fronting the Queen street gardens, together with the foresaid back-ground to the said David Scott's feus fronting Queen street, including No. 125 to the east boundary, and the back-ground to the stances fronting the Queen street gardens, as represented on the said plan; and which part of the said stance No. 125, and of the other stances to the east thereof, and the said two stances and part of another stance fronting the Queen street gardens, with the whole back ground to these stances, and to the said David Scott's other stances, were by said agreement to be given him as a compensation for the loss of the twenty feet taken off the front of his property to Queen street gardens, and for the expense of building the elevation to the Queen street gardens; bounded the said plot or piece of ground hereby disponed and feued as follows, viz. by Darnaway street and Moray place on the north, by Forres street on the west, by Queen street and the piece of ground belonging to the said David Scott on the south, and by the road or street leading from Queen street by the west end of Heriot row to Stockbridge on the east, lying within the parish of Saint Cuthberts, and shire of Edinburgh."

The plan referred to in this contract laid down the buildings facing the Queen street gardens as 20 feet within the old lane which formed the original boundary of Scott's and Lord Moray's ground on that side, and also laid down the street as occupying those 20 feet in addition to the old lane; and Scott, in building the houses on his own ground fronting Queen street, and forming Albyn place, made the eastern front of the end house towards the lane correspond with the line as laid down in the plan. Having, however, subsequently acquired from the proprietors of Queen street gardens a strip of ground more than 20 feet in breadth, so as to enable him to increase the width of the lane to the eastward, he resolved to build the houses fronting the gardens on the ground feued by him from Lord Moray, up to the line of the old lane,—thus including in the area of the houses the 20 feet alluded to in the agreement and feu-contract, and set down in the plan as to be thrown into the street. Having conveyed his property to the Commercial Bank, a petition was presented by the respondent Macartney, manager of the Bank, to the Dean of Guild, praying for warrant to build according to a plan which included this piece of ground. To this petition answers were given in for Lord Moray, and also for the other advocators, Messrs. Fowler and Miss Fitzmaurice, proprietors of a house built on one of his Lordship's feus on the north side of Darnaway street, which had been feued with reference to the plan mentioned in Scott's feu-contract, the front of which house, to the extent of 20 feet, was, according to that plan, opposite the opening of the street in question, but which, according to the proposed new plan, would have another house built entirely opposite to it. These parties contended that Scott, and the Bank as in right of him,

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were bound by the agreement and feu-contract not to build on these 20 feet, in consideration of giving up which on his own ground, Scott had received a large compensation; and further, that in fact he had acquired no right to the 20 feet from Lord Moray, the reference to the plan in the contract clearly proving that the eastern boundary was the road as laid down on the plan, and not the old lane. The Bank, on the other hand, contended that the boundary described in the contract as "the road or street leading from Queen street by the west end of Heriot row to Stockbridge" was the road as then existing, and not the intended street laid down on the plan; that this being the case, the reference to the plan was not sufficient to limit his right of building to the verge of his feu, there being no limitation in the contract; and that as he had provided a wider street than was proposed in the plan, the other feuars on Lord Moray's ground had neithe title nor interest to object.r The Dean of Guild having repelled the objections, Messrs. Fowler and Miss Fitzmaurice brought an advocation, in which Lord Moray did not appear.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note:*—"Finds that by the feu-contract betwixt the commissioner of the Earl of Moray and Mr. David Scott, the latter acquired right from the former to two stances and part of another stance fronting the Queen street gardens, and that with express reference to a plan therein specially described, and from which plan it appears that these stances and part of a stance are bounded on the eastward, not by the ancient lane leading down to Stockbridge, but by a road or street to be made, which is to extend in breadth 20 feet further to the west than the old lane; and

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* "NOTE.—It seems to the Lord Ordinary that it would be preposterous to suppose that Mr. Scott was to have Lord Moray's ground to the old lane without any restriction against building, when he expressly gets a very valuable consideration for adopting a plan by which he was limited in the use of his own ground bordering on the lane in this respect. If, however, he was not to build on the 20 feet, but a broader street was to be kept, as appearing by the plan, why should this ground be conveyed to Mr. Scott, more than any other part of the streets or roads mentioned on the plan? Accordingly it seems to the Lord Ordinary that the words conveying and describing the stances do, in fair construction, connect with the words 'represented on the said plan;' and these are the principal dispositive words of the deed, in reference to the ground in question.

"It will also be observed, that the plan now proposed would make 20 feet of front to the south, and 20 feet of front to the north, neither of which is contemplated in the feu-contract. As to the right of the advocators, the Lord Ordinary rather thinks they have a real right on the street by a servitude of a complex kind, including right of road, non officiendi luminibus prospectus &c., and a fortiori, as found, a sufficient title to defend in this application; and having looked at the locality, he cannot say that he does not think that the advocator's houses would be the worse for the change of plan attempted, i. e. would be worse in some respects; and though perhaps better in some other quite different respects, the Lord Ordinary cannot force them to take one in place of the other."

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agreeably to which plan, the words limiting the whole ground acquired by Mr. Scott on the east, viz. the words 'by the road or street leading from Queen street by the west end of Heriot row to Stockbridge on the east,' must be interpreted to be the road or street to be made as appearing on the said plan—i. e. a road or street extending in breadth 20 feet further west than the ancient lane;—that the Commercial Bank, which derived right from Mr. Scott, has no right to a more extended limit on the east than he had; therefore finds that the said Bank has no right to build upon the plan now proposed, which extends beyond the ground belonging to the Bank;—that the ground upon which the said encroachment is proposed to be made, belongs in property to the Earl of Moray, who is a party opposer to this process, and has never expressly withdrawn his opposition;—and further, that the advocators Messrs. Fowler and Fitzmaurice have a right to have the said ground kept as a street, which is not disputed by the proprietor of that ground, and therefore have a sufficient title to prevent a stranger from obtaining a warrant for building thereon, and that there is no sufficient ground for any plea of emulatio vicini;—therefore, on the whole, advocates the cause, dismisses the original application, and decerns;—finds the respondents, the Commercial Banking Company, liable to the complainers in expenses," &c.

The Court adhered.

MacRitchie, Bailey, and Henderson, W. S.—J. A. Campbell, W. S.—Agents.

No. 380.

MAGISTRATES of EDINBURGH, Raisers.

SIR GEORGE CLERK and Others, Claimants.—*Sol.-Gen. Cockburn—Keay.*

DR. ADAM, Claimant.—*D. F. Hope—Forsyth.*

Implied Obligation—Title to Pursue.—A party having been requested by subscribers to sit for his portrait, as in reference to a public purpose; and having done so—Found that his son and representative was entitled to insist that it should not be diverted from that purpose.

June 10. 1831.

1st Division. Ld. Corehouse. D.

SOME years ago, Sir George Clerk, Bart., and several other gentlemen, who had been educated at the Edinburgh High School, formed themselves into an association called the High School Club. The late Dr. Alexander Adam was rector of that seminary from 1768 to 1809. On the 21st of March 1808, the following letter was addressed to Dr. Adam:—"Dear Sir, At a meeting of the High School Club, some days ago, for the purpose of consulting how the members could best show you some mark of their regard, we were appointed a committee for carrying the resolutions into effect. In pursuance of these resolutions, we now beg leave to request, in the name of the club, that you will do us the favour to sit to Mr. Raeburn for your picture. We are anxious to place it in the school as a memorial of our gratitude, and of the high sense we entertain of the advantages the public has derived for so many years from your useful and im-

portant labours. We flatter ourselves you will not be disposed to refuse this favour, when you reflect that we can ask it from no other motives but those of the most sincere regard and esteem, and that it may serve as an inducement to those who shall come after you, to emulate the able and conscientious discharge of your official duties, by which you have contributed so much to extend the fame of our flourishing seminary." Dr. Adam agreed to this request, and his portrait was painted by Raeburn, and paid for by the subscriptions of fourteen members of the club. Afterwards, on the 9th of August, he addressed one of the subscribers in these terms:— "I feel my desire of prosecuting this work (his Dictionary) increased by the conspicuous manner in which you and your friends have been pleased to exhibit me to public view. I went yesterday to Mr. Raeburn's with a gentleman who was desirous to see the picture, and found it decorated with a very splendid frame, very different indeed from what it was in at the public exhibition. You have ordered every thing concerning it with so much propriety, and so far beyond my expectation, that whatever you determine with respect to the placing of it, and the inscription, will be quite agreeable to me. I have only to request that the names of those gentlemen who have done me so great honour may be recorded; and that their reasons for doing so, which you so handsomely expressed in your first letter to me on the subject, may be shortly mentioned. The shorter and the more simple the inscription is made, the better."

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Dr. Adam died before the portrait was placed. The subscribers then addressed a petition to the Magistrates, setting forth that they had "requested the late Dr. Adam, rector &c. of the High School of Edinburgh, to allow his portrait to be drawn at their expense, as a mark of their gratitude and respect for his meritorious discharge of his official duties," &c.; that the portrait was now framed, "and is ready to be placed in the High School library, as soon as leave shall be obtained to that effect. May it therefore please your Lordship and Honours to grant leave, by a regular act of council, to the petitioners, to place the said portrait of Dr. Adam, acknowledging, in your deliverance hereon, that the property of the said portrait remains in the petitioners, and that they, or the majority of the survivors of them, may at any time hereafter dispose of the same as they shall think fit, and that the said portrait shall not be at the disposal of the said Magistrates of Edinburgh during the survivance of any of the petitioners; and that failing them, and all provision of theirs to the contrary, the Magistrates shall then preserve the same in perpetuam rei memoriam. Signed in our name, and by our appointment." The Magistrates "granted liberty to the petitioners to place the said portrait of Dr. Adam in the High School library, on the terms and conditions before mentioned." The portrait was soon afterwards placed in the library, with this inscription:—"This portrait of Alexander Adam, LL.D., Rector of the High School from June 8. 1768 to December 18. 1809, Author of Roman Antiquities &c., was

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placed here as a mark of gratitude and respect by fourteen of his former pupils. A. D. 1810." The names of these gentlemen were subjoined.

When the buildings of the old High School were sold, this portrait, along with the library and the whole academic establishment, was transported to the new High School.

In December 1829, a petition was presented to the Magistrates in name of the subscribers to the portrait, setting forth that Dr. Adam's portrait, "the property of the petitioners, and of certain other persons whose names are inscribed on the frame of the said picture in consequence of Dr. Adam's request, was placed in the High School library with consent of the Lord Provost and Magistrates, but under the express condition and reservation that the said portrait should not be at the disposal of the said Magistrates;—that the High School library being now pulled down or disused, the petitioners and other parties foresaid are desirous to resume possession of the said portrait," &c. This application was resisted by Dr. Walter Adam, son of the late Dr. Adam; and the Magistrates of Edinburgh raised a multiplepoinding to try the question.

Pleaded by the Subscribers—

1. Dr. Adam had no right of property in the picture, and consequently his representative has none; therefore he has neither title nor interest to claim.

2. The subscribers paid for the picture, which was therefore their property. Though they mentioned to Dr. Adam their intention of placing it in the High School, yet this was not made a condition of his sitting; and the Doctor's subsequent letter of August 1809, expressly gave them his consent to its being placed wherever they pleased.

3. The subscribers placed it in the High School, under the most express reservation of their right of property, and power of disposal of it.

Pleaded by Dr. W. Adam—

1. As the son and representative of the deceased, he has both a title and interest to insist that a public memorial erected to the memory of his father shall not be changed from its original destination. Dr. Adam, if alive, could have objected to any misapplication of his portrait, and it is equally competent to his representatives now to do so.

2. Dr. Adam only consented to sit, and the subscribers only obtained his portrait, under the condition that it was to be placed in the High School, there to remain as a monument to his memory, and an incitement to his successors. His subsequent letter of August 1809, however courteous in its terms, yet, when fairly construed, by no means implied an abandonment of this condition.

3. It was only because the letter of the subscribers to Dr. Adam, of March 1808, was not made known to the Magistrates, that they consented to the conditions under which the portrait was received by them. Their consent was therefore not binding on them; but, at any rate, it

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could not change the contract between the subscribers and Dr. Adam, by virtue of which alone the portrait was procured.

The Lord Ordinary found "that the picture in question is the property of the claimants, Sir George Clerk, Bart. and others, members of the High School Club; that the intention expressed by them of placing it in the library of the High School was not a condition stipulated in favour of Dr. Adam or his representatives, on which they are entitled to found in this action; found there is evidence that it was not so understood by Dr. Adam himself; preferred the claimants Sir George Clerk &c. to the picture in question, and granted warrant to, authorized, and ordained the raisers of the multiplepoinding, to deliver up the same to the said claimants, &c.; found Dr. Walter Adam liable in expenses," &c.

Dr. Walter Adam reclaimed.

Lord President.—There are many cases similar to the present. The Faculty of Advocates subscribed for the erection of the statues of President Forbes and President Blair. But suppose that the Divisions of the Court in which these have been placed should be remodelled, or wholly rebuilt, and placed perhaps in a new site, could the Faculty claim the statues for their own library, and refuse to allow them to stand in the new court-rooms? I think not; and the case of Dr. Adam is stronger, as I feel convinced from these papers that it was the understanding on which the Doctor sat for his portrait, that it should be placed permanently in the High School of Edinburgh. He was asked to sit, and he did sit, to gratify the declared anxiety of the subscribers to place it in the High School, as an incentive to emulation on the part of his successors. How does it appear that he would ever have allowed his portrait to be taken, except in reference to this express destination? But the portrait being thus obtained, the death of Dr. Adam has the reverse effect of liberating the subscribers from their obligation to fulfil their intentions towards him. Their letter to the Magistrates I conceive to have been merely meant to protect the picture from any misuse on the part of a future magistracy, and I can allow it no ampler effect. I am strengthened in this conclusion by regarding the terms in which the inscription was made on the frame of the picture. These were nearly equivalent to a perpetual dedication of it. Taking all the circumstances into view, I think it was pars contractûs between Dr. Adam and the subscribers that the place for the picture should be the Edinburgh High School. The change of the edifice is a thing utterly immaterial; there is still but one High School, and I have no doubt of the title of Dr. Adam's son to enforce the contract against the subscribers, in the same manner that Dr. Adam, if alive, would have had a title himself to do so.

Lord Balgray.—This is a case of some difficulty. There are several parties before us. On considering the original application to the Magistrates by the subscribers, and the conditions on which the Magistrates then got the custody of the picture, it is clear that they have at present no right of property in it whatever. The next question is, whether the son of Dr. Adam has any right to the portrait? I am equally clear that he has not. I hold that

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the property of the picture belongs to the subscribers; but it remains to consider whether their right of property is absolute or qualified—whether, on the one hand, there exists an implied obligation on them to fulfil what they held out to Dr. Adam in their original letter, or whether the Doctor's letter in August 1809 left them at liberty to dispose of it as they pleased. Upon considering the two letters together, and viewing the relative situation of the parties at the date of writing them, I cannot but hold that the right of property in the portrait acquired by the subscribers was only of a qualified nature. In their letter to the Doctor, they distinctly say they "are anxious to place it in the High School," in token of the benefit he had conferred on the public; and they trust he "will not be disposed to refuse this favour"—that is, of sitting for his portrait, as they asked it, "that it may serve as an inducement to those who shall come after you to emulate the able and conscientious discharge of your official duties," &c. I cannot hold this to be any thing but distinctly stating to the Doctor that the permanent destination of his portrait was the High School, and therefore requesting him to sit for it. He agreed, and they are now bound to use it as they held out to him they were to do. If the Doctor were now alive, he could have objected to any change in its destination, and it is equally competent to his son to do so. As for the change of the site of the High School, and the erection of a new one, it is quite immaterial to the question.

Lord Craigie concurred.

Lord Gillies.—I take an opposite view. There is no difference in our opinions as to who are the proprietors of this picture. We are all agreed that the property is in the subscribers. The Magistrates have not the least claim to its present property, and they make none. But how does the question stand between Dr. Walter Adam and the proprietors? He makes a claim "that his father's portrait shall, in terms of its original destination, remain in the High School of Edinburgh, under the protection of the pursuers, as patrons of that seminary." Now, the express condition under which the Magistrates first got possession of the picture was, "that the property of the said portrait remains in the petitioners (the subscribers), and that they, or the majority of the survivors of them, may at any time hereafter dispose of the same as they shall think fit, and that the said portrait shall not be at the disposal of the said Magistrates of Edinburgh during the survivance of the petitioners; and that failing them, and all provision of theirs to the contrary, the Magistrates shall then preserve the same in perpetuam rei memoriam." The claim of Dr. Walter Adam therefore is, that we should find the picture to be under the protection of those persons who are expressly debarred from its property, management, or disposal, so long as any survivor of the subscribers remains. If we sustain this claim, it appears to me that it will lead to very strange results. Suppose the Magistrates place the picture in a position where it is not well seen, or perhaps may be scarcely seen at all, has Dr. Walter a right to interfere and bring an action in this Court for having it placed in a better position? The ground on which this singular modification of right in Dr. Walter and the Magistrates is founded, is the original letter to the late Dr. Adam when asked to sit for his picture. I view the purposes stated in that letter to be a mere

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expression of intention on the part of the writers, and nothing more. And when I see the Doctor's letter of August in the most express terms saying, "Whatever you determine with respect to the placing of it, and the inscription, will be quite agreeable to me," I cannot consider that either the subscribers or Dr. Adam then understood that the former were deprived of their control over the portrait as their own property. This letter by Dr. Adam is followed by the subscribers placing the picture in the High School, under the most complete reservation of the power of property and disposal; and the Magistrates assent to this. How, then, can we now sustain the claim of Dr. Walter, which reverses this right of disposal? And if we acknowledge his title to interfere now in this question, his representatives may interfere two centuries hence, and raise actions regarding the place of the picture for the time. In short, I cannot recognise the species of right claimed by Dr. Walter Adam. I think the property of the picture is unconditionally in the subscribers, and therefore I am against any alteration of the interlocutor.

THE COURT pronounced this interlocutor:—"The Lords adhere to the interlocutor reclaimed against, in so far as it finds that the picture in question is the property of the claimants, the members of the High School Club: But, quoad ultra, they alter the said interlocutor, and find that it was an implied condition in the treaty betwixt the club and the late Dr. Alexander Adam, when he sat for his picture to the late Mr. Henry Raeburn, that the portrait was to be placed in the High School of Edinburgh, as a memorial of the high sense the claimants entertained of the advantages the public derived from his useful and important labours, and as an inducement to those who might come after him to emulate the able and conscientious discharge of his official duties, by which he had contributed so much to extend the fame of the High School; and they accordingly decern and declare that the said picture shall remain in the High School of Edinburgh in perpetuam rei memoriam, and that the Magistrates and Council of the city of Edinburgh, as the patrons of that seminary, shall be answerable that it shall be properly placed therein agreeably to the object in view, and carefully protected from all injury;—find no expenses due by either of the parties."

FOTHERINGHAM and LINDSAY, W.S.—D. FISHER, S.S.C.—Agents.

No. 381.

June 10. 1831.
Rennies v. Rennies.

RENNIE'S YOUNGER CHILDREN, Claimants.—*Jameson.*
MRS. SARAH CAMPBELL OR RENNIE, Claimant.—*D. F. Hope.*
JOHN RENNIE'S TRUSTEE, Claimant.—*Keay—Whigham.*

Clause—Testament.—1.—Terms of a letter, written by a father in reference to the marriage of his son, found to import an obligation to invest a sum of £4000, so that the interest might yield an annuity to the lady, only after her husband's death.—2.—A sum of £9000 being provided to the oldest son by a codicil to a settlement which contained other provisions in his favour; and a subsequent letter being granted by his father, binding himself to secure £4000 on certain terms, in reference to the interests of the wife and children of the son's intended marriage,—held not to import a new provision additional to the £9000.

June 10. 1831.

1st DIVISION.
Ld. Corehouse.
D.

THE late Mr. Rennie of Phantassie, by trust-deed of settlement in 1817, after making provisions for his wife and younger children, left the residue to his eldest son, Mr. John Rennie. By a codicil, dated 24th October 1820, he directed a sum of £9000 to be paid to him at the first term after his decease; and, on the 6th of August 1825, he addressed to him the following holograph letter:—"My dear John—As you are now about to enter into the matrimonial state with Miss Sarah Campbell of Newcastle I hereby bind and oblige myself to subscribe any legal deed to the amount of four thousand pounds sterling as a security for your wife the interest of which to be paid to her as an annuity during all the days of her life in the event of your death taking place before hers the four thousand pounds to be given the children at her death & should she have no issue two thousand pounds to be at her own disposal & I remain yours most affectionately," &c. This letter was written without punctuation. Mr John Rennie carried it with him to Newcastle, and previous to his marriage, deposited it with the lady's father. It was alleged that he received from him £2000 of tocher.

Mr. Rennie died in 1828, and in 1829 the estates of Mr. John Rennie were sequestrated. When the trustees of the deceased were about to embody in a regular deed the obligations undertaken by him in reference to the letter, codicil, &c., various interpretations were put on these deeds respectively by George Rennie and the other younger children—by the wife of Mr. John Rennie—and by the trustee on his estate. To have their rights ascertained, the trustees of the deceased raised a multiplepoinding.

The Trustee for Mr. Rennie's Creditors pleaded—

1. That the provision of £4000 contained in the letter was meant to be an additional grant to Mr. Rennie, over and above the £9000 due to him, bequeathed by the codicil; and,

2. That, according to the sound construction of the letter, the £4000 were to be secured in such a way as that John Rennie should enjoy the benefit of it during his life, and that it should yield an annuity to Mrs. Rennie, only in the event of his predecease.

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The younger Children pleaded—

That the £4000 provided by the letter was not meant to be in addition to the £9000 already provided, but must be imputed pro tanto in satisfaction of that provision.

Mrs. Rennie pleaded—

That the letter ought to be read as follows:—"I bind myself to subscribe any legal deed to the amount of £4000 sterling, as a security for your wife,—the interest of which to be paid to her as an annuity during all the days of her life. In the event of your death taking place before hers, the £4000 to be given the children at her death,—and, should she have no issue, £2000 to be at her own disposal; and I am," &c. She therefore contended that she was entitled instantly to the annuity; and that the late Mr. Rennie must have meant it to be exclusive of the jus mariti, otherwise it would be no annuity to her, but to her husband; while the marriage lasted.

The Lord Ordinary found, "that the letter of the deceased George Rennie of Phantassie, dated the 6th day of August 1825, imports an obligation to secure the sum of £4000 sterling, the interest to be applied in payment of a life-annuity to the claimant, Mrs. Sarah Campbell or Rennie, spouse of Mr. John Rennie, in the event of her surviving her said husband, and commencing from the period of her husband's death, and the capital to belong to the children of the marriage, or if there were no children, one-half of it to be at the disposal of the widow;—that as the said deceased George Rennie undertook this obligation on the occasion of his son the said John Rennie's marriage, for the purpose of securing provisions to the widow and children, it is not presumable that he intended thereby to enlarge the provisions which he had made for John Rennie in his mortis causâ settlements; and therefore found that the sums due by virtue of the said letter, must be imputed in payment of the special bequest of £9000 to John Rennie, contained in the codicil of date the 24th day of October 1820, and decerned and declared accordingly;—sustained the foregoing claim of George Rennie and others, and also the claim for the said Mrs. Sarah Campbell or Rennie, to have the said sum of £4000 sterling, part of the said sum of £9000, invested by the raisers of the multiplepoinding, in such manner as effectually to secure the said Mrs. Sarah Campbell or Rennie during her life, in the event of her surviving her said husband, in such interest as can from time to time be procured for the said principal sum of £4000 sterling, and to secure the capital for the purpose specified in the foresaid letter, in the several events therein contemplated, and that at the sight of the said claimants; and decerned in the preference, and ordained the raisers of the multiplepoinding to invest and secure the said sum of £4000 sterling upon suitable and sufficient security accordingly." His Lordship further found Mrs. Rennie, and also the younger children, entitled to their expenses out of the trust-funds of the deceased Mr. Rennie.

No. 381. June 10. 1831. Rennies v. Rennies. — Eiston v. Eiston.

Mrs. Rennie, and Mr. Rennie's trustee, reclaimed. The Court unanimously adhered.

Lord Balgray.—I feel no doubt in regard to this interlocutor. I am ready to give a fair construction to the terms of the letter of the deceased; but I cannot allow myself to be moved by the intervening sequestration of Mr. John Rennie. I must give to this letter the same interpretation now, as if it had been written yesterday. Now, suppose that any man of business were requested to frame a legal deed, so as to embody formally the intentions of the writer of that letter; could he have any hesitation whatever in providing this annuity to Mrs. Rennie, so as to accrue to her only after her husband's death? The £4000 was ordered to be secured in the mean time. That sum was part of the £9000, which previously was wholly payable to her husband at the first term after his father's death. I can have no hesitation, therefore, in holding that a portion of this sum, while secured for the ultimate annuity of the widow, was left to bear interest in the mean time, which should be available to the husband during the subsistence of the marriage.

Lord President.—My opinion is the same. It is stated that Mrs. Rennie brought a fortune of £2000 to her husband. This circumstance tends to explain the provision made for her; for nothing is more common than to provide the wife in an annuity, after her husband's death, amounting to precisely double of the interest of the fortune brought with her. That appears to be just the thing which was done here. Mrs. Rennie might perhaps be allowed some latitude in her mode of pointing the deed; but she cannot be suffered to put so forced and unnatural a construction upon it as she has attempted to do. I concur also in thinking that the £4000 was not a sum superadded to the £9000.

Lord Gillies.—I feel no difficulty in the case. After reading the letter of the deceased, I was satisfied that the interlocutor was right. The question is simply, whether the writer of this letter intended, as its most obvious construction would import, to make an ordinary and rational provision for his son's wife, consistently with a very common practice; or whether he meant, according to a strained arrangement of the same words, to make a very extraordinary and unusual provision for an annuity to be payable to his daughter-in-law during the marriage, and independent of her husband, which annuity is confessedly the whole that is provided for her at his death? Between these alternatives I cannot hesitate; and I concur in the whole interlocutor.

Lord Craigie intimated that he was of the same opinion.

Walker, Richardson, and Melville, W. S.—J. and W. Jollie, W. S.—Allan and Bruce, W. S.—Agents.

No. 382.

Mrs. Eiston, Advocator.—*Jameson—Cowan.*
John Eiston, Respondent.—*Keay—Anderson.*

Fee and Liferent—Clause.—Circumstances in which a widow, who, before her marriage, was liar of a free-stone quarry, which was kept going during the whole marriage, was held not to have barred herself from continuing to work the quarry for her own benefit after her husband's decease, notwithstanding the terms of her contract of marriage, and a subsequent deed by which she conveyed the fee to her eldest son, reserving to herself the liferent use and enjoyment of her whole property.

No. 382.

June 10. 1834.

1st Division. Ld. Corehouse. D.

Eiston v. Eiston.

The late Walter Eiston, a mason in Ayr, and Margaret Houston, entered into an antenuptial contract in 1787. Eiston was at this time possessed of £100, and Margaret Houston was proprietrix and infeft in a park of five and a half acres, which had been feued to her father chiefly with the view of working a stone-quarry, which formed a considerable part of its value. By the antenuptial contract, Eiston bound himself to invest the £100, and take the rights "in favour of himself and his spouse, and the longest liver of them, in liferent, and to the child or children to be procreated of the marriage in fee; and failing of such child or children, to the longest liver, and his or her heirs and assignees, in fee," &c.; and to provide the conquest during the marriage in the same way. On the other part, Margaret Houston disponed, "to and in favour of herself and the said Walter Eiston, and the longest liver of them two, in liferent, and to the child or children to be procreated of the said marriage in fee, and failing of such child or children, to herself and the said Walter Eiston, and the longest liver of them, and his or her heirs or assignees, in fee, all and sundry lands," &c., including the above park and quarry, which at this time was open, and in the course of being worked.

Several sons and daughters having been born, a new deed was executed by the spouses in 1806, by which they "gave, granted, disponed, and conveyed to and in favour of ourselves, and the longest liver of us, for our liferent use only, all and whole" the park, with certain buildings, and the quarry. "And further, we hereby, with and under the reservation after expressed, divide the foresaid subjects amongst our children in manner following,—viz. We hereby dispone and convey to John Eiston, our eldest son, in the event of his arriving at the years of majority or marriage, and his heirs and assignees, all and whole" a portion of the park containing the quarry. They then provided other portions of the park to the younger children; authorized resignation "for new infeftment to be granted to ourselves and our said children, according to our and their respective interests of liferent and fee before mentioned," &c.—"And we hereby reserve to ourselves, and the longest liver of us, not only the liferent use and enjoyment of the whole sums and subjects, heritable and moveable, specially and generally above conveyed, but also full power and liberty, during our joint lives only, to alter, innovate, revoke, or annul these presents, in whole or in part, at pleasure; and also to sell and dispose of the whole of the said subjects, or part thereof, as we shall think proper, without consent of our said children," &c.

On the husband's death, his widow continued to work the quarry for a number of years without challenge, and drew the proceeds. In 1830, her eldest son John Eiston, founding on the deed of 1806, presented a petition to the Magistrates of Ayr, stating that she was excavating the quarry, and was about to convey away part of the ground for a road, and therefore praying that they might "interdict and discharge the said Margaret Houston from giving or granting ground for any such road as that above alluded to; and also to interdict and discharge her &c. from

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June 10. 1831. Eiston v. Eiston.

opening up or working the stone-quarry situated in said subjects conveyed to the petitioner in fee; to find that she must instantly give security, acted in your Honours' Court-books, to preserve said buildings, parks, and other subjects liferented, without destruction or waste; and if she shall refuse or decline, to ordain her to do so under the penalty of being excluded from the yearly profits of said subjects, till such security be given—all in terms of the Acts of Parliament," &c.

In defence she maintained, that according to the true meaning of the parties, and the sound construction of the deed, she was to enjoy the full benefit of the property as fiar during her life; that the fee originally belonged to her; that a considerable source of her support was the produce of the quarry; and it never could be intended that she should be deprived of this on her husband's death, more especially as she had received no value in consideration of the deed 1806; and accordingly the parties had acted on that understanding; that as to the road, she did not mean to convey away any part of the property, but to form a new road for the benefit of the quarry.

The Magistrates found that, "by the disposition and assignation under which both parties claim, executed by Walter Eiston, mason in Ayr, and Margaret Houston, otherwise Eiston, spouses, they give, grant, and convey the lands in dispute 'to and in favour of ourselves, and the longest liver of us, for our liferent use only,' and the fee of part of the lands disponed, is, by a subsequent part, given to the pursuer;—that a clause is insert in the end of the same deed, reserving 'to ourselves, and the longest liver of us, not only the liferent use and enjoyment of the whole sums and subjects, heritable and moveable, specially and generally above conveyed, but also full power and liberty, during our joint lives only, to alter, sell,' &c.;—that, in the shape in which the question is brought into this Court, upon the disposition before mentioned, unchallenged by the defender, and acquiesced in by her ever since her husband's death, the Court can alone interpret the rights of parties according to the plain and obvious meaning of the dispositive words of the mutual deed founded on;—that the interest which the defender Margaret Houston or Eiston has in the property conveyed in virtue of the deed before referred to, is a bare liferent; and therefore, according to the decisions quoted in the first volume of the Dictionary of Decisions, p. 546, and also according to the argument used in the case of Waddell,[1] found that the defender has no right to open up, and to work, raise, and sell the stones or other minerals below ground, or to give away any of the ground for a road; therefore repelled the defences, and continued the interdict; but, in this very particular case, found no expenses due."

Mrs. Eiston advocated, and the Lord Ordinary "repelled the reasons of advocation, remitted to the Magistrates simpliciter, and decerned;—found the advocator liable in expenses," &c.

She then reclaimed.

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[1] Jan. 21. 1812, (F. C.)

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Lord Balgray.—This is a case depending upon its own circumstances, and not involving any general principle. Now, when I see that the property containing the quarry originally belonged to the wife, and that she makes a grant of it, on certain conditions, in favour of her husband and herself, and the heirs of the marriage, I cannot, in a question between her and one of these heirs, put a rigid interpretation on the terms of the disposition as against her, to whom no equivalent appears to have been given. Looking, therefore, to the ample terms of reservation of the use and enjoyment of this subject, so long as both spouses survive, I cannot think she meant to tie up her own hands, as to her own property, the moment that her husband died. In making a provision for her children, which was to accrue to them after her death, I am satisfied she never had it in view to deprive herself of all use of a considerable part of her property the moment she became a widow. In the whole circumstances, therefore, I am inclined to alter, and to find that there was no room for granting the interdict.

Lord President.—At first I was disposed to look on this as a common question of conjunct fee and liferent; but, on considering its peculiar circumstances, I take a different view of it. This was a going quarry before the advocator's marriage, and during her whole marriage. She continued it without hesitation in her widowhood, as in the exercise of her undoubted rights, until this interdict was applied for. When we attend to the reservation of the use and enjoyment of the whole sums and subjects which is made in the deed founded on by the son, I cannot but come to the conclusion that the parties meant to reserve to themselves, and during the lifetime of the survivor, the full right to work the going quarry. I think the use and enjoyment of the whole property was reserved for the lifetime of the survivor; and how can any use or enjoyment of a quarry be had, unless by working it?

Lord Craigie stated that he had arrived at the same conclusion.

Lord Gillies.—There is, no doubt, a difficulty arising from the improbability that Mrs. Eiston could have intended to deprive herself of all use of the quarry during her lifetime, in any event whatever. But I still incline to think that the terms of the deeds before us have effectually limited her to a mere liferent of her property. The use and enjoyment reserved is a liferent use and enjoyment. Now what does that amount to? I conceive, in regard to a landed estate, that it does not comprehend a right to work a freestone quarry. I cannot make the law bend in this respect; nor can I interpret the terms of the deeds before us in any other way than as reserving a mere liferent to the widow. I am therefore for adhering to the interlocutor under review.

The Court then altered, advocated, assoilzied, and found expenses due.

Advocator's Authorities.—3. Ersk. 8. 35 and 36; 1. Bell, 48; Paterson, Jan. 16. 1824, (ante, II. 617); Falconer &c., Jan. 22. 1824, (ante, II. 633); Reid, Dec. 4. 1827, (ante, VI. 198.)

Respondent's Authorities.—2. Ersk. 9. 57, 58, and 59; 1491, c. 25; 1535, c. 15; Creditors of Mousewell, March 16. 1683, (8253.)

J. Murdoch, S. S. C.- Mackenzie and Sharp, W. S.- Agents.

No. 383.

June 10. 1831.
Fraser v. M'Naughton.
Milligan v. Skinner.

REV. W. FRASER, Raiser.—*D. F. Hope—Cuninghame.*
J. M'NAUGHTON and Others, Objectors.—*Robertson.*

Process—Trust.—An accountant's report having been lodged in a multiplepoinding raised by certain creditors in name of a trustee; and the creditors having given in objections thereto, and these having been repelled; and the trustee having been found entitled to retain certain expenses of the litigation out of the trust-funds, but not having asked decree against the creditors personally—Held not entitled subsequently to give in objections to the report, to the effect of having the expenses laid on these individuals.

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2D DIVISION.
Ld. Mackenzie.
R.

BRANCH of the case mentioned ante, VIII. 104, (which see.) At the time when the objections to the accountant's report there mentioned were given in by M'Naughton &c., there was no objection taken thereto by Mr. Fraser. After the case returned to the Lord Ordinary, Fraser was found entitled to charge the expenses incurred by him in the litigation with M'Naughton &c. on the trust-fund; but he sought no decree or reservation of a claim for them against these individuals personally, except as to a certain portion awarded against them by a separate interlocutor. Subsequently, however, he gave in objections to the accountant's report, to the effect that the expenses should be laid on these parties, so as to relieve the trust-funds.

The Lord Ordinary repelled this objection; and the Court, considering that any objections should have been given in at the time when those for the opposite party were taken, and also that the proper time for having the expenses laid on the individual parties was when decree allowing him to charge them on the fund was pronounced, adhered.

Æ. MACBEAN, W. S.—J. MARTIN,—Agents.

No. 384.

June 10. 1831.
2D DIVISION.
Ld. Fullerton.
F.

WILLIAM MILLIGAN, Pursuer.—*Marshall.*
JAMES SKINNER, Defender.—*G. G. Bell.*

Agent and Client—Prescription.—Milligan, writer in Stranraer, and Skinner, writer in Edinburgh, acted as agents in an action of damages at the instance of a Mrs. Linwood, who was ultimately unsuccessful, and who was unable to pay the business-accounts. Milligan, alleging that he had been employed by Skinner, raised an action against him for payment of his account, ending June 1819. Skinner denied his having employed Milligan, and pleaded prescription. Skinner produced some correspondence; but this neither proving the original employment, nor importing an acknowledgment of the debt, the Lord Ordinary dismissed the action, and the Court adhered.

R. W. NIVEN, W. S.—J. R. SKINNER, W. S.—Agents.

JOHN WRIGHT and Others, Pursuers.—*More—Penney.*
GARDNER'S TRUSTEES &c., Defenders.—*Skene—Miller—Russell.*

No. 385.

June 10. 1831.
Wright &c. v. Gardner's Trustees &c.

Partnership.—1.—Parties retiring from a company on the terms prescribed by the contract are not liable to relieve the remaining partners from the consequences of defalcation of funds subsequently arising.—2.—A partner who had retired, but did not advertise out, having been called upon to pay debts afterwards contracted by the company, not entitled to relief against others who had previously, or at the same time retired, and had advertised out; and as to those who did not retire and advertise out till after him, entitled only to relief for such debts as then subsisted, and would have been claimable against them.

June 10. 1831.

2D DIVISION. Lord Medwyn. T.

IN 1805, a joint stock victualling society was established by contract in Anderston, a suburb of Glasgow, one of the articles of which provided that any of the members should be entitled to withdraw, on three months previous notice, subject to deduction, from his share of his proportion of the existing debts. The company was dissolved in 1824, in debt to a considerable amount; and the creditors having had recourse on certain of the partners, (including one Cranstoun, who had retired in 1809, but who had neglected to advertise out, and was now dead,) these partners raised an action of count and reckoning, repetition and relief, against all who were or had been partners of the company. Among these were several who had retired, in terms of the articles, many years before the dissolution, and had advertised out in the Edinburgh Gazette at different periods between 1808 and 1816.

They pleaded in defence, 1. That those of the pursuers who had continued to be partners subsequent to their retirement, could not claim from them relief for the defalcation of funds at the dissolution; and, 2. That although Cranstoun had retired in 1809, yet, as he did not advertise out, those of the defenders who had previously, or at the same time retired, and advertised out, could not be liable to relieve him to any extent; while those who had not retired till after him, and had advertised out, could only be responsible for such debts as subsisted previously to their advertising; but that there was no specification of any debts in this situation.

On the other hand, it was maintained, That a retiring partner, although settled with in terms of the articles, could not relieve himself of debts then contracted, although not paid till subsequently; that a partner who had retired, but had omitted to advertise out, was liable for debts contracted subsequently to his retirement; and a general averment was in the record that there were such debts, but they were not specified individually.

The Lord Ordinary, with reference to certain defenders who had retired after Cranstoun, found "that the deceased William Cranstoun retired from the society in question in terms of its rules, and received a payment, as a retiring partner, in January 1809, and granted a discharge therefor;—that it was necessary for Mr. Cranstoun to have published his re-

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tiring in the Gazette, to protect himself against any claim at the instance of the public, as having been at one time a member of said society; that it was Mr. Cranstoun's duty so to advertise, and that he cannot claim from any of the present defenders, who advertised out, repetition of any sums he may be called upon to pay to any creditor of the society becoming such after his retirement, unless it could be stated, which it is not, that it was at the request of the other partners that he did not advertise in the Gazette his retirement from the society;—that the present defenders would be bound to relieve Mr. Cranstoun of any debt which was due by the society at the date of his retiring, which may have been subsequently paid by him, or which his trustees are now liable to pay, as coming in his place;—but in respect that there is no specific statement as to any such debt now existing, but only a general allegation that there are such," his Lordship sustained the defences; and, by a subsequent interlocutor, he assoilzied all the other defenders in the several situations.

The pursuers having reclaimed, the Court adhered with reference to all of the defenders who had retired previously to, or at the same time with Cranstoun; but with reference to the others who had retired subsequently, their Lordships allowed a minute, before answer, as to the debts alleged to have been due at the time of their retiring.

CAMPBELL and MACDOWALL, S. S. C.—C. FISHER,—H. WATSON, W. S.—Agents.

No. 386.

MASON, Pursuer.—*Moir.*
MERRY, Defender.—*Aytoun.*

Process—Jury Court—1. *Wm. IV. c.* 69, § 7.—Incompetent for the Court, even of consent of parties, to remit to the Lord Ordinary to decide a question relating to the application of a verdict.

June 11. 1831.

1st DIVISION.

IN a case returned from the Jury Court after verdict, a question arose relative to the application of a verdict. The Court, on the motion of both parties, remitted to the Lord Ordinary to proceed with the cause, in the circumstances mentioned ante, p. 187. The Lord Ordinary pronounced a judgment, against which Merry reclaimed.

On moving the note, the Lord President again called the attention of the Court to 1. Wm. IV. c. 69, § 7, which enacts that " all questions relating to the application of the verdict, or the rights and interests arising therefrom, shall proceed before the Division of the Court to which the cause belongs;" and intimated an opinion that it was ultra vires of their Lordships to remit to the Lord Ordinary, even of consent of parties, and that it was impossible for the Court to recognise in any shape the proceedings which had taken place before his Lordship under the remit. After delaying the cause, in order to consider the effect of the statute, the Court finally adopted the views expressed by the Lord President.

LORD GILLIES.—Neither party can take any thing under the proceedings held before the Lord Ordinary. Any remit like this is a clear excess of power

on the part of the Court, and the consent of parties will not entitle us to assume such power. No. 386

June 11. 1831.
Mason v. Merry.

T. Darling, S. S. C.—Aytoun and Greig, W. S.—Agents.

Mrs. Ann Fraser &c. (Fraser's Representatives,) Suspenders.—*Skene—A. Wood.*
Alexander Urquhart, Charger.—*D. F. Hope—Wilson.* No. 387.

Bill of Exchange—Sexennial Prescription—Proof—Presumption.

1. A charge having been given upon a bill within the six years, but not followed up by further diligence until after the six years, when a charge was given on new diligence, found that the first charge was sufficient to interrupt prescription.

2. Circumstances in which an indorsee, in a question of recourse against an indorser, was held not bound to prove that he had received intimation of the dishonour of a bill which he had retired.

3. Proof by parole allowed that a letter of relief sued upon in an Inferior Court which had disappeared after judgment, and for which the defender's agents' receipt stood unscored, had been returned; and also of irregularity in the practice of that Court as to receipts for borrowed processes.

4. The proof having failed, found that the letter having been pronounced genuine by the Judge comparatione literarum, and no improbation offered, the pursuer was entitled to the presumption that it was genuine.

June 11. 1831.

2d Division. Lord Fullerton. F.

Fraser's Representatives v. Urquhart.

The charger Urquhart drew a bill for £18. 12s. 6d., dated 29th July 1814, at three months, which he indorsed to Simon Fraser, who indorsed it to Ross, writer in Tain, now Sheriff Substitute of the county of Ross. The bill, after being accepted by the party drawn on, was protested for non-payment by Ross on the 1st of November, and a charge given, in virtue of an extract of the registered protest, to Urquhart, and, as was alleged, to the several other parties; but no further steps were taken till 1826, when Ross charged Urquhart of new on a second extract. Urquhart having thereupon paid the bill, with interest and expenses, raised an action of relief against the representatives of Fraser, before the Sheriff of Ross-shire, founding on a letter said to have been granted by Fraser to Urquhart, of date 2d August 1814, in these terms:—"I bind and oblige myself to retire the £18. 12s. 6d. bill indorsed by you, the date of the bill being 29th July 1814, at three months date, without giving you any trouble," &c.

In defence against this action, it was pleaded—

1. That the bill was prescribed, there being no evidence of the first extract, or of a charge within six years after the bill became due, and that the second extract was inept.

2. That as the bill had not been duly negotiated by Ross, no intimation of the dishonour having been made to Fraser or to Urquhart; and as the latter was therefore under no legal necessity to pay the bill to Ross, he could not claim relief from Fraser's representatives.

3. That the letter of relief was not genuine. This allegation was only offered to be instructed comparatione literarum.

No. 887.

June 11. 1831. Fraser's Representatives v. Urquhart.

To this it was answered—

1. That prescription was interrupted; in proof of which, and of the existence and execution of the diligence, Urquhart produced the copy charge which had been served upon himself.

2. That due notice had been given to him of the dishonour, of which he was not now bound to adduce proof; and,

3. That the letter was genuine.

The Sheriff Substitute (Ross) pronounced this interlocutor:—"Finds, ex comparatione literarum, (and from frequent admissions made to him, and promises of payment by Simon Fraser,) that the name adhibited to the bill is holograph of Fraser, as is that to the obligation founded on and produced; therefore repels the defence on that head, and decerns against the defenders for the amount of the bill as libelled."

To this interlocutor the Sheriff Depute, after appointing Ross, the Sheriff Substitute, to lodge a minute as to his private knowledge of some facts of the case, adhered.

Fraser's representatives then brought a suspension upon the grounds stated in the Inferior Court, and in the mean while the letter of relief had disappeared from process. There was no evidence as to how or at what precise period this had occurred; but the suspenders' agent's receipt stood last for the process, including the letter. It was however averred by them, that the charger having demanded extract, the suspenders' agent returned the whole process, including the said letter, but that the receipt had remained unscored through negligence; and that the proceedings in the Sheriff Court of Ross-shire were so loose and irregular, that the state of receipts for processes borrowed could not be relied on.

The Lord Ordinary having repelled the reasons of suspension, adding the subjoined note,* Fraser's representatives reclaimed.

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* "NOTE.—The letter of relief founded on by the charger was produced in the Inferior Court, but is now missing, and consequently there can be no further inquiry into the authenticity of the subscription. But, in the first place, the receipt by the suspenders' agent stands for the process, including that document; 2dly, Though the genuineness of the signature of Simon Fraser was questioned, improbation was never regularly offered by the suspenders, who contented themselves, in their defences in the Inferior Court (page 2), with referring to a comparatio literarum; and, lastly, the Sheriff Substitute, ex comparatione literarum, found expressly that the signature was genuine. In these circumstances, the Lord Ordinary thinks that the charger is entitled to the benefit of the presumption in favour of the authenticity of the subscription.

"Considering the terms of the letter, and the whole circumstances of the case, the Lord Ordinary, though certainly not approving of, or founding any thing on the unusual, and, as he conceives, most irregular course of investigation adopted in the Inferior Court, sees no ground for altering the judgment. In the first place, it does not appear to him that the charger, whose bona fides in making payment is not denied, is bound, in order to make good his claim of relief, to prove, at this distance of time, that he received notice of dishonour. 2d, In regard to prescription, the copy of the charge produced seems sufficient to show that diligence was done in due time against the

The Court granted commission to take a proof as to the process being returned; but the suspenders having failed to prove their specific averment, their Lordships adhered. No. 387. June 11. 1831. Fraser's Representatives v. Urquhart.

J. Macdonell, W. S.—E. M'Millan, S. S. C.—Agents.

James Wilson, Complainer.—*Wilson.*
Leith Walk Trustees, Respondents.—*D. F. Hope—Rattray.* No. 388.

Road—Jurisdiction.—1.—Under the General Road Act, which provides that if trustees 'shall erect' a toll-bar without authority in any Act of Parliament, it shall be lawful to complain to the Sheriff or Justices of the Peace, and that the judgment of the Sheriff or Justices in all matters committed to them shall be final and without review, it is incompetent to apply to the Court of Session for interdict against the erection of such bar.—2.—The application equally incompetent though the bar have not been erected, but merely a warrant granted to erect it.

June 11. 1831. 2d Division. Bill-Chamber. Ld. Cringletie. F. Wilson v. Leith Walk Trustees.

By the General Road Act (4. Geo. IV. c. 49.) it is provided, (§ 49,) "that if the trustees of any turnpike road shall erect any toll-bar where they have no power by virtue of any Act of Parliament to do so, it shall be lawful for the Sheriff or Steward, or the Justices of the Peace, in Quarter Sessions assembled, for the shire or stewartry where any such bar is erected, upon complaint in a summary way, to hear and determine therein, and to order such bar to be removed." And by § 112 it is further declared, "That where by this act the adjudging of any penalty, forfeiture, fine, or any other matter, is committed to the Sheriff or Steward, or the Justices of the Peace assembled in their Quarter Sessions of the several shires or stewartries in Scotland, the judgment of such Sheriff, Steward, or Justices assembled as aforesaid, shall be final and conclusive, and shall not be subject to review by advocation or suspension, or by reduction, or by any process of law whatever, any law or usage to the contrary notwithstanding."

The complainer Wilson is proprietor of a coal-yard situated in Leith Walk, and having two entries,—one below the toll-bar, by which he can bring in coals from Leith, and the other above it, by which he can convey them to Edinburgh without payment of the toll. The tacksman having complained to the Leith Walk Trustees of the evasion thereby effected, they applied to the General Trustees of the county for a warrant to place a check-bar immediately above Wilson's entry towards Edinburgh, so as to intercept carts coming out of his yard. Thereupon Wilson presented a bill of suspension and interdict, alleging that there was no authority for such proceeding.

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present charger, and that, therefore, prescription was excluded; and, lastly, even prescription would not have extinguished the charger's obligation, as he must have admitted, on reference to his oath, that he had signed the bill, and that it had not been paid."

No. 888.

June 11. 1831. Wilson v. Leith Walk Trustees.

The Leith Walk Trustees, on the other hand, maintained that it was authorized by a local act; and they further pleaded, that at all events Wilson's bill was incompetent, as the only mode of redress to which he could have recourse was by complaint to the Sheriff, or Justices of the Peace, who were, by the General Road Act, the sole judges in such matters, and whose judgment was not subject to review.

To this it was answered, that although when a complaint was once made to the Sheriff or Justices, their judgment could not be reviewed by the Court of Session, the statute did not exclude an application in the first instance to that Court; and besides, that the jurisdiction conferred on the Sheriff and Justices was only in the case where the trustees had actually erected a bar, and the provisions of the act did not apply to the case where they had only granted a warrant to erect the bar, and where it was the warrant that was complained of.

The Lord Ordinary pronounced this interlocutor:—"Having advised this bill, with the former one, answers thereto, and in particular the statute 4. Geo. IV. cap. 49, and the act and warrant of the general meeting of the Trustees for the county of Mid-Lothian, held at Edinburgh on the 8th of March last, sees that by § 48 of said statute it is enacted that no toll-bar shall be erected on any of the roads in the said county, unless the same be ordered by the trustees in manner mentioned in said section;—that by § 49, if the trustees shall erect any toll-bar where they have no power so to do, it shall be lawful for the Sheriff, or the Justices of the Peace in Quarter Sessions assembled, upon a complaint in a summary way, to hear and determine therein, and order such bar to be removed; and by § 112 it is enacted, "that where by this act the adjudging of any penalty, forfeiture, fine, or any other matter, is committed to the Sheriff, Steward, or the Justices of the Peace assembled at their Quarter Sessions, &c. the judgment of such Sheriff, Steward, or Justices assembled as aforesaid, shall be final and conclusive, and not subject to review by advocation, or suspension, or reduction, or by any process of law whatever;"—the Lord Ordinary is therefore of opinion that the Legislature has instituted the Sheriffs and Justices of Peace in Scotland as the judges in the question whether a turnpike-gate or toll-bar has been lawfully erected or not, and anxiously excluded the Court of Session from any control therein; and that although the gate in question has not been erected, warrant and authority has been issued therefor, and that it would be an evasion of the statute to entertain this bill, merely on the ground that the gate has not been actually erected, as the same plea might be extended to the case of its being nearly erected, but not quite completed;—the Lord Ordinary therefore refuses this bill as incompetent, reserving to the complainer, when the gate shall be erected, to complain of the same in terms of the statute."

The Court adhered.

A. Spalding,—D. Turnbull, W. S.—Agents.

No. 389.

June 14. 1831. Stewart v. Grant.

DAVID STEWART, Complainer.—*Skene—Robertson.*
JAMES MURRAY GRANT, Respondent.—*D. F. Hope—Buchanan.*

Freehold Qualification—Process—Mandate.—A party domiciled in England having been struck off the roll of freeholders, and a petition and complaint being presented in his name, but no mandate for him being produced within the four months—Complaint dismissed.

June 14. 1831.

1ST DIVISION. Ld. Moncreiff. S.

AT a meeting of the freeholders of Inverness on the 27th of August 1830, Mr. David Stewart was struck off the roll. He was at that time domiciled in England, but was present at the meeting, and opposed the proceedings. A complaint in his name, designing him "David Stewart, Esq. of London, land-surveyor," was afterwards presented to the Court. The four months expired before answers were lodged. It was then objected that there was no process, as the complainer was domiciled abroad, and no mandate had been produced. A mandate was produced after the lapse of the four months, which, it was contended, removed the objection. The Lord Ordinary made avizandum to the Court, who ordered minutes of debate; after which their Lordships sustained the objection, and dismissed the complaint.

LORD BALGRAY was of opinion that a mandate might be supplied cum processu, and that the objection was not fatal in this case.

LORD PRESIDENT.—In an ordinary case I should concur. But in regard to a complaint under the statute, it must be complete within the statutory period of four months, otherwise we cannot sustain it. The case of Arbuckle rested on this principle. A mandate should therefore have been produced within the four months, so as to authorize the complaint, or found an instance; and the want of it cannot now be remedied. Suppose that a misnomer had occurred, that the party complained of was called Thomas instead of James, the complaint could not be directed against the true party after the four months had run. Neither can we recognise the mandate now offered, as curing this objection.

LORD CRAIGIE concurred with the Lord President, as his Lordship conceived that there must be a complaint, complete and regular in itself, presented within the four months. This could not be held to be the case, so long as there was no mandate to support the complaint.

LORD GILLIES.—If the point were not fixed by decisions, I should regard it as very doubtful, and would incline to repel the objection. But it is now fixed, and I conceive that we must dismiss the complaint.

Respondent's Authorities.—4. Bank. 3. 25 and 26; Stewart, Feb. 3. 1681, (Dict. 353); Butler, July 31. 1708, (Dict. 356); Dundas, July 20. 1780, (8837); Davidson, July 6. 1820, (8842); M'Innes, June 3. 1813, (F. C.); Cameron, Feb. 28. 1818, (F. C.); M'Coll, Jan. 17. 1822, (ante, I. 269); Taaffe, Feb. 22. 1822, (ante, I. 379); Gordon, Dec. 13, 1822, (ante, II. 93); Grant, Nov. 30. 1825, (ante, IV. 237); Arbuckle, March 2. 1827, (ante, V. 505); Speirs, March 3. 1826, (ante, IV. 524); M'Donald, March 6. 1827, (ante, V. 531.)

W. MACKENZIE, W. S.—H. MACQUEEN, W. S.—Agents.

No. 390.

June 14. 1831.
Raeburn v. Dawson &c.

HENRY RAEBURN, Pursuer.—*Jameson.*
JAMES DAWSON and Others, Defenders.—*D. F. Hope—More.*

Et è contra.

Trust—Expenses.—Action being raised against a party under trust, and against his trustees; and the trustees having defended, and also raised a counter action; and having failed in both processes—Found that they were personally liable for the expenses of both actions.

June 14. 1831.

1ST DIVISION.
Lord Newton.
D.

IN 1825, Brunton and Wight feued certain building-stances in St. Ann street from Mr. Raeburn of St. Bernards, by missives, under which he agreed to make advances to them on condition that they erected houses of the value of double the amount of the advances, and that they were to have no title to a feu-right till these advances were paid, or effectually secured on the property. They proceeded to build, and Mr. Raeburn made considerable advances to them. Having become insolvent, they executed a trust-disposition in favour of Dawson and others, for behoof of their creditors. At this time the houses were unfinished; and before the trust was accepted, it was explained to the creditors that Mr. Raeburn was in advance above £1800 for the houses. The trustees finished the houses, and Mr. Raeburn advanced on their account about £400 more. Arrears of feu-duties were also allowed to accumulate; and, in 1829, Mr. Raeburn raised an action against Brunton and Wight, and their trustees, concluding for payment—failing which, for declarator that all right to the lots of ground, and buildings thereon, had been forfeited; and that after the buildings had been valued, and their value deducted from the advances, decree should be pronounced for the balance against Brunton and Wight personally, and against Dawson and others as trustees. The trustees lodged defences, in which they denied the amount of the advances, and raised a counter action, in which they insisted that they were entitled to repetition of the sums expended in finishing the houses. The Lord Ordinary found that Mr. Raeburn had made the advances claimed by him; and as the defenders declined to take the houses and pay these advances, his Lordship declared their right to the lots and buildings to be void. After a valuation of the houses was obtained, his Lordship found the pursuer's claims satisfied to that extent, "reserving to him all action, diligence, and execution competent to him against the said Brunton and Wight, and the other defenders, qua trustees, for the balance," &c.; "and in the action at the instance of James Dawson and others against Henry Raeburn, assoilzied him simpliciter, &c.; found James Dawson &c., defenders in the action at the instance of the said Henry Raeburn, and pursuers of the action above mentioned, conjunctly and severally, personally liable to the said Henry Raeburn in the expenses of both actions."

The trustees reclaimed against the personal decerniture for expenses; but the Court unanimously adhered.

J. DICKIE, W. S.—J. W. MACKENZIE, W. S.—Agents.

No. 391.

DAVID CLYNE, Suspender.—*D. F. Hope.*

ROBERT SCLATER and Others, Chargers.—*Skene—A. Dunlop.*

June 14. 1831. Clyne v. Sclater &c.

Process—Interim Execution pending Appeal.—Warrant being granted for interim execution pending appeal on caution, and a bond of caution being lodged, and the warrant thereafter being extracted, and a charge given—Bill of suspension, on the allegation that the bond was irregular, refused.

June 14. 1831.

1st DIVISION. Ld. Moncreiff. Bill-Chamber. H.

SEQUEL of the case reported ante, p. 248. After the pursuers Sclater and others, (being about seventy of the proprietors and partners of the Caledonian Iron and Foundry Company,) had obtained decree against Clyne, they applied for interim execution pending appeal. Clyne opposed this, objecting, inter alia, to their title, as he had done in the action itself. Interim execution was allowed, as usual, on caution.[1] A bond of caution was offered, bearing that "we, Eagle Henderson," and eight others, "a majority of the directors or committee of management of the company, chosen under the contract, and as such authorized and empowered to act for their behoof, bind and oblige ourselves, and the whole partners or proprietors thereof as individuals, as principals, and their heirs &c.; and Thomas Henderson, Esq. of Press, as cautioner &c., binds himself," &c. In case of a reversal, they "renounced the benefit of any objection that might be made to the obligation aforesaid on the ground that all the members of the Caledonian Iron and Foundry Company are not insisting as pursuers, and all other objections whatsoever thereagainst," &c.

Before the Principal Clerk of Session, Clyne objected to the bond, inter alia, because the principal parties who signed it should have been the whole partners of the company, and there should have been two or more cautioners; that the parties bound themselves as directors, and their successors in office, although there was no such company existing, nor any power in them to bind the remaining partners. Sclater and others answered, that, in terms of the contract of copartnery, nine of the directors were empowered to bind the other partners, and the Court had already sustained the contract; but, at all events, the obligants had renounced any objection on this head in the event of reversal; and the only question which could arise in this stage was, whether the parties to the bond of caution were sufficient.

The Clerk being satisfied with the regularity of the bond as tendered, the decree was extracted, and a charge was given to Clyne. He offered a bill of suspension, repeating the objection which he had stated before the Clerk. He urged other objections disregarded by the Lord Ordinary, who ordered answers on this point alone. Sclater and others, besides their former answers, contended that it was no longer competent to Clyne to offer a bill of suspension. He could have presented it before

[1] Ante, p. 558.

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extract of the decree, and was bound to do so; but having failed in this, he could not suspend now, otherwise an appeal from a judgment in this suspension would interrupt interim execution.

The Lord Ordinary refused the bill, and found expenses due.*

Clyne reclaimed; but the Court unanimously adhered.

D. Clyne, S. S. S.—J. Kennedy, W. S.—Agents.

No. 392.

Alexander Mackenzie, Pursuer.—*Cuninghame—M'Dougal.*
Mackenzie's Trustees, Defenders.—*D. F. Hope—Anderson.*
Robert Roy, Defender.—*Rutherfurd.*
Thomas M'Kenzie, Defender.—*Jameson.*

Agent and Client—Settled Account.—Circumstances in which a law-agent and factor's account held not to be settled, but liable to be examined, although his clients and constituents had subscribed a minute specifying a balance due to him.

June 14. 1831.

1st Division. Ld. Corehouse. S.

This was the sequel of the case reported on May 27. 1829.[1] The pursuer, who was a writer in Inverness, and one of the trustees of the late George Mackenzie of Dundonnell, brought an action of relief of certain disbursements against his co-trustees, and also against the heir and executor of the deceased. The Court, after repelling a defence of res judicata, remitted to the Lord Ordinary to determine the question of relief; and two points now arose,—1. Whether the pursuer was authorized by his co-trustees, or any of them, to defend an action of exhibition ad deliberandum raised against himself personally by the heir of the deceased; and,—2. Whether his business accounts were to be held as settled, or open for taxation. The former question was altogether of a special nature; and as to the latter, it appeared that the pursuer had acted for several years as factor and agent for the trustees; and he produced various minutes of the trustees, bearing that his accounts had been exhibited to the trustees, and approved of. He rested mainly on one, dated 21st July 1818, which set forth that he "produced the accounts of his intromissions with the trust-funds, as made up on 25th July 1817, then balanced by £12. 9s. 8d. in his hands, which being examined and compared with the vouchers, were found to be properly stated, the business articles having been reported on by Mr. John Munro, solicitor and accountant, Inverness. Mr. Mackenzie further produced a continuation of said accounts from 25th July 1817 to

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* "Note.—The Lord Ordinary is of opinion that the bill is incompetent. The bond of caution as lodged, and approved of by the Clerk of Court, seems to form part of the decreet of the Court, as the determination of the Clerk certainly might have been brought under their notice before the extract was allowed to go out. But at any rate, after the matters determined by the Court, the grounds of objection to the terms of the bond appear to be altogether untenable."

[1] Ante, VII. 659.

this date," showing "a balance due by the trust-estate to Mr. Mackenzie of £15. 14s. 2d.; and this last account having been compared and examined with the vouchers, the trustees find the same properly stated; and the meeting direct Mr. Mackenzie to take credit for the said balance in his next account."

On the part of the trustees, it was maintained that they were entitled to have the factory accounts examined by an accountant, and the law expenses audited; that this was not barred by the minutes, which did not imply a final settlement; and accordingly the pursuer himself had not regarded them as having that effect, because he himself wrote, on June 14. 1822, to Mr. Thomas Mackenzie, then agent for the other trustees, that "when they (the trustees) authorize you to examine my settled accounts, I will be answerable for errors, if really any exist." They further stated, that the pursuer had obtained their subscriptions to the above minute when they were drunk, and when they did not know what they were doing. This was denied.

The Lord Ordinary "found that the alleged settlement of accounts between the trustees and the pursuer as their factor and law-agent, on 20th July 1818, is not conclusive on the parties, and that there has been no settlement between them which may not be opened up, on the ground not only of error in calculo, but any other error," &c.; and "remitted to Mr. Cleghorn, accountant, to examine the accounts in process, and to report."*

The pursuer reclaimed, praying for an alteration on various other points; but, in regard to the question as to the account being settled or not, the Court adhered.

J. B. Ferrier, W.S.—W. Mackenzie, W.S.—T. M'Kenzie, W.S.—R. Roy, W.S.—Agents.

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* "Note.—The Lord Ordinary pays no regard to the defence pleaded by some of the trustees, that they were drunk when they examined and docqueted the pursuer's accounts. But the law is extremely jealous of any settlement of accounts between an agent and his clients, as the parties do not meet on equal terms; and allows them to be rectified within a reasonable time, on the ground not only of fraud, but of mistake. Indeed this appears to be admitted by the pursuer himself in his letter of 14th June 1822 to Mr. Thomas Mackenzie."

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June 14. 1831.
Few &c. v. M'Leish, Kayser, & Co.

CHARLES FEW and MANDATARY, Pursuers.—*Keay—Anderson.*
M'LEISH, KAYSER, and Co., Defenders.—*D. F. Hope—More.*

Contract—Clause—Patent.—Construction of a clause in a contract between a patentee of a process for refining sugar, and a company who held his licence to use the process, relative to the amount of per centage payable by the refiners, on the conversion of molasses into single-refined sugar by the reiterated application of the patent process.

June 14. 1831.

1st DIVISION.
Ld. Corehouse.
H.

THE late Mr. Howard acquired a patent for refining sugar, which he assigned to the pursuer Mr. Few. Almost all the sugar-refiners, both in England and Scotland, availed themselves of the invention, and obtained licences from Mr. Howard or Mr. Few to employ it in their manufactories. Among others, the defenders M'Leish, Kayser, and Co., sugar-refiners in Greenock, got a licence, and entered into articles of agreement with Mr. Few, which were said to be the same as those with other Scottish sugar-refiners. By these articles they undertook that they "shall, on or before the last day of every March, the last day of every June, the last day of every September, and the last day of every December, render to the said Charles Few, a just and true account, or particular in writing, of the quantity of muscovado, clayed, or single-refined sugar, prepared, clarified, and refined by them, or either of them, as aforesaid, under the said processes, or any of them, or any part or parts of all or any of them, or by the said apparatus, during the three months preceding every such last day of March, last day of June, last day of September, and last day of December; and a like account of the loaves, lumps, pieces or bastards, submitted to a second or double clarification or refinement, on the principles or process of any one or more of the said inventions, or any part or parts thereof; and also of all sugar not prepared by or under the processes and operations aforesaid, or any of them, which they shall melt into syrup, and use for percolating sugar, which they shall have previously submitted to refinement, under all or some of the operations or processes aforesaid; and also a like account of the quantity of treacle or molasses submitted to all or any, or to any part of any of the operations aforesaid, not produced from sugar, previously submitted by them to clarification or refinement by all or any part of any of such operations, and shall and will render and pay to the said Charles Few, within three months next after every such day of accounting, the sums or percentages following—that is to say, the sum of one shilling for each and every one hundred weight of muscovado, clayed, or single-refined sugar, submitted by them to any preparation, clarification, or refinement, by all or any, or any part of any of the operations described in the said specifications, and the sum of one shilling for each and every one hundred weight of loaves and lumps submitted by them to a second or double clarification or refinement, and the like sum of one shilling per hundred weight for pieces or bastards submitted to refinement not being the produce of sugar previously submitted by them to refinement, by all or any,

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or any part of any of the operations aforesaid, and the like sum of one shilling per hundred weight for all sugars not prepared by any of the operations foresaid, which they shall melt into syrup, and use for percolation, as aforesaid, and also the sum of fourpence for each and every one hundred weight of such treacle or molasses submitted by them, or either of them, to such operations as aforesaid, or to any of them;"—"provided always, that nothing in these presents contained shall be construed to make them liable to pay for, or render an account of, any of the sugar so prepared or refined by them, as aforesaid, which they may melt into syrup, and solely use for percolating through sugars, which they, from time to time, shall submit to preparation, clarification, or refinement by all or any, or any part of any of the processes or operations aforesaid, in order to make such last-mentioned sugars net, or to pay a second time for the clarification or refinement of such sugar, as may necessarily require, according to the usage of the trade, to be re-submitted to any such clarification or refinement, to produce the refined sugar originally intended to have been produced therefrom, by reason of any mistake, injury, or other casualty happening thereto, when so first submitted to such clarification or refinement, as aforesaid." It was further stipulated that Few should have a right of inspection of the books of the parties holding his licence.

There are in the process of refining some stages, at which the products of boiled sugar or molasses are called 'pieces or bastards.' In England such products, obtained from boiled and filtered molasses, are a marketable commodity, and are sold in considerable quantities. In Scotland they are generally or universally subjected to a repetition of the patent process, which converts them into single-refined sugar. It requires a double application of the process (however successful its first result may be) to extract single-refined sugar from molasses; but a single application of it will convert raw or muscovado sugar into single-refined. This leaves, however, a considerable unclarified residuum, which, on being subjected anew to the process, will yield a further product of single-refined sugar. By the universal practice of all refiners, the residuum, on being re-subjected in this manner, does not pay a new per-centage to the patentee.

The Scottish refining-houses, in the returns rendered by them, only gave up their refined molasses as liable to fourpence per cwt., though it had passed through the successive stages of first forming pieces or bastards, and then single-refined sugar.

Mr. Few contended that when molasses were subjected to the patent process, they were liable, in the first instance, to the payment of fourpence per cwt. for being converted into bastards; and that if they were further refined, so as to be made single-refined sugar, the additional per-centage of one shilling per cwt. was payable.

Few raised an action of accounting against them, concluding for payment of the additional per-centage of one shilling per cwt. on all pieces

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or bastard sugars, the produce of molasses, which had been converted by the patent process into refined sugars.* The defenders having objected to this demand, maintained a plea in bar, on the ground that they had been allowed by Mr. Few, for a series of years, to make returns upon the principle which they still contended for.

The defenders, on the merits, admitted, that if they bought bastards or pieces, the product of once-refined molasses, in the English market, and converted them by means of the patent process in Scotland into single-refined sugar, they would be liable, under the contract, to pay one shilling upon every cwt., although fourpence per cwt. had previously been paid to the patentee in England. But they contended that, according to the terms of the contract, they were not subject to a double per-centage in any instance, even for repeatedly applying the patent process, provided that the product of the repeated processes was not advanced beyond the stage of single-refined sugar; that, accordingly, if they began with raw sugar, it paid one shilling per cwt., and no more, whatever number of applications of the patent process might be requisite to convert it into single-refined. And, therefore, the same rule ought to hold if they began with molasses, because, although fourpence per cwt., only was paid for it, yet it gave a product of only about one-third of the amount which raw sugar rendered; and consequently they, in reality, had already paid at the rate of one shilling per cwt. on that first product, when they proceeded by a second clarification to convert it into single-refined sugar.

On the other hand, the pursuer stated that every application of the patent process gave a valuable return, in the shape of a new product, to the refiner, and a separate per-centage was therefore payable to the patentee; that accordingly on converting molasses into pieces or bastards, or raw sugar into single-refined sugar, or single into double-refined sugar, a per-centage was payable; that the reason why only fourpence per cwt. was charged on molasses, was, that it yielded just about one-third of the product which sugar would have done; but if that product were converted into single-refined sugar, it was then liable to one shilling per cwt., just as any other sugar would be, which had not paid any per-centage.

The Lord Ordinary found "that the defenders, in terms of the articles of agreement libelled on, are bound to pay to the pursuer one shilling per hundred weight for the sugars called pieces or bastards, submitted by them to a second clarification or refinement, upon the principles, or by the process mentioned in the said articles,—the said pieces or bastards not being the produce of sugar previously refined by them, on the said principles, or by the said process;—found that pieces or bastards, being the produce of West India molasses, are not the produce of sugar previously refined, and are consequently liable in payment of one shilling per hun-

* The case was stated to be a leading one to determine the question with regard to the Scottish refiners in general, and to involve property to the amount of several hundred thousand pounds.

dred weight when submitted to a second refinement in the manner above mentioned; therefore repelled the defences, and appointed the defenders, within three weeks, to lodge in process an account or return of all pieces or bastards, the produce of West India molasses, which have been submitted by them to a second refinement, and that in terms of the second conclusion of the libel."*

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Few &c. v. M'Leish, Kayser, & Co.
Gordon v. Thomson &c.

The defenders reclaimed.

Lord President.—I think the interlocutor well founded. If the defenders bought the pieces or bastards made from molasses in England, by this process, they admit that they would have to pay 1s. per cwt. on such articles upon subjecting them to the second process of refinement, which makes them single-refined sugar. Now the price of such an article, when so bought, would just cost them 4d. per cwt. the more, in consequence of its having been once subjected to the patent process in England; yet still they would pay the 1s. per cwt. on its being again subjected to the process in their hands in Scotland. But since this is the case, why is it that such bastards and pieces, though made by themselves from molasses, should not also pay 1s. per cwt. on being subjected a second time to the patent process, and converted into single-refined sugar? I can see no principle for any such distinction; and I conceive that the charges,—1. Of 4d. per cwt. for converting molasses into bastards and pieces, and, 2. Of 1s. per cwt. for converting these pieces into single-refined sugar, are both well founded in the contract of the parties.

Lord Balgray.—I concur. The defenders may take one cwt. of treacle or molasses, and make as much of the bastards and pieces out of it as they can by any repetition of the patent process; but so soon as they subject these pieces or bastards themselves to the patent process, so as to convert them into single-refined sugar, the per centage of 1s. per cwt. takes place.

Lords Craigie and Gillies concurred.

The Court therefore adhered, and remitted to the Lord Ordinary to proceed with the cause.

A. Swinton, W. S.—W. Cook, W. S.—Agents.

Lieut.-Col. John Gordon, Advocator.—*Keay—Buchanan.*
Peter Thomson and Others, Respondents.—*Rutherfurd.*

No. 394.

Landlord and Tenant—Contract.—Provision in articles of lease as to buildings, held to supersede an alleged local custom as to remunerating the tenant for meliorations thereon.

* "Note.—The pursuer does not appear to be barred by his conduct from insisting in this action; for, although he may be considered as negligent in not having brought forward his claim at an earlier period, the defenders were still more to blame by not rendering an account of the pieces or bastards which they refined, according to the express terms of the contract; but the delay may afford a sufficient ground for refusing the expenses of process to the pursuer."

No. 394.

June 14. 1831. 2d Division. Lord Medwyn. F.

Gordon v. Thomson &c.

The whole leases of the barony of Slains having fallen in the year 1801, the proprietor, the late Mr. Gordon, who had acquired the property recently before, drew out a set of regulations, with reference to which he let the several farms on the estate to Thomson and others, the respondents. The sixth and seventh articles of the regulations were as follows: "6. Mr. Gordon allows as much of the first year's rent as, when added to the present value of biggings belonging to him on each farm, will be equal to the said year's rent, for building suitable dwellings and offices, agreeably to the plan fixed by him; the dimensions to be larger or lesser in proportion to the rent and extent of the farm, and to be built within three years after entry, at the sight of his factor for the time; the tenants finding all the carriages, and recompensing the outgoing tenant, where he has any claim for meliorations. The dwelling-house to be slated; the offices to be thatched or tiled, in the proprietor's option, and the whole to be kept in good condition during the lease, and left so at removal. But in case the tenant shall not have erected the said houses when the first year's rent becomes payable, he shall only have allowance out of his first year's rent to the amount of what he has built, without reckoning on carriages; and the balance, to the extent aforesaid, out of the next year's rent, if the houses are then completed. 7. To encourage the tenants to make suitable enclosures, by making the outer fences, stone-dykes, and the inner subdivisions, ditch and hedge, lined out to the satisfaction of the factor for the time, they shall be allowed by the heritor, at the expiry of their lease, the value of such enclosures and fences, according as shall be valued by men mutually chosen, providing such enclosures are then fencible. But no allowance to be made for any enclosures that are not fencible at the expiry of the lease; or if the proprietor incline to make any such enclosures or fences at his own expense, the tenant shall pay therefore yearly, along with his rent, at the rate of six per cent., and keep them in sufficient repair during the lease, and leave them so at his removal."

Buildings were erected by the tenants, and the allowance retained out of the rent, as provided by the regulations; but no valuation was made of the buildings erected.

On the expiry of the leases, the advocator Colonel Gordon, son and heir of the granter of the lease, having presented a petition to the Sheriff of Aberdeenshire, praying for sequestration of the crops of the several tenants as for rent due, he was met by a claim on their part for ameliorations on the houses, over and above the steadings as they existed at their entry, and the amount which had been allowed to be expended on them out of the rent, in terms of the regulations; and, for constituting these claims, they raised actions, which were conjoined with Colonel Gordon's application for sequestration. The tenants chiefly rested on an alleged custom of the barony of Slains, under which the outgoing tenants were said to have been in use to receive from the landlord the excess of

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the value of the buildings left on the farm over their value at the tenant's entry, as ascertained by an inventory taken at the time, and called the landlord's inventory; and they contended that the provision in the regulations as to buildings was not intended to supersede this custom, but that its object was merely to increase the amount of the landlord's inventory, still leaving the tenants a claim for any ameliorations over and above that amount, according to the usage, which was in some measure recognised in the articles themselves, by the stipulation for payment by the incoming to the outgoing tenants of their ameliorations.

On the other hand, Colonel Gordon maintained, that the object of reducing the contract to writing was to supersede any implied or uncertain conditions from alleged usage; that the stipulations regarding buildings having been expressed in the written contract, it was incompetent to add an obligation on the landlord not therein provided; and this the more especially, because, where remuneration was intended to be provided, it was specially stipulated for,—as in the article of the regulations regarding fences which immediately followed that regarding buildings.

The Sheriff allowed a proof of the usage of the barony, and thereafter found "it sufficiently established, that, by the practice of the barony of Slains, the outgoing tenants are entitled to meliorations on the houses beyond the value of the landlord's inventory and sums allowed by him for improving the buildings, which fall to be added to that inventory;" and therefore allowed the tenants deduction of the excess of the value of their ameliorations. Colonel Gordon thereupon brought an advocation, in which, besides maintaining the above pleas, he contended that the proof adduced did not establish the custom.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:*—"The Lord Ordinary having resumed consideration of the

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* "NOTE.—After the judgment of the House of Lords between these parties, relative to the fodder of the waygoing crop, it is vain for the tenants to contend that they are not bound by the articles and conditions founded on. But it is true, notwithstanding, that, after that judgment, it is with considerable doubt that the Lord Ordinary has ultimately come to the opinion he now entertains of the case. The clause relative to the fodder, if literally interpreted, necessarily excluded the local custom which would have given right to the outgoing tenant to the fodder of the waygoing crop; but here the sixth clause does neither expressly, nor by necessary inference, exclude the local custom of the barony as to meliorations. It recognises, at least refers to, the said local custom, where it mentions the landlord's inventory, the present value of biggings belonging to him, and the claims of the previous tenants to meliorations. The new tenant is to be allowed what is equal to a year's rent; and he is taken bound not to erect buildings of that value, but agreeably to a plan fixed by the landlord; and the offices are to be thatched or slated, in the proprietor's option. As the tenants might thus be called upon to erect buildings much beyond a year's rent in value, it never could enter into their minds that a custom, which gave them a claim for meliorations beyond the advances to them at the commencement of their lease, was departed

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debate, and advised the process—In respect it is established by the proof that at the time when the tenants who removed in 1822 took their farms, and for long prior thereto, it was the practice of the barony of Slains that the outgoing tenants were entitled to meliorations on the houses beyond the landlord's inventory; and although the respondents are bound by the articles and conditions according to which the late Mr. Gordon granted leases at the general set in 1801,—in respect that there is nothing in these articles and conditions, or the leases, to exclude the practice as to payment of meliorations to the outgoing tenant, and to advertise the tenant that that practice was henceforward to cease, and that in this case the landlord's inventory must also include the additions made in 1801 to what formerly went by that name, for improving the buildings; and further, in respect that the advocator has not established his claim to a year's road-money and school salary as due to him by the tenants in relief, therefore repels the reasons of advocation, remits the cause simpliciter, and decerns; finds expenses due," &c.

Colonel Gordon reclaimed.

LORD JUSTICE-CLERK.—In the former case,[1] under these articles of lease regarding the fodder of the waygoing crop, the House of Lords altered our judgment, and, in respect of the express stipulation in the articles, got over our difficulty of the tenants not having an opportunity of consuming the fodder. We are bound to bow to that judgment, and to hold that, notwithstanding any universality of practice, the articles must be given effect to, unless there

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from. There is nothing inconsistent in the clause with the subsistence of this claim for meliorations; and this seems to have been at one time the opinion of the advocator himself, otherwise the valuations to which he was a party seem unnecessary. A strong inference might have been drawn from article 7, which provides that the tenants shall, at the expiry of their leases, receive meliorations for fences; and it might have been very fairly presumed, that no notice being taken of payment for meliorations on houses was, because the tenants were to be entitled to none. But it is expressly denied that there is any local custom as to paying for fences, and the landlord has not undertaken to prove that there is. Hence it was necessary to specify this claim in favour of the tenants, as it was a new claim for meliorations, not provided for by the custom of the barony. That the claim for meliorations on the houses is not inconsistent with the articles, is what distinguishes this case from the former one about the fodder. The local custom must be held to have been in the view of the parties at the time; and that the conditions of the leases were adjusted on the understanding that it formed a part of the contract, so that both parties held it as implied therein, as much as if it had been expressly inserted.

"There is a statement in the respondent's answers, article 5, which makes it very improbable that they paid the road-money in July 1801, the first year of their possession, as they had no occasion to attend the collection of rent in 1801, none being due by them till Martinmas 1802. But still the onus lies on the advocator to prove his claim, and there is no sufficient evidence that the tenants did not pay the local tax in the year 1801. It was legally due by them, and the presumption is that it was paid by them. There is nothing on the other side sufficient to take off this presumption."

[1] See ante, III. 440, and 2. W. and S. 115.

No. 394.

June 14. 1831.
Gordon v. Thomson &c.

E. of Mansfield v. Scone's Lethindy Trustees.

be a total difference between the two cases. When forming new leases, the parties were entitled to make any bargain they pleased, so as to supersede any custom of the barony; and the matter of meliorations being regulated by these articles, we cannot allow the custom to be reverted to, even were the proof fifty times stronger than it is. There is not, however, much in it, and certainly nothing inferring that, over and above an allowance stipulated, the tenants were to be entitled to a further remuneration. I do not think we are warranted, in the face of the sixth article, to go into an inquiry. In these circumstances, I cannot arrive at the conclusions of the Lord Ordinary.

Lord Cringletie.—I agree. I am satisfied the tenants had no conception that they were to receive any thing, otherwise they would have had inventories made at the time, to determine afterwards what were ameliorations. In this stipulation to pay the outgoing tenants, if they were to have been paid for that, would it not have been provided for, as well as in regard to the fences?

Lord Meadowbank.—I have no occasion to add any thing. Article sixth is drawn up for the very purpose of superseding the custom of the barony, and we are bound to give effect to it. As to the case of Bell,[1] it does not touch this, as there were no stipulations in the leases there, having reference to the general practice; and besides, there were considerable doubts even as to that decision at the time.

The Court accordingly altered the Lord Ordinary's interlocutor; "found that the rights of parties as to alleged meliorations must be regulated by the sixth article of the conditions of lease referred to, without any regard to the alleged custom of the barony;" and remitted to the Lord Ordinary to proceed accordingly.

C. F. Davidson, W. S.—J. Jopp, W. S.—Agents.

No. 395.

Earl of Mansfield, Pursuer.—*Murray—Currie.*
Trustees of Scone's Lethindy, Defenders.—*D. F. Hope—G. G. Bell.*

Superior and Vassal—Consuetude.—The Lord of a lordship erected out of church lands, with all the duties thereto effeiring, found entitled to exact from the vassals of the lordship the duties immemorially paid by them, though not enumerated in the titles produced by them,—they not, however, making a full production.

June 14. 1831.

2d Division. Ld. Fullerton. F.

The abbacy of Scone was, at the Reformation, erected into a temporal lordship, to which the Earl of Mansfield has now right, with all the duties &c. thereto pertaining. Among the lands held of the abbacy was a property called Scone's Lethindy, which had been vested in trustees as a mortification, and which was now held partly of the Crown as in right of the abbey, and partly of Lord Mansfield. From time immemorial prior to 1820, Lord Mansfield and his predecessors had drawn from this property £19. 7s. 6d. Scots of feu-duties, two bolls of barley, or their commuted value, and 8 geese, 20 poultry, and 20 capons. Subsequent to 1820, the trustees refused to pay these duties, in consequence of which Lord Mans-

[1] Bells v. Lamont, June 14. 1814, (F. C.)

No. 395.

June 14. 1831. E. of Mansfield v. Scone's Lethindy Trustees.

field raised the present action, concluding for payment, and also for the performance of all services that might be found to be contained in their charters, for exhibition of which he also concluded. The trustees did not make a full exhibition, but produced an old charter of part of the property, in the reddendo of which were enumerated all the duties claimed, (with the exception of the two bolls of barley,) together with certain personal services of ploughing, harrowing, &c.; and also a Crown charter, in 1735, to a fifth and half a fifth of the property, which contained the same prestations, (but did not mention the two bolls of barley,) and declared the prestations enumerated to be "pro omni alio onere, questione, demanda, seu servitio seculari quibuscunque, quæ de terris suprascript. cum pertinen. per quocunque tempore futuro alio modo exigi poterint, vel requiri." In regard to the two bolls of barley, the trustees alleged that they formed a commutation for the personal services, which they averred were due only for a farm called Sheriffton, which Lord Mansfield had, since 1820, turned into pasture, and incorporated with his park, so as not to require personal services; and they maintained that as the services could not be demanded, the commutation was not due. Lord Mansfield, on the other hand, contended that under his titles to the lordship he was entitled to exact all duties which were either contained in the charters, or had been paid to him and his predecessors for time immemorial.

The Lord Ordinary found that "the defenders, by the terms of their titles, as explained by use and wont, are bound to pay annually to the pursuer the sum of £19. 7s. 6d. Scots of feu-duty, and likewise to deliver annually to the pursuer two bolls of bear or barley, or to pay the value thereof according to the annual fiars of the county of Perth; and also to deliver annually 8 geese, 20 poultry, and 20 capons to the pursuer."

The trustees reclaimed so far as regarded the two bolls of barley, and referred to the case of Leslie v. Earl of Moray.[1]

Lord Justice-Clerk.—The Earl has produced an universal title, which will embrace this as well as the other claims. Why did not the defenders produce their titles, if there is any ambiguity here? I do not think it possible to doubt.

Lord Cringletie.—Mr. Leslie, in the case quoted, produced his charter, and instructed by that means that he was not bound; but here the defenders have been paying beyond the memory of man, and produce nothing to relieve themselves.

The other Judges concurring, the Court adhered.

J. L. Mitchell, W. S.—W. Fraser, W. S.—Agents.

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[1] Feb. 2. 1827, (ante, V. 284.)

HUGH FALCONER, Suspender.—*Robertson—Carlyle.*
THOMAS MANSFIELD, Charger.—*Skene—Gillies.*

No. 396.

June 15. 1831.
Falconer v. Mansfield.

Process—Suspension.—Bill of suspension, offered without caution or consignation, of a charge on a registered bond for a liquid debt, refused with expenses.

June 15. 1831.

1ST DIVISION.
Ld. Moncreiff.
Bill-Chamber.
H.

THIS was a charge by Mr. Mansfield, as trustee for the creditors of Mr. Stuart, against Falconer, who had purchased, at public roup, Mr. Stuart's house in Moray place, Edinburgh, at the price of £4800. He presented a bill of suspension, alleging that by the articles of roup he was bound only to find security for the price in the first instance, whereas he was charged for payment. The Lord Ordinary and the Court, being satisfied that the charge was correct, refused the bill.

W. C. HALDANE, W. S.—J. and L. DAVIDSON, and T. SYME, W. S.—Agents.

ARCHIBALD HEPBURNE MITCHELSON, Pursuer.—*Keay—Anderson.*
CRAWFORD BALFOUR ATKINSON, Defender.—*D. F. Hope—Thomson.*

No. 397.

June 15. 1831.
Mitchelson v. Atkinson.

Entail—Clause.—An entail being defective in the resolutive clause, the estate held adjudgable for the debts of an heir of entail who had been in possession.

June 15. 1831.

1ST DIVISION.
Ld. Corehouse.
H.

JOHN CRAWFORD BALFOUR died infeft in the lands of Powmill, to which he had succeeded under an entail executed by Captain William Balfour. The entail declared, inter alia, "that all such debts &c. shall be ipso facto void and null quoad the said lands &c. above disponed, as also quoad the other lands to be purchased with my personal estate and effects after mentioned, and disponed and tailzied in manner above and under written, and shall no way affect the same; and that the next heir of tailzie to him or her that shall happen to contravene may immediately, upon contravention, pursue declarator thereof, and serve themselves heirs to him or her who died last infeft in the fee, and did not contravene, without necessity any ways to represent the contravener," &c. The defender Mr. Atkinson succeeded as heir of entail; and the pursuer Mr. Mitchelson, a creditor of John Crawford Balfour, raised an action of constitution against Atkinson. He pleaded in defence, that as he had succeeded to the estate as heir of entail, he was not liable for the debt, nor could the estate be adjudged; that the entail was sufficiently fortified, as its terms were nearly a transcript from the statute 1685, c. 22; that it contained both prohibitory and irritant clauses, and a declaration that the next substitute might immediately serve heir to the predecessor of an heir contravening without representing the contravener, which was equivalent to a clause resolutive of the contravener's right.

To this the pursuer answered, that as there was no resolutive clause, and it could be supplied by no equivalent, the estate was adjudgable.

The Lord Ordinary "found that the tailzie of the estate of Powmill

No. 397.

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is defective in the resolutive clause, and that the defender, by taking up the estate under it, has incurred a representation to his predecessor as heir of provision, and is responsible for his debts; and therefore repelled the defences, decerned in terms of the conclusions of the libel, and found the defender liable in expenses."*

The defender reclaimed.

LORD GILLIES.—If there is to be any argument against this interlocutor, we must henceforth consider that there is no point yet fixed in the whole law of Scotland.

The other Judges assented.

THE COURT then adhered; but, of consent, restricted the liability of the defender to the value of the estate.

MACKENZIE and SHARP, W. S.—MOWBRAY and HOWDEN, W. S.—Agents.

No. 398.

WILLIAM JOHNSTONE, Suspender.—*D. F. Hope—Shaw Stewart.*
JAMES BARBOUR, Charger.—*Jameson—Wilson.*

June 15. 1831.

1ST DIVISION. Ld. Corehouse. D.

Bill of Exchange.—Special case, where, on a charge being given for a balance due under a bond, a question arose whether a bill for £200 had been paid when it fell due, or was only retired by a renewal to the extent of £180. The Court found the latter fact to be sufficiently proved, and repelled the reasons of suspension.

R. WELSH, S. S. C.—W. DALRYMPLE, S. S. C.—Agents.

No. 399.

D. M'GREGOR and D. FRASER, Suspenders and Raisers.—*Ivory.*
JOHN MACANDREW, Charger and Claimant.—*Cuninghame.*
JOHN FRASER, Arrester and Claimant.—*Jameson—Neaves.*

Arrestment—Assignation.—Circumstances in which an arrestment in the hands of a cautioner, at the instance of the executor of the principal debtor, was found not entitled to compete with an onerous assignation of a decree in foro, obtained by the creditor of the principal against the cautioner.

June 15. 1831.

2D DIVISION. Ld. Fullerton. F.

ALEXANDER FRASER bought a quantity of wheat from Urquhart in March 1822, and died on the 22d of July thereafter. The suspenders M'Gregor and Donald Fraser were two of his nearest of kin—the former being his brother-in-law, and the latter his brother. John Fraser, another brother, by a family arrangement obtained himself decerned executor to Alexander; but all of them took an active concern in the management of his affairs. On the 14th of November 1822, M'Gregor and Donald Fraser got delivery of the wheat, and granted a letter binding themselves to see

* "NOTE.—No question has been raised in this case with regard to the extent of the defender's representation—namely, whether it is universal, or limited to the value of the estate of Powmill."

No. 899.

June 15. 1831. M'Gregor &c. v. Macandrew &c.

Urquhart "fully satisfied and paid the price" &c. of the wheat "now taken from your corn-lofts by us," &c. In 1823, an action was brought against M'Gregor and Donald Fraser by Urquhart on the letter of guarantee, in which defences were stated; but although they were fully acquainted with the affairs of the executry, they did not plead compensation or retention on any debt alleged to be due by Urquhart to Alexander Fraser. Decree having been obtained against them in the beginning of 1824, Urquhart assigned it to Macandrew, who thereupon charged M'Gregor and Donald Fraser. They brought a suspension, and a relative multiplepoinding, on the ground of arrestments used in their hands by John Fraser as Alexander's executor, proceeding on an action brought by him against Urquhart for the payment of certain bills; and which arrestments, they alleged, were executed prior to the intimation of the assignation. In the multiplepoinding, the claimants were Macandrew the assignee, and John Fraser the executor. The Lord Ordinary repelled the reasons of suspension, found the letters orderly proceeded, and in the multiplepoinding preferred Macandrew, with expenses, stating his reasons in the note below.*

The defenders and John Fraser reclaimed.

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* "NOTE.—Upon considering the circumstances which led to this complicated litigation, the Lord Ordinary does not think that the arrestments used by John Fraser afford the suspenders a good ground of suspension, or that there is any proper competition between those arrestments and Macandrew's assignation, which admits of being determined by the mere consideration of dates. Alexander Fraser bought a quantity of wheat from Urquhart, the cedent of Macandrew, in March 1822. The purchaser died the 22d of July in the same year. The suspenders, Donald M'Gregor and Donald Fraser, were two of his nearest of kin, and though, by a family arrangement, John Fraser was the only one of the next of kin who obtained himself decerned executor, all of them, including the suspenders, seem to have taken an active concern in the management of the affairs of the deceased. On the 14th of November 1822, the suspenders took delivery of the wheat bought from Urquhart, and granted a letter binding themselves to see him 'fully satisfied and paid' the price. Late in the year 1823, an action was brought against the suspenders by Urquhart on the letter of guarantee, and decree in foro was pronounced against them in the beginning of 1824. These suspenders, who, as it appears from the minutes of the meetings of Alexander Fraser's executors, were fully acquainted with the affairs of the executry, and who, as next of kin, were substantially interested in it, did not plead compensation or retention on any debt alleged to be due by Urquhart to the executry. Soon after the decree was obtained, it was assigned by Urquhart to Macandrew, whom the Lord Ordinary must hold to be an onerous assignee until the contrary be proved in competent form. Macandrew, having charged on this assigned decree, was met by a suspension on the ground of arrestments used in the hands of the suspenders by John Fraser, the decerned executor of Alexander, proceeding on an action brought by him against Urquhart for the payment of certain bills; and a multiplepoinding was brought by the suspenders, in which the claimants are Macandrew the assignee, and John Fraser the arrester. Now, in the first place, it does not appear to the Lord Ordinary that there could be any proper arrestment at the instance of John Fraser, the decerned executor, in the hands of the suspenders, who were indebted to Urquhart purely as guarantees for the

No. 399.

June 15. 1831. M'Gregor &c. v. Macandrew &c.

Moir &c. v. Glen &c.

LORD JUSTICE-CLERK.—I agree entirely with the Lord Ordinary, and think this neither more nor less than a most invalid attempt, on the part of two brothers in favour of a third, to defeat the assignation of the decree, which was perfectly valid—the very parties who got the ipsum corpus of the wheat, and who granted a letter guaranteeing the price.

LORD MEADOWBANK.—If these parties knew, as they ought to have done, that John Fraser had this claim against Urquhart, their granting the guarantee for payment of the wheat was a deception. In any view of the case, there was a gross deception—for the purpose, first, of inveigling Urquhart, and then the onerous assignee. I think it was a trick among the three brothers, and that they were properly found liable in expenses, conjunctly and severally, as I cannot separate them in the transaction.

LORD CRINGLETIE expressed a similar opinion.

THE COURT accordingly adhered.

D. HOUSTON,—Æ. MACBEAN, W. S.—BROWN and MILLER, W. S.—Agents.

No. 400.

ADAM MOIR and MANDATARIES, Pursuers.—*Skene—Christison.*
R. GLEN and A. EASTON, Defenders.—*More—Currie.*
Also,
ADAM MOIR and MANDATARIES, Advocators.
J. ANDERSON, R. GLEN, and A. EASTON, Respondents.

Sale—Clause—Bona Fides.—A piece of ground, of which certain portions had been feued out, having been sold by an heritable creditor, holding a disposition of the whole subject, under articles of roup which excepted the parts feued—Held,—1.—That the purchasers did not acquire right to the superiority and feu-duties of the ground feued; —and,—2.—That the purchasers, drawing the feu-duties for 20 years unchallenged, were not protected from repetition by the plea of bona fides.

June 15. 1831.

2D DIVISION. Ld. Fullerton. T.

MOIR was proprietor of a piece of ground near Falkirk, several portions of which had been feued out for building by his father.

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arrester, and who were of consequence entitled to relief against the arrester himself. Such an arrestment clearly could never be followed with forthcoming, and could, at best, only be considered as a formal intimation to the guarantees to withhold payment, on the ground that the decerned executor had counter claims against Urquhart. Secondly, It is clear that the suspenders, two of the next of kin, and the decerned executor, had necessarily a common interest; and it must appear that, in the circumstances of this case, the arrestment was a measure intended to protect that interest, and calculated practically for no other purpose but indirectly to give effect to a plea of compensation or retention in favour of those interested in Fraser's executry against Urquhart's onerous assignee; which plea the suspenders, after allowing decree to go out against them, could not have directly maintained. The Lord Ordinary therefore thinks that Macandrew is entitled to enforce the decree, and to recover payment, leaving the suspenders and the decerned executor to make the most of their claim in the separate action which has been brought against Urquhart."

No. 400.

June 15. 1831.
Moir &c. v. Glen &c.

In the year 1800, Moir borrowed from one Wilson £300, for which he granted an heritable bond and disposition in security, with powers of sale. The description of the property in Wilson's bond was in exactly the same terms with that contained in Moir's own titles, and, in particular, no mention was made of the feu-rights as excepted from the warrandice or otherwise. In 1803, Moir exposed the property by public roup under articles of sale, wherein it was described in the terms of his titles, with this exception, "excepting that part of the said subjects feued and disponed to Archibald Henderson," &c. (the several feuars); and it was stipulated that the property should be set up in either one lot, or in four lots, the fourth being thus specified—"The feu-duties, and other duties and casualties of superiority, payable by the foresaid feuars and vasssals in the said subjects to the said Adam Moir." No offerer having appeared, the roup was repeatedly adjourned, and no sale was effected. Shortly after this, Moir went abroad; and in 1805, Wilson, the heritable creditor, exposed the property to sale in virtue of the powers contained in his bond. The general description in the articles of roup was exactly the same, and contained the same exception of the feu-rights as the previous articles; but there was no specification of feu-duties, &c.; and it was proposed to set the property up as one lot only. It was purchased for £530 by the late Alexander Glen, who obtained decree of adjudication in implement, which, on his death, passed to his son, the defender Robert Glen, by whom it was conveyed to the other defender Easton, who obtained a charter, and was infeft thereon, in 1826. The adjudication and charter contained an exception of the feu-rights, expressed in similar terms to that in the articles of roup. Immediately on Glen's purchase, he was put into possession of the whole titles, including the feu-contracts with the vassals; and from his entry to possession, he, and after him Easton, drew the feu-duties from the feuars, as well as the rents of that part of the property which was not feued, without challenge. In 1828, an action was raised by Moir, (who had been hitherto abroad,) before the Sheriff of Stirling, against Anderson, one of the feuars, who had regularly paid his feu-duty to the Glens and to Easton, concluding for payment of the feu-duties since 1805.

In defence, Anderson pleaded that he had paid bonâ fide to the purchasers, who, he contended, ought to be made parties to the process. Glen and Easton were accordingly called, and gave in defences, pleading that their titles included the superiority of the ground feued; and at all events, that as the case resolved into a competition of heritable rights, it was incompetent before the Sheriff. The Sheriff sustained this objection to his jurisdiction, and dismissed the action. Moir then brought an advocation; and he also raised in this Court an action of declarator and count and reckoning against Glen and Easton, to have it found that they had no right to the superiority of the ground feued, but that the

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same remained vested in him; and to have them ordained to repeat the feu-duties levied by them since 1805.

In defence, they pleaded—

1. The fair construction of the exception contained in the articles of roup under which they bought the property, and in the title made up under the sale is, that it had reference to the feu-rights only—not to the superiority and feu-duties, because Wilson, the heritable creditor, having the whole conveyed to him in security, could have no intention of selling only part of it; and because the exception in the articles of roup prepared by Moir himself, from which those prepared by Wilson seem to have been copied, was merely of the feu-rights; and,

2. At all events, the feu-duties actually drawn have been bonâ fide percepti et consumpti.

To this it was answered—

1. In determining what was sold under Wilson's articles of roup, it is incompetent to refer to those prepared by Moir on a totally different occasion; and, according to the terms of the former, the ground feued was absolutely excepted, so that no right to the superiority or feu-duties was conveyed,; and,

2. Although a party having a defective title may be protected against repetition of fruits percepti et consumpti, when he has believed his title to be good, yet he must have some title to afford a foundation for the plea of bona fides; whereas here there is no title at all.

The Lord Ordinary, in the action of declarator and count and reckoning, pronounced this interlocutor, adding the subjoined note:*—

* "NOTE.—Although the articles of roup of 1803, when the sale was contemplated by the pursuer himself, contain the very exception which exists here—namely, that of the 'piece of ground' feued out and disponed to the vassals, still, as that exception was so qualified by other passages in the articles as necessarily to be limited in construction to the exception of the rights of the vassals, the Lord Ordinary thinks that if the sale had taken place under those articles, the pursuer (the exposer) would have been bound to grant a disposition of the whole lands, under the usual exception from the warrandice of the rights of these vassals. But no sale took place at that time; and when the property was again exposed by the holder of the heritable security in 1805, and purchased by Glen, the articles of roup expressly excepted, as formerly, the 'piece of ground' disponed and feued, but contained no expressions limiting or qualifying the force of that exception; and the charter of adjudication obtained by the defender Easton contains an exception expressed in similar terms. In these circumstances, however strong the probability may be (and the Lord Ordinary considers it to be very strong indeed) that the parties contemplated the sale of the whole subjects formerly exposed, and under the exception only of the feu-rights, he does not conceive himself at liberty, in construing the written contract actually completed, to explain away the force of the exception there actually expressed in terms of sufficient and even technical precision, by mere inference from the terms of a transaction formerly proposed, but never carried into effect. He has therefore sustained the title of the pursuer, and his claim to these excepted lands, as asserted in the declaratory conclusion of the libel.

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"Finds that the parcels of ground feued and disponed to the vassals libelled were excepted in the articles of roup under which the defender Glen acquired his right;—that the defender Easton acquired right from Glen under the same exception, and that the said lands so feued and disponed are excepted in the charter of adjudication obtained by Easton;—that the right to the superiority of the lands so feued and disponed is still vested in the pursuer, and therefore decerns and declares in terms of the declaratory conclusion of the libel;—that the defenders are bound to deliver up to the pursuer the feu-contracts and other titles of the lands so feued out;—that the defender Easton is bound to account to the pursuer for any of the feu-duties which he may have drawn since his citation in the action in the Inferior Court, brought by the pursuer against the vassals;—and, quoad ultra, in respect of the bonâ fide possession of the defenders, assoilzies them from the conclusions of the action; finds no expenses due, and decerns."

His Lordship, at the same time, in the advocation, advocated the cause, and "in respect of the bona fides in which the payments of the feu-duties concluded for were made by the defender Anderson, and received by the other defenders Glen and Easton during the period libelled," assoilzied them from the conclusions of the action before the Sheriff, and found them entitled to expenses.

Moir presented reclaiming notes, in both processes, as to the questions of bona fides and expenses, while Glen and Easton reclaimed, in the declarator, in so far as decree was pronounced against them in the declaratory conclusions, and in the advocation, in so far as it had not been remitted simpliciter.

In the declarator, the Court were clear that no right whatever had been acquired to the ground feued and excepted in the articles of roup, and they accordingly refused Glen and Easton's reclaiming note. On advising Moir's note, it was suggested from the Bench that he might agree to waive his claim for repetition of the feu-duties, on condition of getting his expenses; and Moir's counsel having acceded to this, his note was refused of consent as to the feu-duties, while he was found entitled to his expenses. In the advocation, the consent by Moir in the former

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"But though the Lord Ordinary is precluded from going beyond the written terms of the bargain, and of the defender's titles, in ascertaining the true extent of the subjects sold, he conceives himself at liberty to take into consideration the former articles of roup, as well as all the other circumstances of the case, in inquiring into the bona fides of the parties. And considering the meaning evidently attached to an exception framed in similar terms in the previous articles of roup by the pursuer himself, and the acquiescence of the pursuer, or those acting for him, in a similar construction of the articles under which the subjects were sold, by allowing the defenders to get possession of the feu-contract, and to draw the feu-duties for 25 years, the Lord Ordinary can have no doubt that they are fully entitled to the character of bona fide possessors, and are therefore protected from all claims of repetition."

No. 400. process to waive his claim for the feu-duties limited the case to one of
June 15. 1831. expenses, in determining which, however, it was necessary to take the
Moir &c. v. merits of the action into consideration.
Glen &c.

Lang v. Lang.

LORD MEADOWBANK.—This was originally an action of debt, and it was only made a competition of heritable rights by Glen and Easton, but not by the pursuer. The Lord Ordinary has found the respondents entitled to expenses, as he held Anderson in bona fide to pay the feu-duty to Glen and Easton, and them in bona fide to receive it. Now I do not think that, after our judgment in the declarator, we can hold even Anderson in bona fide to pay to parties without a title, and I would subject them all in expenses.

LORD JUSTICE-CLERK.—Easton and Glen had been drawing the feu-duties for upwards of twenty years, and, in such circumstances, was not Anderson in bona fide to pay them? In the other case, but for the waiver, we would have ordained Glen and Easton to repeat the feu-duties, and Moir should have gone at once against them, and not proceeded against an obscure feuar. Appearance, however, was made for Glen and Easton; and, on the principles on which we decided the declarator, it is clear they had no defence. It was they who made it a competition of heritable rights; and they, but not Anderson, ought to be subjected in expenses to Moir.

LORD MEADOWBANK.—It is clear that, but for the waiver, Moir would have been entitled to decree for his feu-duties against Anderson; and he is therefore entitled to expenses from him, though Anderson should have relief against Glen and Easton.

LORDS GLENLEE and CRINGLETIE not objecting to this—

THE COURT recalled the Lord Ordinary's interlocutor, except in so far as it advocated the cause; found it unnecessary to determine on the claim for the feu-duties; and found Moir entitled to his expenses from the three parties, with relief to Anderson against Glen and Easton.

W. RENNY, W. S.—J. DUNCAN, W. S.—J. MACKENZIE, Agents.

No. 401. PETER LANG, Complainer.—*Skene—Brownlee.*
GEORGE LANG, Respondent.—*D. F. Hope—G. G. Bell.*

Process—Public Officer—Clerk of Court—Title to Pursue.—A complaint having been presented against an assistant clerk of Court for a deviation from the regulations of Court, in twice giving up a partibus of a summons to be called against the complainer, when the clerk had not the summons in his custody, nor any receipt to show for it, and the summons had not been fee-funded—Held,—1.—That the clerk had committed an irregularity;—but,—2.—That this arose from an innocent and harmless mistake, and therefore no expenses found due to the complainer.

June 16. 1831. PETER LANG presented a petition and complaint to the Court, stating
1ST DIVISION. that on Thursday the 19th of May 1831, a summons, Pollock v. Lang
S. (the complainer), appeared in the calling list as put up in the Outer

House, which his agent could not obtain from Mr. George Lang, the assistant clerk, to whose office it belonged, either on that evening, or on the evening of Friday following, though he made repeated calls for the purpose; that the clerk told him that he had no such summons in his possession, nor any receipt for it; that the same summons was again put out on the calling list on the Thursday following; and when his agent called at the appointed time on that evening, and again on Friday evening, to borrow it, he was told by the clerk that he had no such summons in his possession, and that at this date none such had been fee-funded. He therefore prayed, that, as by these irregularities it was made to appear that several actions were in dependence against him, and so his credit was affected, and he had been exposed to serious inconvenience, the Court should afford him such redress as was competent under such circumstances, and find the clerk liable in expenses.

No. 401.

June 16. 1831.
Lang v. Lang.

The clerk answered, that what had occurred arose merely from an inadvertent mistake in the hurry of business, and that the mistake of an inept enrolment in the calling list did now and then occur, but it was never before made the subject of complaint; that, in the present case, the agent for Pollock had left the summons in the respondent's office on 16th May, to be called in common form; that it was received by mistake, without being fee-funded; but on the same evening the respondent had an explanation with the agent, who took away the summons that it might be fee-funded, promising to return it next morning; that the respondent retained the inventory and partibus, and gave in the partibus to be called as usual, having no doubt that the summons would be returned by Thursday evening; but Mr. Pollock's agent having been suddenly called out of town, the summons was not returned when the defender's agent called for it on Thursday and Friday evening, the 21st and 22d days of May, on which occasion the respondent explained to him that it would be called again next week, and the first calling should be overlooked altogether; that, pursuant to this arrangement, it was inserted in the calling list of next week, but, by the neglect of the pursuer's agent, the summons had not been fee-funded, and forwarded to the respondent, when Lang's agent again called for it; that the respondent immediately wrote to the pursuer's agent, who sent it, marked as fee-funded, to the office on Friday evening; and a note, dated that evening, was immediately sent by the post-office to Lang's agent, to whom it was delivered on Saturday morning, stating that the summons now waited his calling for it, and that thirteen days would be allowed from the Friday evening to put in defences; but, instead of again applying for the summons, he presented this petition and complaint.

The respondent therefore pleaded,—1. That as the complainer had not qualified any intelligible damage, he had no title to appear; and the public prosecutor alone could insist in relation to any offence ad vindictam publicam;—and, 2. That the mistake was of a trifling and innocent de-

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scription, and one to which the most careful men were exposed in the hurry of multiplied business, so that it would be extremely unjust to visit it with either fine or censure of any sort.

Lord Balgray.—I have no doubt as to the competency of the complaint. When a clerk violates the regulations of the Court in the conduct of a process, a party to the process may complain for redress. Here there has been an irregularity, but of a very trivial description; and I cannot but express surprise that so few such mistakes occur, when I think of the multiplicity of business passing through the hands of the clerks, and the interested solicitations of the parties to which they are exposed. I see nothing in the respondent's conduct to warrant any thing like an infliction of punishment, which we should certainly be doing, if we awarded expenses against him. After the letter of the respondent to Lang's agent, stating that the summons was returned fee-funded, and he should have thirteen days to prepare his defences, if the agent had then said he must still have some reimbursement for all the useless trouble which had been occasioned to him, his claim would have been at least intelligible; but there was no ground for a complaint to the Court. That could only proceed from a spirit of revenge or spite which we ought to discountenance; and therefore, though I would find that the conduct of the respondent had been irregular, so as to make this a warning to others, I would not subject him in expenses; and this finding may also act as a salutary warning against frivolous complaints.

Lord Craigie concurred, and was understood to observe that the complainer should at least have stated extrajudicially to the respondent what injury he conceived himself to have sustained, and what reparation he asked, before raising a judicial complaint against him.

Lord Gillies concurred, and added, I think the alleged injury to the complainer from not getting up the summons at the first calling was completely repaired by the second calling, and the notice that thirteen days were still to be allowed to lodge defences as usual. It is true that the rules of the Act of Sederunt must be enforced, as they are intended to repress irregularities. But neither in this, nor in any other Court, is it possible altogether to prevent these; and when an innocent mistake like this occurs, as its occasional occurrence is inevitable, we should pervert our enactments, if we were to make them the means of visiting it with punishment. I would therefore find no expenses due to the respondent.

Lord President.—My opinion is so much anticipated by your Lordships, that I shall only say I concur entirely. We should find that the respondent committed an inadvertent mistake, which had been productive of no harm to the complainer; and therefore, while we find there has been an irregularity, allow expenses to neither party.

The Court accordingly "found the complaint competent,—that an irregularity has been committed on the part of the respondent, but that such irregularity has been caused by innocent mistake, and been attended

with no injury or damage to the complainer; therefore found no expenses due," &c. No. 401.

June 16. 1831.
Lang v. Lang.
Smith v. Robertson.

Petitioner's Authorities.—A. S. July 11. 1828, § 26, 27, 28. 104; 50. Geo. III. c. 112. § 26. *Respondent's Authorities.*—Beveridge, p. 248; Anderson, May 27. 1830, (ante, VIII. 820); Macauley, Nov. 23. 1830, (ante, p. 48.)

G. Lang,—G. Todd Jun.—Agents.

John Smith, Pursuer.—*More—Marshall.*
Mrs. Robertson, Defender.—*Murray.* No. 402.

Landlord and Tenant—Irritancy.—It being stipulated in a minute of tack that the tenant should pay his rent in advance before getting possession; and the entry being at Martinmas; and the tenant having offered his rent on the 23d of November, and demanded entry; and being refused possession, as having failed to enter and pay on the term-day—Held that the tender was made debito tempore, and that the landlord was liable to give possession, or pay damages for failure.

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1st Division.
Ld. Corehouse.

In April 1829, Mrs. Christian Robertson, proprietrix of Ingsay in Orkney, entered into a minute of tack with John Smith, farmer in Kirkwall, by which she set to him the lands of Ingsay for twelve years from Martinmas 1829, at a rent of £16. 16s., and twelve geese, payable in advance. He bound himself specially to pay the first year's rent in advance; but it was declared that, so soon as he had stocked his farm sufficiently, he should not be required to pay rent in advance; declaring, however, "that if one whole year's tack-duty, feu-duty, teinds, or minister's stipend, or other public burdens, shall remain unpaid after the term of payment thereof above specified, then this tack shall, in the option of the said Christian Robertson, be void and null, without any procedure of law or declarator to that effect; and it shall not be lawful to the said John Smith to purge the irritancy at the bar."

On the 23d of November, Smith's law-agent in Kirkwall wrote to Mrs. Robertson, enclosing a sum of £16. 16s. as rent for crop 1830, requesting that Smith might be immediately put into possession, and threatening an action of damages in the event of refusal. This was delivered by Smith; but Mrs. Robertson re-enclosed the £16. 16s., and answered that "the farm was ready to be given up on Martinmas day; but Mr. Smith failing in his stipulation, I am not inclined to enter into any new arrangement, having adopted different measures, as I never saw Mr. Smith till this moment."

Smith then raised an action, in which, besides mentioning what is already stated, he set forth that he had always been ready to implement his part of the minute of tack, but had been unwarrantably excluded from possession; and particularly, that on the 13th of November, two days after the term of entry, he had called on the defender's son and manager at Stromness, stating his readiness to advance the tack-duty immediately

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on getting possession, but that possession was refused. He therefore concluded for an entry to the farm, or for damages on account of her failure to implement her contract.

Mrs. Robertson denied the above allegation, and averred that Smith called on her son, some time before the term, to intimate his utter inability to pay the rent, when he was told he should not be allowed to enter to the farm, unless he paid the rent on the term-day; and she therefore maintained, that as no tender of the rent had been made to her before the 23d of November, she was entitled to refuse possession until payment was made, and to void the contract, if it was not offered on the term-day.

To this Smith answered, that a tender of payment on 23d November was bonâ fide implement of the contract of parties, and the failure to give more strict performance was not enough to entitle the defender to void the lease.

The Lord Ordinary, on the 9th of March 1831, "found the missive of tack obligatory;—that a tender of the rent for the first year was made debito tempore by the pursuer; in respect whereof, and that the defender does not offer to prove, by the writ or oath of the pursuer, her averment that he intimated, previous to the term of entry, that he was unable to pay the rent, found, in terms of the first conclusion of the libel, that the defender is bound to put the pursuer in possession of the farm in question on or before the month of April next, reserving all claim of damages on account of the pursuer not being previously put in possession; and failing her doing so, found damages due, and reserved consideration in which way the same are to be ascertained."

The defender reclaimed, and craved absolvitor, or at least a proof at large of Smith's intimation, before the term of his inability to pay the rent.

The Court unanimously refused the note, and remitted to the Lord Ordinary, reserving all questions of expenses.

Lord Balgray.—The pursuer founds on a formal minute of tack. The written contract of lease is of a bonâ fide nature, and I cannot allow it to be undone in this summary way. The landlord should have been more cautious before forming the contract.

Pursuer's Authority.—Turnbull, Feb. 11. 1676, (9162.)

C. Spence,—A. Peterkin,—Agents.

N. M'LACHLAN (M'KIRDY'S EXECUTOR), Advocator.—*Jameson—Monteith.*

MRS. MARY HENDERSON or THOMSON, Respondent.—*D. F. Hope—W. Bell.*

No. 403.

June 16. 1831. M'Kirdy's Executor v. Thomson.

Bill of Exchange—Sexennial Prescription.—A bill indorsed by the drawer to a party who was his law-agent, and by him to a bank, on which diligence was raised by the bank within the six years, having been found in the repositories of the law-agent, with a blank re-indorsation by the bank, but without any receipt or assignation of the diligence—Held,—1.—That the bill must be presumed to have been retired with the agent's own funds.—2.—That the re-indorsation was equivalent to a receipt;—and,—3.—That the diligence by the bank saved it from prescription, so as to make it capable of being the foundation of an action raised after the six years.

June 16. 1831.

2D DIVISION. Ld. Mackenzie. T.

THE late William Thomson, husband of the respondent, drew a bill for £22, dated the 1st of August 1818, and payable three months after date, on one Walker, who accepted it. During its currency, Thomson indorsed it to the late John M'Kirdy, writer in Greenock, who was his law-agent, and by whom it was indorsed to the Renfrewshire Banking Company. When it became due, it was protested by the Bank, and diligence raised, and charges given to the obligants. Having been retired by M'Kirdy, the Bank delivered it up to him re-indorsed blank, and also the diligence, but without any assignation thereto. At this time Thomson was in embarrassed circumstances, and no proceedings were adopted against him by M'Kirdy, who survived for three years. On M'Kirdy's death, the bill and diligence were found in his repositories; and, in 1829, M'Lachlan, as his executor creditor, raised an action before the Sheriff of Renfrewshire against Mrs. Thomson, the relict of Thomson, concluding for payment.

In defence she pleaded—

1. The re-indorsation of the bill by the Bank, after diligence had been raised on it, was not, without a receipt or assignation, a sufficient title to pursue.

2. M'Kirdy having been the agent of Thomson, the presumption was that he retired it with Thomson's funds,—the more especially as there was no entry of payment in M'Kirdy's books, and no assignation had been got from the Bank; and,

3. The bill was prescribed; for although diligence was raised by the Bank, which might still be proceeded with, the act 1772 refuses all action or diligence on the bill, except such action or diligence as shall have been commenced or raised within six years.

To this it was answered—

1. The indorsation by Thomson to M'Kirdy was a sufficient title to the bill, and the re-indorsation by the Bank was equivalent to a receipt in his favour.

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—.

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2. M'Kirdy must be deemed an onerous holder, unless the contrary be established habili modo; and the circumstance of his having been Thomson's agent does not affect his rights as a party on the bill. Thomson was confessedly in embarrassed circumstances when the bill fell due, and there is no averment that he provided the funds to retire the bill; besides, the presumption is, that M'Kirdy did so with his own funds; and,

3. It is enough to preserve a bill from the statutory prescription that there has been diligence done, or action raised, within the six years, though that particular diligence or action may not have been proceeded with; and accordingly it is settled, that diligence or action against one obligant preserves recourse against the whole, which otherwise could not be the case.

The Sheriff pronounced this interlocutor:—"In respect that no receipt is produced to show that the deceased Mr. John M'Kirdy paid the sum contained in the bill in question to the Renfrewshire Banking Company, and did not obtain any assignation to the diligence which had been raised in name of their cashier against the whole parties on the bill; and in respect it is not alleged that any marking exists in the books of the said defunct, showing that he had made the supposed advance to the Bank; finds that the mere circumstance of the bill, registered protest, and horning at the Bank's instance, having been found in the deceased's repositories, does not legally raise the presumption that he had paid the money, or vest the pursuer with right of action on the said documents against the defender; therefore assoilzies the defender, and finds her entitled to expenses of process and dues of extract, for which decerns against the pursuer."

M'Lachlan having advocated, the Lord Ordinary altered, and decerned against Mrs. Thomson; and the Court adhered.

J. Pattison, W. S.—J. Stuart, S. S. C.—Agents.

No. 404.

John Baird, Raiser.—*Cuninghame.*

Mrs. Rymer or Faulds and Others, Claimants.—*D. F. Hope—R. Bell.*

J. H. Mack, Claimant.—*Jameson.*

Arrestment—Process—Multiplepoinding.—A creditor, who had arrested rents, having consented that the tenant should pay out of these rents sums necessary to enable the common debtor to obtain an entry from the superior, but requiring him to retain the subsequent rents in liquidation thereof; and a ranking and sale having been brought of the property; and the tenant having paid the subsequent rents to the judicial factor, under a guarantee to repeat them; and brought a multiplepoinding as to one half-year's rents—Held,—1.—That the tenant ought not to have paid the subsequent rents to the factor, but should have retained them in liquidation of the sums advanced; and that the arresting creditor was entitled to be preferred to the rents, as if they remained in the tenant's hands;—and,—2.—That it was competent in the multiplepoinding to have the fund enlarged, so as to embrace these rents.

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2D DIVISION.
Lord Medwyn.
T.

Baird v. Faulds &c.

THE Shotts Iron Company, of which the raiser Baird is manager, were tenants of the Caltonhill Foundry, belonging to Mr. Rymer of Cliftonhill, who was bound in certain provisions to his sister Mrs. Faulds and her family. On the 7th and 15th of November 1822, Mrs. Faulds used arrestments in Baird's hands of the rents due at Martinmas of that year, and to fall due at the Whitsunday following. At this time an action of non-entry and of maills and duties had been raised against Rymer by the superiors, the Magistrates of Edinburgh, and his title-deeds were hypothecated in the hands of Meek, W. S. In these circumstances, Mrs. Faulds' agent, Mr. Richardson, addressed to Baird the following letter: —"As agent for Mrs. Faulds and her family, I hereby authorize you to pay to Mr. John Meek, W. S. the business-account due to him by Mr. John Rymer of Cliftonhill, and to get up from him the title-deeds of the Caltonhill Foundry belonging to Mr. Rymer, and also to take out an entry from the Town of Edinburgh, and pay the expense thereof, as well as the expenses incurred by the Magistrates, in relation to a process of non-entry, and a process of maills and duties at their instance against Mr. Rymer, and the tenants in said subjects; and I authorize you to retain the rent of the said subjects until you shall repay yourself the said advances, and any expenses your own agent may thereby incur; reserving always the claim Mrs. Faulds has to the rents under the arrestment used by her on 7th November 1822, after deduction of £20 paid Mr. and Mrs. Faulds to account on 4th April 1823."

Baird thereupon paid Meek's account, and the sums necessary to obtain an entry, which exhausted the rents arrested by Mrs. Faulds, as well as the other rents then in his hands. Thereafter a ranking and sale of Rymer's property was brought, in which the claimant Mack was, in 1825, appointed judicial factor, and as such he demanded from Baird payment of the rents fallen due subsequent to the date of the above letter. Baird paid him these rents, but took from him an obligation to repeat, in the event of his being found liable to Mrs. Faulds for not retaining sufficient to replace the arrested fund.

In 1827, Baird raised a summons of multiplepoinding, in which he set forth that the only fund in his hands was the half-year's rent due at Whitsunday of that year; and with his condescendence he gave in an account of the rents &c. from 1822 downwards, in which he took credit for the sums paid by him under the letter, and also for the subsequent payments of rent to Mack, as judicial factor.

To this Mrs. Faulds objected that by her agent's letter she had not abandoned her arrestments, but merely consented to payment, in the mean time, out of the arrested fund, of the sums necessary to preserve the property for the benefit of all concerned, on the condition that they were to be replaced out of the rents falling subsequently due; that Baird ought not to have paid the subsequent rents to the judicial factor, but should have retained them, so as to restore Mrs. Faulds' arrested

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fund to its original amount; and she contended that the fund must now be enlarged accordingly, which could be done without prejudice to Baird, who had a guarantee from the judicial factor, and who had also in his hands rents which had fallen due subsequent to the raising of the multiplepoinding.

On the other hand, Mack, the factor, (who appeared as claimant for the half-year's rent due at Whitsunday 1827,) contended, 1. That the letter was an absolute consent to pay the preferable claims out of the arrested fund, and so far an abandonment of Mrs. Faulds' preference over the other creditors, at least to the extent of the rent fallen due at Whitsunday 1823, attached by the arrestment of 15th November 1822,—the only arrestment reserved in the letter being that of the 7th November, which attached the half-year's rent due at Martinmas; and, 2. That at all events Mrs. Faulds' claim was a personal claim against Baird for paying away the subsequent rents, but could not form the ground of competition with the general body of creditors.

Baird, in addition, contended that the only fund as to which the multiplepoinding was raised being the half-year's rent due at Whitsunday 1827, it was incompetent in this process to introduce the question of his liability for other rents.

The Lord Ordinary found, inter alia, "that although the effect of the arrestment 15th November 1822 is not also reserved, the intention and import of the letter could only have been to allow of payments in the mean time for the general behoof, and to save the property from forfeiture, but not to give up or abandon her preference to the creditors at large, secured to her by diligence; and that the raiser was bound to have retained payment of the said sums so advanced out of the subsequent rents which should become due by him, over which no preference was secured, either by the claimant or any other creditor;"—"that on making payment to Mr. Mack of the rents due by him, the raiser obtained from him a letter of guarantee, dated 28th January 1826, and that under this letter he is entitled to reclaim so much of the sums so paid as will, with other unattached funds in his hands, be sufficient to pay the amount of the payments made in virtue of Mr. Richardson's said letter;—that although this summons only states the half-year's rent due at Whitsunday 1827 as the fund in medio, and calls upon the claimant, as well as others, to compete thereon, it is competent to show that a larger fund should be in the raiser's hands;—and accordingly, so far as the claimant Mrs. Faulds is concerned, that the fund must be enlarged, so as not to be affected by the sums paid under Mr. Richardson's letter." His Lordship accordingly preferred Mrs. Faulds to the amount of rents arrested by her, but found no expenses due to any party, except the expense of raising the process and bringing it into Court, which he allowed the raiser to retain out of the fund in medio; and in a note stated as his reason for refusing Mrs. Faulds her expenses, that she had not put her claim on the proper ground

at first; and for refusing Baird's, that his improperly putting the funds out of his hands had been the cause of the litigation. No. 404.

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Baird v. Faulds &c.
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All parties reclaimed,—the judicial factor on the merits, and Mrs. Faulds and Baird in so far as they were not allowed expenses. The Court, while they allowed Mrs. Faulds her expenses out of the estate, and reserved Baird's claim, refused the reclaiming note for the judicial factor, and adhered to the Lord Ordinary's interlocutor on the merits.

Lord Justice-Clerk.—The interlocutor of the Lord Ordinary is founded on the principles of justice. We must give a fair construction to Richardson's letter; and it is clear that Mrs. Faulds never meant to abandon her preference, though she allowed her funds to be employed for the benefit of all concerned to obtain an entry. She accommodated the other parties without abandoning her preference; and therefore the raiser should have retained funds out of the subsequent rents to the same extent to answer her claims. But he pays to the factor, taking, however, a guarantee to secure himself; and as the factor is bound to repay to that extent, we must hold the money to be here, and that the payments to him were not duly made; and in this situation Mrs. Faulds is clearly entitled to a preference, and I think she should have her expenses out of the common fund.

The other Judges assented.

R. Rutherford, W. S.—J. Richardson, W. S.—Wotherspoon and Mack, W. S.—Agents.

John Livingston, W. S. Complainer.—*Robertson.* No. 405.
Mr. and Mrs. Murray, Respondents.—*Murray—M'Neill.*

Proof.—A party charged with a criminal offence, not bound to produce a letter written in relation to the subject, but not sent.

In a complaint by Livingston against Mr. and Mrs. Murray for the abstraction of certain productions from a process then standing on Livingston's receipt, a remit was made by the Court to the Lord Ordinary on the Bills to take the judicial declaration of the respondents. Mrs. Murray compeared; and "being shown a letter bearing the date of the 19th of June 1830, and addressed to Mr. Livingston, and interrogated whether she received a letter from Mr. Livingston, dated the 18th of June, after she wrote that letter? declares that she did receive such a letter from Mr. Livingston after she had written that shown to her, and she supposes it will be in the possession of Mr. Logan, her agent. Declares, that she thinks the letter was to the effect of that quoted on the 7th and 8th pages of the complaint. Declares, that as soon as she was able to write, she did write a letter which she intended as an answer, but that she was not allowed to send it; that Mr. Murray prevented her from sending it. Declares that she was very ill at the time she wrote the first letter, which she wrote in bed, and that it was several days after she received Mr. Livingston's letter before she wrote what she intended

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as an answer to it; that that proposed answer was given to Mr. Logan her agent, and, as far as she knows, it remains with him still."

Livingston declined to examine Mrs. Murray further, unless she produced the letter which she had intended to send. Mrs. Murray's counsel objected that it was incompetent to call for such production. The Lord Ordinary reported "the examination as above taken, reserving to the complainer to apply to the Court for production of the document above referred to, and leaving it to the Court to determine whether he is entitled to the production of it or not; and whether, in the event of the Court finding that it ought not to be produced, any further examination of Mrs. Murray should be allowed."

When their Lordships advised this report, they unanimously found that Mrs. Murray "is not bound to produce the answer which she says she had prepared to the complainer's letter of the 18th of June, but which answer was not sent; and remitted to the Lord Ordinary to proceed with the examination ordered, and to report."

Lord President.—The complainer might as well insist on Mrs. Murray's disclosing all her secret thoughts, as her delivering up a letter which, though penned, was never dispatched; but, on the contrary, ex præposito retained by the writer.

Lord Gillies.—She is under no obligation to produce such a letter.

H. Macqueen, W. S.—D. Fisher, S. S. C.—G. Logan, W. S.—Agents.

No. 406.

Thomas M'Kenzie, Pursuer.—*Jameson.*

Robert Roy and Others, Defenders.—*Skene.*

Auditor—Expenses.—1.—Fees allowed to counsel attending a consultation preparatory to a jury trial.—2.—Question as to the rate of fees, and number of counsel attending a jury trial.

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This was a question as to fees to counsel in the Dundonnel cause, which related to the right of succession to that estate. A reduction of a deed of settlement executed by the late proprietor was brought by the heir-at-law against Mr. Roy, W. S. to whom the estate was thereby conveyed, and who was alleged to have obtained it by fraud. It was tried by a jury twice. On the first occasion no verdict was returned, and on the second the trial last nearly five days, and the pursuer got a verdict. Some time previous to this second trial, the precognition of 114 witnesses was laid before three counsel. This amounted, with other papers, to about 5000 pages, on considering which, 63 witnesses were selected as proper to be brought from Ross-shire to give evidence; and at the trial the pursuer had four counsel—the defender six. The Auditor, in taxing the pursuer's account, having refused to allow any fees for the consultation relative to the precognition, and allowed fees for only three counsel in attend-

ance on the trial, at the rate of 100 guineas to the leading counsel, and proportionally to two juniors, the pursuer objected to his report in so far as it disallowed the consultation fees, and cut off the fee for the fourth counsel, and struck too much off the fees for the remaining three.

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The defenders answered, that as it was a second trial, the expense and trouble of preparation must have been much less than at the first; that the expense of the consultations at arranging the evidence, and preparing for the second trial, just formed part of what was covered by the fees for the trial; and that three counsel were enough for the management of any cause whatever."

The Court repelled the objection as to the fees to counsel at the trial; but remitted to the Auditor to allow fees for the consultation preparatory to the trial in November; and on a report being returned, taxing these at fifty guineas, decree was pronounced accordingly.

Lord President.—The preparation of the evidence to be adduced at this trial must have been unusually laborious. The witnesses were to be brought from Ross-shire; it was therefore necessary to determine, some time before the trial, what witnesses should be selected. This preparatory labour seems to me to be so essential, and to have implied so much separate exertion in this case, that I think the Auditor was wrong in disallowing fees for it.

The Court concurred.

H. Macqueen, W. S.—Gibson-Craigs, Wardlaw, and Dalziel, W. S.—Agents.

Mrs. Walker or Thomson, Pursuer.—*D. F. Hope—Wilson.*
Mrs. Easton or M'Kechnie and Robert Chrystie, Defenders.—*Skene—Marshall.*

No. 407.

Idiocy—Bill of Exchange—Sexennial Prescription.—1.—It is not relevant, to set aside a decree, to allege that the defender was insane at the date of it, he not being then cognosced.—2.—The sexennial prescription held to be interrupted by the evidence of the execution of letters of horning afforded by an extract from the record of hornings.

On the 2d of August 1818, John Thomson drew a bill for £42, at twelve months, on Andrew Easton, who accepted it. Thomson having died, his widow was confirmed executrix qua relict, and, in November 1821, obtained decree in absence against Easton for the amount of the bill. On the dependence of this action, she executed arrestments in the hands of Easton's debtors.

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1st Division. Ld. Corehouse. D.

In April 1822, Mrs. Thomson, founding on the bill, decree, and arrestment, raised an action of forthcoming against the arrestees, in which appearance was made by the representatives of Easton, who also brought an action of reduction of the bill and decree, on the ground that Easton was insane at their respective dates. A remit having been made to the Jury Court, they judicially admitted that he was not insane at the

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date of the bill; and, on the other hand, Mrs. Thomson admitted that he was so at the date of the decree. He had, however, not been cognosced nor interdicted.

In defence, his representatives maintained—

1. That the decree having been pronounced when he was insane, it was inept; and,

2. That as more than six years had elapsed from the term of payment of the bill, it was prescribed.

To this it was answered—

1. That as Easton had not been cognosced at the date of the decree, and the bill was granted for value, and therefore was a just debt, the decree was effectual; and,

2. That, separatim, prescription had been interrupted by the execution of letters of horning and caption, in evidence of which an extract from the register of hornings and the caption were produced.

The Lord Ordinary, "in the reduction, found it admitted that Andrew Easton was not insane at the time the bill in question was granted, and that it is not alleged he was cognosced at the time the action was raised, in virtue of which the diligence under challenge was used; repelled the reasons of reduction, assoilzied the defender, and decerned; and in the forthcoming, in respect of the documents produced, found that the sexennial prescription of the bill was effectually interrupted," and therefore preferred Mrs. Thomson, and found her entitled to expenses.

The defenders reclaimed; but the Court adhered.

J. Pattison jun. W. S.—J. Forman, W. S.—Agents.

No. 408.

A. Pursuer.—*Robertson.*

B. Defender.—*Skene.*

Auditor—Expenses.—Question as to fees to counsel for consultation prior to raising an action.

June 17. 1831.

1st Division.

In this case the Court sustained an objection by a pursuer to the report of the Auditor, in so far as it disallowed a fee to counsel given for advice whether a process should be raised. The opinion had been taken, and the fee paid, at the suggestion of the defender. The pursuer rested on the case reported ante, Feb. 12. 1831, p. 429. The defender answered, that nothing but the expenses "to follow hereon" were concluded for under the summons, or could be awarded by the Court. But the expense in question was precedent to raising the summons, and could not be so awarded. Their Lordships decided the question in this case as a special one, and intimated, in reference to the previous judgment, that, before determining the general question when it should again come purely before them, they would advise with the other Division.

MRS. HAY MACKENZIE and J. H. MUNRO, Pursuers.—*H. J. Robertson.*
MAGISTRATES of DINGWALL and Others, Defenders.—*Robertson—Neaves.*

No. 409.
June 17. 1831.
Mackenzie v. Magistrates of Dingwall &c.

Process— Res Judicata.—An interlocutor having found a decree to be res judicata, and a party, in terms of it, entitled to fish 'from the march at Breakenord down to the sea;' 'but, in respect parties are not agreed as to the march between the lands of Balblair and Breakenord,' appointed a condescendence on that subject; and the interlocutor having become final—Held that it was still competent to inquire in what sense the words 'the march at Breakenord' were used in the decree.

June 17. 1831.
1ST DIVISION.
Lord Newton, D.

SEQUEL of the case reported ante, VII. 383, (which see.) In a question as to the fishings of the river Conon, an interlocutor had been pronounced in 1788, containing these words:—"Find that the Magistrates of Dingwall have produced a sufficient title to the fishings in the said river opposite to their property, from the march at Breakenord down to the sea." On the 12th of November 1828, the Lord Ordinary (Corehouse) found that interlocutor to be res judicata in the present action; and further found "that the words 'opposite to their property' in the judgment 1778 are demonstrative, and not taxative; and therefore found that the Magistrates of Dingwall, and those in their right, have a sufficient title to the fishings in the river Conon from the march at Breakenord down to the sea, and to that effect assoilzied the defenders, and decerned; but, in respect parties are not agreed as to the march between the lands of Balblair and Breakenord, appointed the pursuers to put in a condescendence, specifying what they aver to be the situation of the march," &c. Reclaiming notes relative to this judgment were refused, Jan. 20. and Feb. 10. 1829, of which last date the case is reported as above mentioned. The cause having returned to the Lord Ordinary, condescendence and answers were lodged, in reference to the interlocutor of the 12th of November 1828, when a discussion arose between the parties as to the import of that interlocutor. The lands of Breakenord lie along the river Conon; their upper boundary marches with Balblair; and the dispute was, whether the pursuers were foreclosed, by the judgment in 1828, from showing that 'the march at Breakenord,' specified in the judgment 1778, was the lower march next the sea, and was not the upper march with Balblair. The pursuers pleaded that the interlocutor could not be so construed, because, although it had an express finding, repeating the old judgment of 1778, that the defenders might fish from 'the march at Breakenord down to the sea,' there was no finding that that march was the upper march of Breakenord between it and Balblair. The Lord Ordinary had allowed a condescendence on that subject, but had pronounced no finding; it was therefore still open to the pursuers to show that the march in the old judgment was the lower march. The defenders answered that this was decided by the final judgment of 1828. That

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judgment found they had a title to the fishings "from the march at Breakenord down to the sea, &c.; but, in respect parties are not agreed as to the march between the lands of Balblair and Breakenord, appointed the pursuers to put in a condescendence, specifying what they aver to be the situation of the march," &c. These words were precisely the same as if the Lord Ordinary had specifically found, 1. That they had a right to fish from the march at Breakenord down to the sea. 2. That that march was the march between Balblair and Breakenord; and, 3. In respect parties were not agreed where that march lay, had ordered them to condescend. All this was now res judicata between the parties. If the interlocutor were otherwise interpreted, it followed that a condescendence was ordered as to a march between Balblair and Breakenord, although that march might have nothing to do with the merits of the cause. The Lord Ordinary (Newton) found, that "by the words 'the march at Breakenord,' as used in Lord Corehouse's interlocutor of 12th November 1828, is meant, as shown by the subsequent part of that interlocutor, the march betwixt the lands of Balblair and Breakenord; and that it is not now competent to inquire in what sense these words were employed in the interlocutor in the former process of the 24th of January 1778."*

The pursuers reclaimed.

Lord Gillies.—The interlocutor of Lord Corehouse very clearly indicates what his opinion was as to the march at Breakenord, specified in the old judgment of 1778. His Lordship considered it to be the march between Balblair and Breakenord; but he has not expressed this opinion in the form of a legal finding, and without that there can be no res judicata. There must be a judicial finding before there can be a res judicata. I hold it, therefore, to be still open to the pursuers to inquire in what sense the words 'the march at Breakenord' were used in the judgment of 1778.

The other Judges concurred; and the Court altered, and found "that it is competent to inquire in what sense the words 'the march at Breakenord' were used in the decree 1778. For that purpose, allowed the parties to give in Cases on the import of the evidence in process so far as concerns this point; and in particular on the import of the proof led, the pleadings and other proceedings in the cause on which the decree 1778 proceeded; reserving all questions of expenses."

J. Burness, S. S. C.—Horne and Rose, W. S.—Agents.

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* "Note.—The Lord Ordinary, conceiving that any ambiguity which there may be in the final interlocutor of 12th November 1828 is removed by the subsequent part of that interlocutor, and that the meaning of Lord Corehouse, or of the Court in adhering, can admit of no doubt, holds himself precluded from considering what was the march intended by the Court in their interlocutor of 24th January 1778. But were it competent to him to entertain this question, he is of opinion, on an attentive consideration of the proof taken in the former process, that the sense in which Lord Corehouse has understood the interlocutor is the just and correct one."

A. MACALESTER and TUTOR, Pursuers.—*D. F. Hope—A. M'Neill.*
DUKE of ARGYLL, Defender.—*Skene—Moir.*

No. 410.

June 17. 1831. Macalester &c. v. D. of Argyll.

Thirlage.—The tenants of certain farms, some of whom were taken bound in their leases to carry their grain to any mill to which the same 'are or shall be thirled,' and to pay 'accustomed multures,' having, from time immemorial, resorted to a particular mill, both when it was the property of their landlord, and after he had conveyed it away 'cum multuris,' &c. found—

1. That a title by progress from the landlord to the mill in question, cum multuris &c., was relevant, without any special clause of astriction, to sustain a claim of thirlage, founded on immemorial usage, against the landlord and his tenants in farms alleged to be so astricted.

2. That the thirlage was sufficiently established against the landlord and his tenants by proof of immemorial usage of those tenants to carry their corns there, with occasional performance of mill-services and payment for abstracted multures, although no decree had been obtained against the landlord, and he had taken some of the tenants bound in their leases to pay certain multures to himself.

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2D DIVISION. Ld. Mackenzie. F.

THE family of Argyll having acquired the lands of Kilarue, Tangietavil, &c., including the mill of Tangie, cum molendinis et multuris, by progress from the church, the Duke of Argyll, in the year 1741, disponed to M'Millan of Drumore, "totas et integras terras de Kilarue, Tangietavil," &c. "cum molendino de Tangie, cum omnibus multuris sequelis lie knaveship et lie thirlage ejusdem," &c. M'Millan, in 1767, conveyed the lands and mill, "with all and sundry multures, sequels, knaveship, and thirlage of the same," to Campbell of Barbreck, who thereupon obtained a charter of resignation from the Duke of Argyll's commissioners, in which the right to the multures and mill-services was repeated. These titles came by progress into the person of the pursuer Macalester.

It was alleged that during the period when the mill of Tangie was possessed by the Argyll family, and even prior to that time, the lands of Backs, and many other farms belonging to the Duke, were thirled to this mill, in so far as the tenants had immemorially used to carry their whole growing corn to the same, and to pay intown multures; but there was no special astriction to the mill of Tangie in the Duke's titles to these farms, which had been held in feu by the Argyll family since the year 1576, 'cum molendino et multuris,' and for a certain feu-duty, 'pro omni alio onere,' &c.

In support of this claim, Macalester and tutor raised the present action, concluding for declarator of thirlage of grana crescentia against the Duke of Argyll and his tenants for the lands of Backs, and other farms enumerated in the summons.

The Duke and his trustee stated a preliminary plea in defence against the relevancy of Macalester's title, and claimed to be assoilzied without going into a proof; but the Lord Ordinary, having advised Cases, found "that there does not appear to be sufficient ground for deciding the

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cause in favour of the defenders hoc statu, and therefore appoints the cause to be enrolled, with a view to an order for proof or remit to the Jury Court."

This interlocutor was acquiesced in, and thereafter a proof taken on commission, upon the import of which his Lordship again ordered Cases.

The proof was held to establish—

1. That the possessors of all the farms libelled (with the exception of two farms, to which the proof did not apply) had been in constant use to attend the mill of Tangie with all their corns, seed and horse corn excepted, and to pay the intown multures, down to about the year 1810, from a period as far back as seventy or eighty years before the date of the action.

2. That mill-services, such as carrying mill-stones, were occasionally performed during that period by these farms to the mill of Tangie.

3. That there were other mills of a lower rate of multure, which some of the tenants passed in going to the mill of Tangie; and Colonel Porter, one of the witnesses, deponed, "that Donald Bowie in Backs complained of the hardship of being bound to the inconvenient mill of Tangie, when Campbeltown mill was quite at hand."

4. That in the tacks of some of these farms, the Duke of Argyll bound his tenants to pay a certain 'quantity of multure meal' to himself, and to carry their corn 'to any mill to which the farms are or shall be thirled,' and to pay 'the accustomed multures', &c. No thirlage to any other mill was proved; and it also appeared that some of the tenants had been summoned in processes for abstracted multures by the previous proprietor and tenants of the mill of Tangie, in which decree had not been pronounced, nor the Duke called as a party, the tenants having settled matters by paying for the abstractions.

The Duke led no proof to contradict the above; but an argument was founded on the leases granted by his Grace, in which he took the tenants bound to pay multure to himself. It was also maintained, that the clause binding the tenants to take their corns to the mill, 'to which they are or shall be astricted,' and to pay 'the accustomed multure,' inferred astriction, or a reserved power of astriction to some other mill belonging to the Duke, and not to the mill of Tangie; and it was further contended, that as there was no proof of the tenants having ever paid multure for grain sold out of the thirl, the only thirlage that in any event could be held to be established was of grana mollibilia.

But his Grace chiefly maintained—

1. That the terms of his titles to these farms contradicted the claim of thirlage; for not only did they contain no special astriction to the mill of Tangie, but the conveyance being cum molendinis et multuris, with a special feu-duty, bearing to be 'pro omni alio onere,' any thirlage previously constituted was thereby discharged;[1] and,

[1] Ersk. 2. 9. 22; Coltart, Dec. 13. 1768, (16058); Duke of Roxburghe, July 21. 1785, (16070); Brunton, Jan. 17. 1682, (Harcarse.)

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2. That the claim of thirlage being founded neither upon any decree against the Duke, nor upon a special astriction to that mill in any of the titles produced, there was no basis whereon to establish such servitude by prescription, (Ersk. 2. 9. 28.)

The Lord Ordinary decerned and declared in terms of the libel, except as to the two farms above alluded to, adding the subjoined note.*

Macalester acquiesced in the exception contained in this interlocutor. His Grace reclaimed; but the Court unanimously adhered.

Lord Justice-Clerk.—Although this is a long case, I must say I have not found much difficulty in forming my opinion. I have no doubt of the sufficiency of the pursuer's title to found this claim of thirlage, and I am equally satisfied with the proof of possession. The argument for the Duke seems to me to be completely answered by the state of his own titles. He and his authors were originally proprietors of the mill as well as of the farms. If he intended to discharge them from the thirlage, that might have been done expressly, instead of which there is a conveyance of the mill, 'cum omnibus multuris,' &c. In point of law, I can find no objection to the pursuer's title; and the only question is, whether it be proved that the lands in question did, in point of fact, carry their corns to this mill as alleged? Taking the whole in conjunction, as ought to be done, I can have no doubt. The proof led for the Duke, particularly the evidence of Colonel Porter, is as material in establishing the thirlage as the pursuer's own proof; and it is impossible to say that the occasional interruptions by abstracted multures, which were paid for, established any immunity. There was a bad road to the mill of Tangie, which accounts for this, and which, if not repaired, may interfere with claims for abstracted multures. Upon the whole case, I think the Lord Ordinary perfectly well founded in his interlocutor.

Lord Cringletie.—I am of the same opinion. The absence of a decree, instead of being evidence against the thirlage, is in favour of the claim. It shows that the matter was not seriously disputed. The tenants submitted and

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* "Note.—The Lord Ordinary thinks the chief grounds of thirlage established are,—1. That the mill of Tangie is held by titles derived from the Duke, with multure, &c. 2. That there is sufficient evidence that these lands have paid heavy intown multures from time immemorial down to 1809 or 1810, and also performed mill-services, and occasionally paid for abstractions, there being no evidence at all to contradict that of the pursuer; from which the Lord Ordinary thinks it must be inferred that the lands stood so astricted at the time the Duke conveyed the mill with multures, &c. 3. That, in the tacks of many of the lands at least, the Duke seems to have been in the practice of taking the tenants bound to carry their grain to any mill to which the farms are or shall be thirled, and to pay the accustomed multures, which proves that there had been a thirlage, and none is shown to have existed to any other mill. The stipulation of dry multure to the Duke himself seems of no moment, for that is over the proper thirlage mentioned in these tacks in any view of it, and plainly was just part of the rent, independent of any mill. The astriction of certain lands in the charter seems equally unimportant, as these very lands are conveyed with the mill, and never could be the whole thirl. This clause must have been to prevent the tenants pretending the extinction of the thirlage quoad them confusione."

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paid for their abstractions, knowing they were bound. It is said that the Duke was not called in these processes, and that no decree passed against him; but if the tenants acquiesced, where was the necessity for calling the landlord. Here, however, the landlord imposes the thirlage.

LORD MEADOWBANK.—I have nothing to add. The Duke could not, had he gone before a jury on the facts, have claimed a verdict.

(Lord Glenlee was absent.)

M. N. M'DONALD, W. S.—J. and W. FERRIER, W. S.—Agents.

No. 411.

MRS. E. RALSTON or ALLISON, &c., Petitioners.—*Robertson.*
J. ROWAT, Respondent.—*D. F. Hope—Sol.-Gen. Cockburn—M'Neill.*

Judicial Sequestration of Land Estate.—Circumstances in which an application for sequestration of a landed estate was refused.

June 18. 1831.

2D DIVISION. R.

ROWAT was in possession, by singular title, of an heritable property disponed to him by Allan, deceased. The petitioners, Mrs. Allison and Purdon, claiming as heirs-portioners of provision and line to Allan, raised an action to reduce Rowat's title. Condescendence and answers had been lodged in the reduction, documents recovered from havers, and a proof from aged witnesses taken to lie in retentis. At this stage of the process a petition was presented by the pursuers, praying for sequestration of the rents until the issue of the action of reduction.

The Court unanimously refused the application, for which they considered there was no precedent.

J. BURNSIDE, W. S.—J. WEMYSS, W. S.—Agents.

No. 412.

MARGARET LETHAM and CHILD, Pursuers.—*J. Anderson.*
W. FORLONG &c. (FORLONG'S TRUSTEES), Defenders.—*Monteith.*

June 18. 1831.

2D DIVISION. Ld. Mackenzie. F.

SPECIAL case, in which the Lord Ordinary having pronounced decree in absence against Forlong's trustees for interim aliment, pending a process of declarator of marriage and legitimacy, the Court reponed upon payment of previous expenses to be modified by the Lord Ordinary, and reserving all questions.

J. LIVINGSTON, W. S.—GIBSON-CRAIGS, WARDLAW, and DALZIEL, W. S.—Agents.

No. 413.

JAMES ROY, Complainer.—*Skene—J. W. Dickson.*
JOHN SCOULAR, Respondent.—*D. F. Hope—Pyper.*

Bankrupt.—Circumstances in which it was held established that a party who had obtained a discharge under a sequestration on a composition-contract had, subsequently to his discharge, become bound to allow one of his creditors to apply certain funds coming into his hands to the payment in full of the original debt.

June 18. 1831.

2D DIVISION. Ld. Moncreiff. T.

THE estate of the respondent Scoular was sequestrated in 1815. Among other creditors, Megget, W. S. was ranked for a debt of between £1100 and £1200, as a partner of Aitken Megget, and Co., on account of bills

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subscribed by that firm for Scoular's accommodation, and which Megget had retired. The sequestration was wound up in 1816, by a discharge on a composition of 9s. per pound; and Megget received payment of the composition on his debt. Part of the funds of the sequestrated estate consisted of a claim by Scoular on a Mr. Thomson of Jamaica to the extent of £642, which, in the state given up by Scoular, was set down doubtful, and valued at only 5s. per pound. Megget, as agent in the sequestration, had been employed to recover this debt; and his employment being continued by Scoular after the discharge, he ultimately succeeded in obtaining full payment of it. A few days after the last remittance was received, (June 1819,) Megget handed to Scoular a state of accounts between them, with a request that he would look it over, and see if it was correct. In this state the first item charged against Scoular was the original debt, stated at its full amount, with interest; and, on the other hand, credit was given for the composition, which had been paid, and the remittances from Jamaica. In answer, Scoular wrote to Megget:—"I have received your note, with a statement of the account betwixt us, which, with the exception of the charge for interest, is nearly correct; that interest was to be exacted on the balance was never, I presume, at any time thought of; indeed it would have been folly in me to have acceded to it. I have annexed a statement in the way which I conceive it can only stand; and on the supposition that you pay me £50 out of the present remittance, the balance will then be about £462. You will perceive that, allowing the £189, as stated in the account, to go towards the extinction of the original debt, is fully more than I can at present afford, from the circumstance of so much of the funds being still unproductive. Until the sureties are relieved from all their obligations for me, they must consider it rather improper that any part of the funds should be appropriated to any other purpose. These matters have pressed very hard upon me for some time; and had not this money been recovered from Mr. Thomson, application must have been made to the sureties to make up the deficiencies. Besides, the want of a little money at times has prevented me from carrying on business but to a very limited extent; the gains of course have been proportionally small. Mr. R. Brown is very pressing to have a settlement for Mr. Tod's trustees immediately. I would therefore esteem it an additional favour if you would be so good as to advance the £50 to-morrow, and I trust it will not be long before I am enabled to give you something further to the old accounts."

The state of accounts which accompanied this letter was as follows:—

"1815.		
"Dec. 12. To amount of bills and accounts due A. Megget and Co. by J. Scoular, - - -	£1179	8 11
Carry over - -	£1179	8 11

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	Brought forward, - -				£1179 8 11
" Paid composition on do., at 9s. per pound, -					530 15 6
					£648 13 5
" 1818.					
" May 25. Mr. Megget received a remittance from Jamaica, of this date, for - - -		£423	9	2	
" Mr. Bullock's account of charges against Mr. Thomson and others, charged in his account, - - -		21	19	9	
		£445	8	11	
" Paid discount at the Bank, per note,	£2 11 0				
" By cash,	300 0 0				
" By cash, 19th November 1817, and interest to this date, -	102 11 6				
" By account of law affairs, -	5 0 11				
		410	3	5	
" 1819.		£35	5	6	
" Jan. 23. A remittance received this date, £ * or proceeds,		76	3	5	
					111 8 11
					£537 4 6
" May 28. By cash, - -		-		-	100 0 0
" By account of law business,		-		-	15 7 9
					£652 12 3
" June. A remittance received this day for - -		£289	16	1	
" Say to be paid to J. Scoular from it, - -		50	0	0	
					189 16 1
					£462 16 2

The last remittance was contained in a bill which was at this time indorsed by Scoular to Megget, who, on the other hand, granted Scoular a bill for £50, which, after various renewals, was ultimately retired by the

* This sum is obliterated in the original.

latter. Matters remained in this situation till 1826, when Megget's estates were sequestrated. In the state of affairs given up by Megget, there was no mention of any debt being due him by Scoular; while, on the other hand, Scoular claimed to be ranked on the estate for a sum of £316, as the balance on the accounts between them. This balance arose by leaving out of view the original debt due by Scoular prior to his sequestration, and debiting Megget with the remittances from Jamaica, and crediting him with his payments or advances subsequent to the discharge. The trustee having ranked this claim, a complaint was presented by Roy, a partner of Megget, and creditor to a small amount, on the ground that Scoular had, subsequently to his discharge, agreed to allow the money recovered by Megget from Jamaica to be applied in payment of the original debt in full, and consequently he could not now claim repetition of the sums so applied. In the record made up under this complaint, Scoular stated, that "previously to the approval of the composition, the respondent had told his creditors generally, and Mr. Megget in particular, that if ever he had it in his power to pay their debts in full, he would do so; but he granted no obligation to Mr. Megget, binding himself to make such payment—both because this would have been an illegal preference, and because he had no right to deprive his cautioners of the relief to which they were entitled in the first instance."

Roy averred that, subsequent to the discharge, Scoular repeatedly expressed his anxiety that Megget should be paid the original debt in full, and verbally came under an obligation, that in the event of the Jamaica debt being recovered, it should be retained by Megget in payment thereof. The evidence founded on by Roy in proof of this obligation was the letter of Scoular, and relative state of accounts above quoted; and it appeared that, at the time of writing this letter, Scoular had indorsed to Megget the bill for the last remittance, and that he had granted an obligation in regard to the advance of £100 made by Megget in May 1819, engaging to repay it, with interest, in June following. These circumstances, added to the length of time during which no demand was made by Scoular, Roy contended, afforded sufficient proof of the agreement on Scoular's part to allow the remittances to be applied to the payment in full of the original debt, and could not be referred to as indications of an agreement prior to the discharge, because Scoular himself averred in the record that no such prior obligation had been come under by him.

To this it was answered by Scoular—

1. The undisputed fact that Megget recovered from Jamaica funds belonging to Scoular, establishes the claim for them against his estate. In defence against this claim, Megget or his creditors must establish a counter claim, independent of the original debt extinguished by the discharge, and constituted subsequently thereto. But the letter and state founded on prove no more than that Scoular was desirous, if he could, to pay Megget in full, but do not prove any obligation, contracted subsequently

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to the discharge, which could have been enforced against him. They may as readily be referred to an obligation prior thereto, (which would be ineffectual,) or to the general promise made by Scoular to his creditors to pay them in full when he had it in his power, which could infer nothing more than a nudum pactum, from which he was entitled to resile.

2. The obligation to repay the advance of £100 had been made when Megget had only a very trifling balance in his hands from the remittances, and when he had received a bill for £76, but which was not payable till the month of June thereafter; and the obligation was granted to secure Megget, in case the bill should not be honoured. As the bill, however, was duly honoured, no demand was made by Megget for the £100, which, together with his giving up no debt as due by Scoular to his estate, showed his own understanding that the advances made by him in the course of the remittances were not loans, but truly payments to account of these remittances.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:*—"Finds that the estate of John Scoular, the respondent, having been sequestrated in 1815, the sequestration was wound up, in May 1816, by a composition-contract;—that, in that sequestration, Mr. Thomas Megget, as a partner of the company of Aitken Megget and Co., was ranked as a creditor for a debt of between £1100 and £1200, on account of bills subscribed by that firm, which he had paid;—finds it admitted that the stipulated composition on this debt was fully paid;—finds it established by the evidence founded on and produced, that in the end of the year 1818, and in the year 1819, an agreement or understanding existed between the said John Scoular and Thomas Megget, that the full amount of the original debt should still be recognised as a lawful debt to be paid by the said John Scoular to Thomas Megget;—that at the date of the settlement of John Scoular's sequestration in 1816, there was a debt due to his estate by George Thomson of Jamaica, which was then considered of so doubtful a nature, that it was only valued at 5s. in the pound;—that the whole of that debt having been subsequently recovered by the agency of Mr. Thomas Megget, it appears to have made

* "NOTE.—It is impossible to convert the general hypothetical promise to all the creditors into a special illegal compact with Mr. Megget to give him an undue preference; and the trustee's assumption that there was a special agreement with Mr. Megget about the time of the composition, besides being too vague in itself, is supported by no evidence; and if it refers to a time previous to the approval of the composition, is contradicted by the respondent's express statement on the record. The cases quoted have no application, unless the fact be assumed. It is certainly an awkward circumstance that Mr. Megget did not include the balance acknowledged to be due by Scoular in the state given up to his creditors, not removed by the fact that the claim became known to the trustee. But this is by no means enough to prove the allegation necessary to the respondent's case, even if he had made a relevant averment."

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part of the agreement between him and the respondent Scoular that the money so recovered should be applied towards extinction pro tanto of the whole debt due to Mr. Megget, as it stood in 1819;—finds, in particular, that the last remittance was made by a bill for £239. 16s. 1d. which was taken payable to the said John Scoular himself, and was indorsed by him to Mr. Megget, and that it appears from Mr. Megget's books that that bill lay with Mr. Megget for seventy-five days, and was then discounted by him fifteen days before it became payable;—that it appears from a letter and state holograph of Scoular, that on the 23d of June 1819, the accounts between the parties were ascertained on the principle above stated, and that thereby a large balance of £462. 16s. 2d. appeared to be still due to Mr. Megget;—finds it expressly stated on the record, by both parties, (respondent's statement, art. 9, and answer by complainer,) that previous to the approval of the composition in Scoular's sequestration, "he granted no obligation to Mr. Megget, binding himself to make such payment" of the former debt, other than a general promise to all the creditors, that if ever he had it in his power, he would pay their debts in full;—that the estate of Mr. Megget having been sequestrated after the lapse of some years, a claim was, at a late period, made by the said John Scoular for a debt of £316. 17s. 11d. as the balance, with interest, of the sums recovered by Mr. Megget from the said George Thomson, as above set forth, which claim has been sustained by the trustee;—that it being sufficiently instructed that in the year 1819 the respondent did agree to allow the whole money recovered from George Thomson to be applied in payment of the full debt of Mr. Megget, as set forth in the state made up by the respondent himself, and that the money was actually so applied, it was incumbent on the respondent, in claiming on the estate of Mr. Megget, in competition with his creditors, to aver and to prove that such agreement and application of the money in 1819 took place in fulfilment of an obligation illegally undertaken by the said respondent before the settlement of the composition-contract in his own sequestration;—that the respondent has not made any such averment, but, on the contrary, has expressly stated the reverse on the record; and finds that there is no evidence, and no legal ground, for presuming that any such illegal compact was entered into;—finds no evidence that any fraudulent or undue means were used by Mr. Megget to induce the said respondent to agree to the application of the funds recovered to the liquidation of his debt, on the footing above stated, supposing that such a plea were competent without a reduction: Therefore, on the whole, finds that the respondent has not averred and proved sufficient grounds, in fact and law, in support of the claim made in this sequestration; alters and reverses the judgment of the trustee complained of, and decerns."

Scoular having reclaimed, the Judges delivered the following opinions:—

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Lord Cringletie.—With great diffidence I presume to differ from the Lord Ordinary; but I cannot acquiesce in the interlocutor, as I think it assumes facts which are not proved. If I saw any evidence of the constitution of a debt after the discharge, I would be satisfied with the interlocutor. That was the case of Sutherland v. M'Kay, (ante, VIII. 313,) where a bill was granted and renewed repeatedly. What I want to see is the obligation to pay the whole debt. There is no evidence of the date of the alleged arrangement. That I want to see, and whether there was any arrangement made at all. There was no written obligation granted—all depends on the alleged verbal agreement. Scoular admits there was no improper obligation, but denies any obligation at all. It is said that the state of accounts was admitted by Scoular to be correct, or at least not objected to. All that this proves, however, is a sort of understanding. I see that £300 was paid back to Scoular out of the first remittance, which is against the presumption that all was to be applied in payment of the debt. The letters show that Scoular did not want to quarrel with Megget, but do not prove any obligation on his part. There seems to have been a promise or understanding merely. No value is pretended to have been given. It was, at the best, pactum nudum; and, though proved, there would be locus pœnitentiæ, so that Scoular might recal. It is on the absence of legal obligation that I go.

Lord Glenlee.—On the whole, it rather appeared to me that the judgment of the Lord Ordinary was the safest that could be pronounced. I can hardly suppose a case where payment is voluntarily made after discharge, in which there would be no ground to suspect an agreement previous to it; but it wont do to assume this, particularly when both parties agree that there was no such arrangement. It is true there is no separate reservation of this debt; and if Megget was pursuer, he might have found difficulty in making it out. But that is different from the real state of the case, which is this—You admitted my right to retain the Jamaica debt;—whatever was the ground of it, you admitted my right to retain. What sort of figure would Scoular have made in an action for repetition, after recognising the accounts? And I think he is in the same situation here; and he cannot say the agreement was before the discharge, as he is precluded by his own statement.

Lord Justice-Clerk.—I am of opinion that no violation of the Bankrupt Act has been proved by the evidence, but I am a good deal struck by the observation of Lord Cringletie, that there is no evidence of any agreement abstracted from an illegal preference between Megget and Scoular, though there is something like a private understanding. But the question is, whether there was such an agreement as to bar the present claim? The Lord Ordinary says nothing on that head, and I would wish a little more discussion regarding it.

> The Court then ordered Cases "on the point how far there is any sufficient evidence of the constitution of an effectual claim on the part of Mr. Megget to the payment of the balance of the debt originally due him by Mr. Scoular, subsequent to the discharge of the latter under his sequestration."

On advising these Cases, the Judges who had been present at the former ad-

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vising repeated the opinions then expressed by them; and Lord Pitmilly, who was now present, concurring with Lord Glenlee, the Court stood equally divided. After allowing the cause to stand over for further consideration, and being still equally divided, they appointed the papers to be laid before the other Judges for their opinion.

The following opinions were returned:—

Lords President, Craigie, Balgray, Gilies, Mackenzie, Corehouse, Newton, and Fullerton.—We are entirely of the opinion expressed by Lord Moncreiff, Ordinary, in his note on this case—1. That there is no evidence, nor even allegation, that at the time of the agreement to the composition by Scoular, there was any special promise or obligation by Scoular to Megget to pay his debt in full, notwithstanding his agreement to accept of a composition in common with the other creditors. 2. That subsequently, in 1818 or 1819, Scoular did agree, that if Megget could recover Thomson's debt in Jamaica, he should be at liberty to apply it towards payment of his claim, beyond the amount of the composition received;—that accordingly Megget did recover that debt, and, as far as appears, entirely by his own exertions, and at his own risk and expense; and therefore we are clearly of opinion, that, in terms of the agreement, Scoular was bound, both in equity and in law, to allow Megget so to apply Thomson's money to the liquidation of the surplus due to him by Scoular beyond the composition.

Lord Medwyn.—I entirely concur in the first branch of the preceding opinion, and also in the conclusion arrived at in the second branch, except that I cannot by any means express myself in such decided terms; but, upon the whole, looking to the transactions of the parties, and the correspondence which passed between them, and the length of time that this money has remained in Mr. Megget's hands, although there be no legal claim for payment of what yet remains to make up the sum originally due by Scoular to Megget, Scoular, I think, can have no right to reclaim what has remained so long with Megget, upon no other assignable reason than the understanding that he was to retain it for his old debt.

The Court then refused Scoular's reclaiming note, and adhered to the interlocutor of the Lord Ordinary.

T. Megget, W. S.—R. M'Farlane, W. S.—Agents.

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June 21. 1831. Turner v. Cuthbert &c.

DAVID TURNER, Advocator.—*Keay—Cowan.*
MRS. CUTHBERT and HUSBAND, Respondents.—*Neaves.*

Jurisdiction—Stat. 4. Geo. IV. c. 97.—The Sheriff has jurisdiction, as Commissary, to entertain an action for slander concluding, with concourse of the procurator-fiscal, for damages, fine, and palinode, under the stat. 4. Geo. IV. c. 97.

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1st DIVISION. Lord Newton. D.

MRS. CUTHBERT and husband, innkeepers in Ayr, raised an action, with concourse of the procurator-fiscal, before the Sheriff as Commissary of Ayrshire, against David Turner, merchant in Ayr, setting forth, that "albeit the calumniating, defaming, and injuring any persons in their good name &c., as well as insinuating that houses kept by them are of bad fame &c., are crimes," &c., yet the defender had calumniated Mrs Cuthbert by representing her as the keeper of a brothel; and concluding, "Therefore the defender should be ordained, by decreet of me or my depute, not only to make payment to the private pursuer of the sum of £100 sterling in name of damages and expenses, and fined and amerciated in the sum of £10 sterling, payable to the procurator-fiscal of Court, to be disposed of as I or my depute shall think proper and direct, but also be ordained to compear before me or my depute while sitting in judgment, and repeat and subscribe a palinode or recantation, acknowledging the foresaid defamatory expressions to be false and groundless, and to ask pardon for the same; and to be otherwise punished according to his crime; conform to the laws and daily practice of Scotland, used and observed in the like cases."

The defender denied the libel, and a proof was allowed, on advising which, the Commissary found that "the defender used very improper and unbecoming expressions, tending to hurt and injure the pursuer's character and reputation, &c.; therefore found him liable to the private pursuers in the sum of £2. 2s., with expenses of process."

Turner advocated, and pleaded, inter alia, 1. That as the action was prosecuted ad civilem effectum for damages as its substantial object, it was incompetently brought before the Sheriff qua Commissary; and, 2. That a conclusion for palinode was incompetent where damages were concluded for; at least the insertion of such a conclusion did not, since the act 4. Geo. IV. c. 97, create a Commissary jurisdiction.

Cuthberts answered—That the action, as laid, was proper to the Commissary Courts, and incompetent before the Sheriff, except as Commissary.

The Lord Ordinary ordered Cases to the Court on the question of jurisdiction, and issued the subjoined note.*

* "NOTE.—The Lord Ordinary has been induced to report the point of competency in this case, which is a very unimportant one on the merits, as he understands it to be of consequence to fix the limits of the jurisdiction of the two Courts, with a view to the interest of their respective clerks. The only circumstance which can have the effect to take the present action out of the operation of the statute is the conclusion, for palinode; but the Court seems, in some late cases, to have expressed doubts as to the propriety of such a conclusion in cases similar to the present."

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Pleaded by Turner—

The statute 4. Geo. IV. c. 97, which constituted Sheriffdoms into Commissariots, enacts, by § 7, "that no Inferior Commissary, as established by this act, shall possess or exercise any jurisdiction in such actions, or in any cases to which the jurisdiction of the Sheriff is now competent." If, therefore, the action, as laid, could competently have been raised in the Sheriff Court prior to that statute, it was now incompetent to bring it in the Commissary Court. Originally, all actions of slander, even those concluding ad civilem effectum for damages, were exclusively proper to ecclesiastical jurisdiction. This was not because of any special conclusion in the action, whether for palinode, fine, or damages, but because of its subject-matter,—slander being viewed as an ecclesiastical offence. But a change had long ago occurred in this respect, and actions of damages for slander were now common both in the Inferior and Supreme Courts. Had there been no conclusion for palinode, it was clear Cuthberts' action was competent formerly, and now therefore exclusively, in the Sheriff Court. But the palinode was the mere remnant of an antiquated form; it was never enforced by any diligence ad factum præstandum, and it had been repeatedly disapproved of in judgments of this Court. There were several cases in which a palinode had been concluded for along with damages in a Sheriff Court, or in the Court of Session, in the first instance; and the jurisdiction was sustained, though objected to.

Pleaded by Cuthberts—

The right of a party defamed to conclude for palinode, as well as for pecuniary reparation, was one that had long been recognised in Scottish Courts, and could not be abrogated without an Act of Parliament. It was not obsolete, but a matter of constant practice, to conclude for palinode, as appeared from the Act of Sederunt framed by the Court on the 21st February 1824, in reference to the statute in question, by which a rate of fees was fixed, and a form of decree prescribed for the special case of a conclusion for palinode in the Inferior Commissary Courts. No authoritative judgment had ever been pronounced sustaining the jurisdiction of the Sheriff, or of the Court of Session, in the first instance, as to any conclusion for palinode.

Lord Balgray.—The right to conclude for palinode is acknowledged by the law of Scotland; but it is a matter within the discretion of the Judge to say in what cases he will sustain that special conclusion, and decern for palinode. This may be a matter of delicate jurisdiction; but we cannot hold it to have been incompetent to insert that conclusion in Cuthberts' summons. It is, however, a conclusion which necessarily made the action proper to the Commissary Court, to which indeed it has been appropriated from the earliest times. I think the action was therefore competently brought before the Sheriff as Commissary.

Lord Craigie.—I take a different view. The conclusion for palinode has for a long time past been generally, if not universally, discountenanced and

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rejected. It exposes a Court to the risk of ordaining a man judicially to retract, as false, a charge which he may conscientiously believe, or even know to be true, though he had no means of proving it. Acting upon this general principle, I had occasion, not long ago, as Lord Ordinary, to remit to a Commissary with instructions not to sustain a conclusion for palinode. I therefore conceive that the insertion of this conclusion, in terms of an obsolete and inexpedient practice of former times, would not have had such an effect on the question of jurisdiction, before the late statute, as to make the Sheriff incompetent to entertain it then, and therefore I hold the objection to the jurisdiction of the Commissaries to be well founded now.

Lord Gillies.—I am of the opinion first delivered. Whether the palinode should be a part of our law is, a question for the consideration of Legislators, not of Judges. The point is, whether the palinode has been for some centuries, and now is, a part of the law of Scotland; and I cannot hesitate in holding it to be so. Until it be abolished by Parliament, it must remain a part of our laws. And when I look to the terms of the A. S. Feb. 21. 1824, which gives an express formula for the extract of a decreet by the Commissaries when they find a party bound to sign a palinode, it is quite impossible for me to hold the palinode as obsolete, or to disregard its existence in a summons. But such conclusion, I conceive, made the action proper to the Commissary Court, and I would therefore repel the objection taken to the jurisdiction.

Lord President.—I take the same view. The action of slander originally belonged to the Ecclesiastical, and afterwards to the Commissary Courts. The conclusion for palinode is still proper to the Commissary Court; and although it is a question of judicial discretion when this conclusion ought to be enforced, I can conceive many cases where it may and should be so. Accordingly provision is expressly made, in reference to this, in the A. S. which has just been referred to. I concur, therefore, with the Judges who are for repelling the objection to the jurisdiction.

The Court then "repelled the objections to the competency of the action," and found the advocator liable in expenses.

Advocator's Authorities.—4. Geo. IV. c. 97. § 7; 1. Ersk. 5. 30, foot note; Crichton, Jan. 28. 1808, (App. No. 18. Jurisd.); Engl. (Canon Law), l. 5, t. 6, § 11; Fergusson (Consistorial Law), p. 23; Chalmers, Feb. 19. 1790, (6083); Roger, July 1. 1823, (ante, II. 444); 2. Mackenzie, t. 10; 4. Bankt. 13. 6. and 12; 1. Ersk. 5. 26; Wilkie, Feb. 15. 1765, (7360); Bruce, Dec. 20. 1793; Borthwick's Law of Libel, p. 409 and 150.

Respondents' Authorities.—A. S. Feb. 21. 1824; Balf. Pract. 664; 2. Bankt. p. 548; 1. Ersk. 5. 30; Hamilton, June 19. 1750, (7682); Borthwick, p. 182 and 206, and App. No. 41; Fergusson (Consist. Law), 233; Tweedall, June 15. 1821, (ante, I. 70.)

Hunter, Campbell, and Cathcart, W. S.—R. and A. Kennedy, W. S.—Agents.

JOHN CALDER, Pursuer.—*Murray.*
G. AITCHISON and Co., Defenders.—*D. F. Hope—Sol.-Gen. Cockburn.*

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Proof— Cautioner. — A letter binding a party 'to guarantee an agent for four per cent. for commission and guarantee,' being put in evidence at a jury trial; and merchants being tendered to prove 'what they understood to be the effect and import of the undertaking in the letter'—Held,—1.—That such evidence was inadmissible, as it belonged to the Court to interpret the obligation;—and,—2.—That the letter merely bound the party to make good the price for which the agent should sell, and that such agent should possess ordinary skill and good character.

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1ST DIVISION.
Jury Court.

CALDER, fish-curer in Leith, addressed G. Aitchison and Co., merchants there, on the 12th of September 1820, as follows:—"Gentlemen, I beg to consign to you 550 barrels white herrings, which I request you will get forwarded to Konigsberg, and to be sold there on arrival by your agent, at the best price the market will afford; and I hereby also authorize you to freight the brig Chance of Largo, Captain Thomas Smith, to carry said cargo at the rate of 3s. per barrel in full. I have to request that you will order the same to be insured at 21s. per barrel, say £577. 10s. sterling on the whole, it being understood that you are to advance me at the rate of 16s. per barrel on the quantity shipt, agreeably to what your Mr. Aitchison mentioned; and further, that you are to guarantee your agent at Konigsberg, on being paid at the rate of four per cent. for commission and guarantee. (Signed) John Calder.—P.S. Insure at 23s. instead of 21s. (Signed) J. C."

The quantity of herrings consigned was afterwards increased to 700 barrels; and Aitchison and Co. consigned them to Oppenheim and Warschauer, a house of high respectability in Konigsberg, who sold them through the medium of an agent there. In January 1821, an account-sales was rendered by Aitchison and Co. to Calder, in which they charged 'Commission, 2½ per cent.,' and 'Del credere, 1½ per cent.'

Calder, alleging that the consignment had been disadvantageously and unwarrantably sold by Oppenheim and Warschauer, raised an action against Aitchison and Co., which was remitted to the Jury Court, where the following issue came to be tried:—"It being admitted that, in the month of September 1820, the pursuer consigned to the defenders, in terms of a letter from the pursuer to the defenders, dated the 12th of September 1820, 700 barrels crown brand white herrings, for the purpose of being forwarded to Konigsberg, and there sold: Whether the defenders failed to perform their duty as commission-agents in regard to the disposal of the said herrings, to the loss, injury, and damage of the pursuer?"

The Jury having found for Aitchison and Co., a Bill of Exceptions was tendered by Calder, which, after mentioning that certain correspondence between Aitchison and Co. and Oppenheim and Warschauer, rela-

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tive to the disposal of the consignments, had been put in evidence, and also witnesses adduced as to the general rate at which herrings were then selling in the Konigsberg market, and the mercantile fitness of the foreign agent who sold the herrings, set forth that "the counsel for the pursuer, in further maintenance of the said issue, did propose, and offer to give in evidence by William Connal, an extensive commission-agent in the city of Glasgow, and by other merchants of extensive dealings, and well acquainted with the usage of trade, what they understood to be the effect and import of the undertaking in the said missives or letters of the 12th of September 1820, given in evidence as aforesaid, in which the defenders stipulated to guarantee their agent at Konigsberg, upon condition of being paid at the rate of four per cent. for commission and guarantee; and that the guarantee contained in said letters is understood by merchants to amount to an engagement upon the part of the persons so undertaking to be responsible that their said agent should act in conformity to the instructions he received, and that they were responsible for his deviating from those instructions, or committing any breach of his duty as agent, in selling the goods consigned at a lower price than he was directed, or below the market price at the time, or in a manner injurious to the owner of said cargo. Whereupon the defenders' counsel, learned in the law, objected that the evidence of merchants to prove their understanding, according to usage, as to the nature or extent of the obligation undertaken for the agent in a foreign country by those missives, is not admissible evidence; that it was a pure question of law for the Court, or raised a question as to the construction of the letters; and that it was the province of the Court to construe the letters, as in the case of any other written instrument; and that it is incompetent to examine any merchants or other witnesses with reference to the practice, usage, or understanding of merchants in that matter. And the said Lord President and Lord Chief Commissioner did then and there declare it to be their opinion that such evidence of merchants was inadmissible. Whereupon the counsel for the said pursuer did then and there insist, before the said Lord President and Lord Chief Commissioner, that the said several matters so proposed to be given in evidence by the counsel for the pursuer were admissible, and ought to have been received, and did tender their exceptions to the opinion so given by the said Judges. The counsel for the pursuer here closed their case, and the counsel for the defenders did then insist that the Court should direct the Jury to find a verdict for the defenders; and did contend that, in sound construction of said letters of the 12th of September 1820, the defenders did not incur an obligation to guarantee their agent at Konigsberg, as contended for on the part of the pursuer; but the undertaking or guarantee is no more than what is known in the law as an obligation del credere—that is to say, an obligation to make good the sum or sums for which the goods might be sold; and that no further obligation was undertaken on the part of the defenders, on account of their agent, other

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than that they should employ a person of ordinary skill and good character. But the counsel for the pursuer did contend that the defenders were bound by law, and by their special undertaking by their said letter-missive, to indemnify the pursuer for the loss he had sustained by the misconduct of the defenders' agent at Konigsberg; and that the Jury ought to be directed to find a verdict for the pursuer, and to assess the damages. But the said Judges did give it as their opinion, that the letter-missive did not in law, nor according to the true meaning of the said letter, create any obligation on the defenders, other than that which was contended for by their counsel as aforesaid.; and the said Judges did accordingly direct the Jury to find a verdict for the defenders, and the Jury did then and there deliver their verdict for the defenders. Whereupon the counsel for the pursuer did tender their exception to the said direction, and did insist,—1. That the Jury ought to have been directed to take into their consideration the missives and other evidence laid before them; and that the construction of the terms thereof, being such as are in use amongst merchants, should have been left to the Jury, to find according to their understanding of the same; and if they were of opinion that damage had arisen from the defenders' agent having failed to obey his instructions, or perform the other duties for which the defenders, according to the understanding of merchants, had made themselves responsible, they should assess damage, and find a verdict for the pursuer. 2. That if the Court did not leave the construction of the terms used to the Jury, they ought to have directed that the obligation undertaken by the defenders was not by law merely of the nature of a del credere commission upon sales made by the agent, but amounted to a guarantee of the conduct of the agent generally; and being for a valuable consideration, it made the person undertaking the said guarantee liable to answer that the agent should obey the instructions sent him, and perform his duty in other respects; and that if they were of opinion that it had been proved that the defenders' agents had not obeyed their instructions, or performed their duty, they ought to assess the damages, and find a verdict for the pursuer; and did further request the said Judges to sign the said bill of exception."

After hearing counsel, the Judges delivered the following opinions:—

Lord Balgray.—I approve of the proceedings at the trial. It seems to me to have been an unwarrantable proposal which was made to adduce merchants to prove "what they understood to be the effect and import of the undertaking in the said missive or letter of 12th September, in which the defenders stipulated to guarantee their agent at Konigsberg" for four per cent. "for commission and guarantee." Had they been examined in such terms, the witnesses would just have been constituted judges of the cause, and allowed to explain the letter of obligation, which it lay with the Court to interpret. The Court therefore acted rightly in not delegating their proper functions to the proposed witnesses; and I think they put the true construction upon the obligation. They could not wrest it beyond its usual and well-known legal import. I am

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the more confirmed in this conclusion when I observe the rate at which the per centage is charged, and from noticing that when the account sales is rendered to the pursuer early in 1821, stating 2½ per cent. for commission, and 1½ for del credere, and drawing out the nett proceeds, he makes no objection at the time, nor for a considerable period afterwards. I think the trial was conducted according to law and justice, and I am for refusing the bill.

Lord Gillies.—I am of the same opinion. The offer of proof here was of a peculiar kind. If it had been sustained, it would just have amounted to a reference of the cause to these witnesses as judges, in construing a written legal obligation.

Lord President.—I remain of the same opinion which I expressed, and which governed me at the trial. The Lord Chief Commissioner, who sat along with me, concurred in thinking that this letter, undertaking a definite obligation, fell to be construed by us, as Judges, in the same way as any other written obligation, a contract of lease, or of marriage, or any other which might be put in evidence. Had the letter been of a more general or undefined tenor, and yet common in commercial practice, and a question had arisen as to the amount of the obligation undertaken on the one hand, or the remuneration fairly due on the other, that might have been a case for having recourse to the evidence of mercantile men. But here was a special contract, by which Aitchison and Co. undertook "to guarantee their agent, on being paid at the rate of four per cent. for commission and guarantee." We held this to be clearly a legal obligation by them to make good the price of the herrings, and to employ an agent of fair skill and character to sell. I concur, therefore, with your Lordships in refusing this bill.

Lord Craigie was understood to assent.

The Court accordingly disallowed the bill.

Pursuer's Authorities.—Thomson, July 16. 1754; Hood, Jan. 16. 1818, (F. C.)

G. Gentle,—Brodies and Kennedy, W. S.—Agents.

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Earl of Mansfield, Advocator.—*Murray—Currie.*
Ralph Scott, Respondent.—*Skene—Ivory.*

Master and Servant.—Circumstances in which, a master having agreed to give his servant, in addition to wages, a present of £20 as an encouragement to assiduity, it was held that the contract was renewed in all its parts by tacit relocation from year to year.

June 21. 1831.

1st Division. Lord Newton. D.

Scott, in March 1829, raised an action before the Sheriff of Perthshire against Lord Mansfield, stating that, in and prior to the year 1810, he had been employed as a hedger and haymaker on his Lordship's property of Caenwood near London, and that, on the 20th of April of that year, he entered into this minute of agreement with his Lordship's overseer, Andrew Middlemiss:—"It is hereby agreed and finally understood that Ralph Scott, from the 26th of May 1810, is to take and fulfil the office of hedger and ditcher on the farm and estate of Scone in a good and workmanlike manner, whereof the same conditions as his predecessor hath already been paid is still to become his wages from the superintendent and

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tenants of the said farms. And as conscious of his assiduity towards the work, as addition to the above, the Earl of Mansfield is to make him an allowance of £20 per annum. Done by us at Caenwood, 20th April 1810 (Signed) Andrew Middlemiss, for Lord Mansfield. R. Scott." That afterwards, on the 14th of May, the following minute was executed between them :—" It is agreed between Andrew Middlemiss for Lord Mansfield, and Ralph Scott, that Ralph Scott is to go to Scone—is to superintend the hay harvest—is to bind hay, and instruct others in that process; that he is also to be employed as hedger—to have the care of the fences upon Lord Mansfield's farm, and of the fences of such tenants as do not choose to keep them in order by their own labourers. He is to receive the same wages as were paid to the hedger who was lately employed; and when at harvest or other work, he will receive the wages of the country. But, in addition to these, as an encouragement for his greater assiduity, Lord Mansfield is to make him a present of £20; and it is also understood that Scott is to continue in Lord Mansfield's service at all events till Whitsunday 1811, and until this agreement shall be terminated by the demise of either party. (Signed) Andrew Middlemiss, for Lord Mansfield. Ralph Scott. Caenwood, 14th May 1810:"—That he accordingly went to Scone, where he performed the stipulated duties, and continued by tacit relocation to act in the above capacity; and that although he had been paid the ordinary wages of his labour, yet he had never received payment of any part of the annual allowance of £20, and therefore he concluded for payment of £380, being the amount during 19 years, and periodical interest.

In defence Lord Mansfield stated, that Middlemiss had no authority to bind him to pay Scott £20 per annum, but only to give him a present of £20 for the first year; that accordingly this was all that was agreed to in the minute of the 14th of May, which must be held as superseding the former; that Scott had shown by his conduct that he had no such claim, because, although in poor circumstances, he had never asked payment of it, and, on the contrary, had got payment of his regular wages, and granted discharges without any reservation; that he and Middlemiss were on terms of intimacy, and it appeared that, in 1812, Scott, in place of asking an explanation from Lord Mansfield, had written to Middlemiss, and got a letter from him with a view to support this claim; but that nevertheless he had never made it till he was about to be removed.

The Sheriff found " that the minute of the 20th of April bears that an allowance of £20 was to be made to the pursuer per annum in addition to his wages, as conscious of his assiduity towards the work; and that the subsequent minute of the 14th of May bears, that as an encouragement for his greater assiduity, the defender was to make him a present of £20; and it was understood that the pursuer should at all events continue in the service till Whitsunday 1811;—that no subsequent alteration having been made on the terms of bargain, the pursuer is entitled to the said allowance yearly during the time he remained in the defender's ser-

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vice at Scone; but that not having demanded payment as it fell due, he is only entitled to interest at the rate current at the Bank in Perth, where the defender's business was transacted;" and therefore decerned, with expenses.

Lord Mansfield brought an advocation; but the Lord Ordinary repelled the reasons, and found expenses due.*

His Lordship then reclaimed.

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* "NOTE.—The case is not without difficulty; but the Lord Ordinary sees nothing sufficient to induce him to alter the judgment of the Sheriff. He is of opinion that the question must be regulated by the minute of the 14th of May 1810, and that its terms, when clear, cannot be controlled by any thing in the previous minute of the 20th of April. But it does not appear certain, looking at these alone, that the £20, though denominated a present, was not meant as a part of the wages or allowance which the pursuer was to receive for his services during the year, for which he was engaged by the minute. It is stated to be in addition to the wages which the pursuer's predecessor had been in use to receive; and, considering the circumstances of the parties, it does not seem unreasonable that an addition to this extent should have been made. Besides, the cause assigned for giving it is one no less applicable to the services for subsequent years than to those of the first. It is not to be given because the pursuer might be put to expense in removing to Scotland, or for any reason exclusively connected with the year to which the missive relates; but as an encouragement for his greater assiduity—as a remuneration for his expected services during the year for which he is engaged. Of consequence, it may be not unreasonably inferred, that if the pursuer, without any further bargain, continued his services, which the defender, by suffering him to do, must be presumed to have approved of, he was entitled, under tacit relocation, to the continuance of the same emoluments. Now, if the minute can bear this interpretation, or if its meaning is in so far doubtful, the Lord Ordinary thinks it not incompetent to look to the previous minute for explanation. This document, which does not specify any particular period of service, expressly states the £20 to be an annual addition, and assigns the pursuer's expected assiduity as the reason. There seems no ground to presume that Middlemiss, who had no authority from his situation to hire servants for Scotland, would have entered into such a bargain for the noble defender without some communication with him; and the much more ample and distinct specification of the nature of the work to be performed, contained in the second minute, may sufficiently account for its existence, without supposing that Middlemiss had exceeded his instructions in the first. Indeed, had he acted so improperly, it is not likely that he would have been retained as the person to make the second bargain. It was argued, as proving the pursuer's mala fides, that having doubts as to the amount of his wages, as appears from the letter of Middlemiss to him of 8th May 1812, he did not apply to Lord Mansfield for an explanation. But the Lord Ordinary is not satisfied that this is a fair inference. It is not stated whether Lord Mansfield was or was not at Scone in spring 1812; but if he was not, it was natural for the pursuer, when his service for the second year drew near a close, to apply for an explanation to Middlemiss, the person who had made the agreement with him on the part of his Lordship, and having learnt from him that he considered the £20 to be an annual payment, to conclude that this was the case. The pursuer's accounts and receipts produced have no relation to his annual wages, and contain no general discharge of what might be due to him. The accounts relate entirely to specific pieces of work, mostly drains and dressing of grounds, executed in great measure by labourers employed under the pursuer, and his receipts are just for the sums specified in the accounts. It is, no doubt, somewhat strange that he should have allowed so many years to pass without any settle-

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Lord Balgray.—Looking at the whole case as one in which the agreement of parties, the locatio operarum, must be interpreted as of a bonâ fide nature, I see no ground for altering the interlocutor. I am not moved by the discrepancy in the terms of the two letters. Either of them supports the conclusion at which I arrive. Take even the last of them—it bears in gremio to be a mere agreement of a year's duration from Whitsunday 1810 to Whitsunday 1811. It expresses the duties and obligations of the parties; but, though not also expressed, it was clearly the duty of both, when the year was out, to explain the terms on which a continuation of the contract was to take place, if any change was contemplated by either. But if, in the absence of any express innovation, it clearly lay on the servant to continue to discharge the same duties as before, why is it not equally incumbent on the master to bestow the same remuneration in all respects? I think he was bound to do so. The duties imposed on Scott were not those of a mere ordinary servant, but of a much higher description. He was "to superintend the hay harvest—to bind hay, and instruct others in that process—to be employed as hedger—to have the care of the fences upon Lord Mansfield's farm, and of the fences of such tenants as do not choose to keep them in order by their own labourers." Then his remuneration is to be the former hedger's wages, or, at hay-making &c., "the wages of the country;" in addition to which, "as an encouragement to his greater assiduity," he is to get a present of £20, and is to remain in the service at least for one year. It is clear that such duties as these entitled him to higher remuneration than was due for his mere manual labour. Now it does not appear that he received more than common wages for his labour—just 1s. 6d. or 1s. 3d. per day, according to circumstances; and as for the accounts paid to him for dressing Scone park, these did not make any remuneration peculiar to Scott. It appears he did the work by contract, employing others under him; and if he had not made the cheapest offer, he would not have got the contract. He seems merely to have had the chance of the country in relation to these jobs, and this cannot be said to have given him any peculiar advantage. Now, as there must have been some inducement to cause him to quit London and come down to Scone, and as he was there to exercise a superintendence which implied a degree of superior intelligence on his part, I am satisfied that a mere labourer's wages were not to be his sole reward, and that the annual addition of £20 was due to him from year to year, so long as he remained employed under his agreement.

Lord Craigie.—I concur with Lord Balgray. Had Lord Mansfield intended to make so important a change on the first agreement of April as to convert the £20 from an annual payment into a mere donation, which was not to be repeated after the first year, I think it would have been his Lordship's duty to call the attention of the servant specially to a change which was to him of such vital importance. Indeed his Lordship would not otherwise have been acting with candour. I feel satisfied that no such change was intended by him. A question has now arisen at a distance of time, when the circum-

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ment of his wages; but £20 was undoubtedly due to him, and there is just as little appearance of his having asked for or been paid this sum, as there is in regard to any of the subsequent sums sued for."

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stances cannot be supposed to remain in his recollection; and he has therefore been induced to oppose a demand which I cannot but consider to be well founded when I look to the terms of the agreement of May 1810, as adverted to by Lord Balgray, and the other particulars of the case to which he has already spoken.

Lord Gillies.—My opinion concurs with those already delivered, though I do not look on the case as free from difficulty. The first letter is perfectly clear, and stipulates that the payments shall be per annum. Now, had so great a change been intended in the second as Lord Mansfield alleges, it must have more engaged the attention of the parties, and could not have passed over as a mere matter of course. Again, in 1812, when Scott had written to Middlemiss, inquiring, amongst other things, as to this payment of £20, Middlemiss answers that he is to consider it as payable per annum. As to the delay in settling this annual payment, I do not think it militates against the claim; for although the first year's £20 was confessedly due to him, yet he never asked it any more than the others.

Lord President.—Had Lord Mansfield paid the first year's £20, and never paid another, that would have been a decisive circumstance. But there is no proof that the first was ever asked or paid. The same cause which induced Scott to allow the first to lie over, would make him do the same as to the subsequent sums also. I am not therefore moved by Scott's delay to enforce his claim. On considering the terms of the second agreement, which, it is said, his Lordship dictated, and which is conceived in language very superior to that which is employed in the first minute, it is plain that it is meant to regulate the mutual duties and obligations of the parties for the term of a twelvemonth. When that term expired, and a second commenced, without any change on the agreement, what is to follow, except that by tacit relocation it was renewed for the second year upon the same terms as applied to the first? If there was no change made on the duties of the servant, where is there any evidence of such change having been made on the obligations of the master for the second and the subsequent years? I therefore concur in the interlocutor of the Lord Ordinary. But there seems to me to be an inadvertent discrepancy in his Lordship's note, which should be corrected. After stating as to the minute of the 14th of May, "that its terms, when clear, cannot be controlled by any thing in the previous minute of the 20th of April," he goes on to observe, as to the same minute, "If it can bear this interpretation, or if its meaning be so far doubtful, the Lord Ordinary thinks it not incompetent to look to the previous minute for explanation." These passages should be altered or reconciled."

Lord Gillies.—Your Lordship will observe, that it is only if the last minute be *clear*, that it is said it cannot be controlled by the terms of the first minute; and, on the other hand, it is only if the last minute be *doubtful*, that the Lord Ordinary looks to the first for explanation. Now, even if there were a discrepancy between these passages, yet, as they do not come under our review as part of an interlocutor, it is impossible to do any thing further than has been done by the notice which you have now taken of the circumstance.

The Court accordingly adhered.

J. L. Mitchell, W. S.—Gibson-Craigs, Wardlaw, and Dalziell, W. S.—Agents.

HARVEY, HALL and Co., Advocators.—*Skene—Rutherfurd.*
THOMAS BLACK and SON, Respondents.—*Keay—Moir.*

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June 21. 1831.
Harvey, Hall and Co. v. Black and Son.

Jurisdiction—Arrestment.—The creditor of a Scotchman domiciled abroad having used arrestments jurisdictionis fundandæ causa, and thereupon raised an action against him, on the dependence of which he again arrested in common form, and in which he obtained decree; and a multiplepoinding as to the funds arrested having thereafter been brought in name of the arrestees, to which the common debtor was edictally cited,—1.—Held that no jurisdiction had been created over him quoad the multiplepoinding, so that he had not been made a party thereto, and the process dismissed accordingly.—2.—Observed, that an arrestment in common form, proceeding on a bill granted by the debtor while on a visit to Scotland, for goods then purchased by him, could not compete with a subsequent arrestment, on the dependence of an action founded on the arrestments jurisdictionis fundandæ causa.

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2D DIVISION.
Ld. Fullerton.

ROBERT LIGERTWOOD, a native of Scotland, but resident, animo remanendi, as a merchant in Miramichi, came to Scotland in January 1827, and purchased goods from the respondents Black and Son, and the advocators Harvey, Hall and Co., to whom respectively he granted bills payable in Aberdeen, where they carried on business. These goods he transmitted to America, whither he returned without acquiring any domicile in Scotland. Black and Son raised diligence on their bill, and, on the 18th of January 1828, used arrestments in common form in the hands of debtors to Ligertwood; while Harvey, Hall and Co., besides raising diligence on their bill, and using arrestments thereon of the same date with those of Black and Son, further arrested in the hands of these debtors jurisdictionis fundandæ causâ, and thereupon raised action before the Sheriff of Aberdeen against Ligertwood for certain other sums owing them, on the dependence of which they used arrestments in the same hands, dated the 9th of July 1828, and thereafter obtained decree. The arrestees brought a multiplepoinding before the Sheriff, to which Ligertwood was called as a party, but without any additional proceedings to constitute jurisdiction against him. In this process Harvey, Hall and Co. claimed a preference, and Black and Son to be ranked pari passu with them. The question argued by the parties was, whether the arrestments of January 1828, used directly in virtue of the diligence raised on the acceptances, without founding a jurisdiction, were valid, and could compete with the subsequent arrestment by Harvey, Hall and Co., on the dependence of an action preceded by an arrestment jurisdictionis fundandæ causâ.

The Sheriff found that the common debtor "being a native of Scotland, arrestment against him, jurisdictionis fundandæ causâ, was unnecessary and inept;" and accordingly he ranked the claimants pari passu.

Harvey, Hall and Co. thereupon brought an advocation, in which they maintained that the arrestment on the bill, at the instance of Black and Sons, without previously founding a jurisdiction, was inept, and therefore could not compete with their arrestment on the dependence of the action proceeding upon an arrestment founding the jurisdiction; and they refer-

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red to the Juridical Styles, III, 705, and to the case of Grant as decided in the House of Lords July 5. 1825.

To this it was answered, that the common debtor being a native Scotchman, and having personally purchased goods in this country, and granted bills for the amount payable in Scotland, it was competent, without any arrestment jurisdictionis fundandæ causâ, to do diligence against him on the bill, and thereon to arrest in the hands of his debtors; Ersk. 1. 2. 19, and note, (Ivory's edit.)

The Lord Ordinary having reported the cause upon Cases, the Court, while they intimated an opinion that the arrestments on the bill could not compete with the arrestment on the dependence of an action proceeding upon an arrestment jurisdictionis fundandæ, doubted whether the multiplepoinding was competent at all, in respect the common debtor had not been made a party, and was not subject to the jurisdiction of the Court. On this point they allowed a minute by Harvey, Hall and Co., who stated "that the summons of multiplepoinding was executed against him edictally by virtue of letters of supplement; that the letters of advocation were executed against him edictally; and as he was in Scotland at the time the advocation was brought, it was also executed against him personally;" all which was substantiated by the executions in process.

The Court, however, holding that nothing which had been done was sufficient to subject him to the jurisdiction of the Sheriff, remitted "to dismiss the process as incompetent, in respect that no jurisdiction has been created in the Sheriff Court," and to find no expenses due to either party.

Lord Justice-Clerk.—After the fullest consideration, I can find no sufficient ground for sustaining the jurisdiction. We must look upon this man entirely as a foreigner; and as the Sheriff's interlocutor has no basis, it must fall to the ground.

Lord Glenlee.—Certainly this person must just be considered a foreigner: and unless you make the common debtor a party, how can any thing be done in the multiplepoinding?

Lord Cringletie.—What signifies an arrestment without a forthcoming!

Lord Meadowbank.—My opinion is the same, chiefly in consequence of the decision of the House of Lords as to the forum originis. The only point that occurred to me was this, that the House of Lords did not positively exclude the forum originis as an ingredient; but I cannot make up my mind to take it as an ingredient.

C. F. Davidson, W. S.—Gordon and Barron, W. S.—Agents.

Single Bills.

Hunter v. Duff's Trustees.

June 21. 1831. 2d Division.

Expenses—Auditing Accounts.—On the Auditor's report on the expenses in this case being moved, an objection was taken to his having disallowed a charge of £5 for copying 117 letters for the use of the Lord Ordinary, to enable his Lordship to refer to them more easily than by having recourse to the originals in process. The Court differed as to how far the expense was necessary or proper, but referred the point to the decision of the Lord Ordinary.

JOHN LEARMONTH and Others, Pursuers.—*D. F. Hope—Handyside.* ADAMS and Co., Defenders.—*Sol.-Gen. Cockburn—More.*

No. 418.

June 23. 1830.
Learmonth &c. v. Adams & Co.

Partnership—Title to Pursue.—Where the prospectus of a proposed Joint Stock Co. stated that the powers of the directors were to be defined by the contract; and a party applied for shares in reference to the prospectus; and a contract was extended, which differed materially from the prospectus; and a summons was raised by the "acting directors of the intended company," libelling on the prospectus and contract, and other procedure, and concluding against the party for a sum, "being the first call under the contract"—Found that the defender was not liable,—reserving to the parties having interest to insist for payment of the defender's share of the expenses necessarily incurred in the affairs of the intended company.

June 23. 1831.

1ST DIVISION.
Ld. Corehouse.
H.

ON the 1st of January 1825 a prospectus was issued "for forming a New Sea Insurance Company," &c., and stating that it was to be constituted "upon the following conditions, subject to such alterations or modifications as may afterwards be judged expedient:—1. That the firm and designation of the company shall be the Commercial Marine Insurance Co. of Scotland. 2. The capital stock of the company shall be one million sterling, divided into shares of £50 each, &c. 3. That as soon as applications for shares to the extent of £250,000 shall have been "tendered, and admitted by the interim committee of management, the company shall be held to be constituted, and a general meeting of the subscribers called, for the purpose of appointing a board of management for the first year. 4. That the management shall be vested in a chairman, deputy-chairman, and directors," &c.; no proprietor to be a director unless holding twenty shares. 5. A regular contract to be prepared by the board of management, &c. 6. "That the instalments upon the stock subscribed (which shall not exceed five per cent.) shall be payable in such manner, and at such periods, as the directors may appoint; and no instalments beyond that extent shall be demanded, unless the directors shall deem it absolutely necessary for the uses and purposes of the company. Applications for shares to be made in Edinburgh at James Smith, S. S. C." &c.

Adams and Co., wine-merchants in Edinburgh, on the 5th, addressed the following note to Mr. Smith:—"Sir, we request to hold 100 shares of the capital stock of the proposed Commercial Marine Insurance Co. of Scotland."

In the Edinburgh Advertiser of the 11th of February, an advertisement was inserted, bearing, in reference to the projected company, that "the capital, of which a considerable part has been already taken up, has now been fixed at one million sterling, divided into shares of £50 each;" and that it was probable that "the call or deposit, which will be required for carrying on the operations of the company, will not exceed five per cent. in whole on the amount of subscribed capital."

A general meeting of subscribers was called by advertisement in the same paper on the 1st of April, to be held on the 13th, to elect directors

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&c.; and intimating that it was in contemplation to include fire and life along with sea insurance. No directors, however, were chosen, but an interim committee of management was appointed to superintend subscription lists, and make arrangements for holding another general meeting. This meeting was held on the 1st of August, pursuant to advertisement and circulars, and sixteen directors were appointed "for the purpose of arranging the establishment, and commencing the business of the company." They were authorized to prepare a contract for the signature of proprietors, to arrange commencing business, and to appoint a manager and other office-bearers; and to have "full power, in reference to the original prospectus, dated 1st January 1825, on which the stock of the company was subscribed, to call for the payment of such instalments of the subscription as they may judge necessary for the purposes of the company." It was also provided, "that when the company is constituted by the signature of the contract, it is recommended to obtain," &c.

At a meeting of the directors, held on the 13th of October, "the meeting having gone over the list of applications for shares in the company, and having found that no intimation had hitherto been made of the shares having been granted to the individuals applying for the same, resolved that it was proper immediately to make intimation to those whose applications have been acceded to," &c. The intimation was in the form of a letter from the secretary, notifying that the directors had acceded to the application for shares, had appointed a manager, and that business was to be commenced on the 1st of January 1826. Annexed to the letter was a circular containing the directors' names, and stating the proposed capital at one million. One of these was sent to and received by Adams and Co.

A contract of copartnery was prepared and extended for signature; and it was resolved by the directors, on the 19th of January 1826, "that until the contract is signed, it is not expedient to give any instructions as to commencing the business of the company." The contract so extended provided, that the company should be called "the Commercial Marine Insurance Co. of Scotland;"—"that the capital stock of the company shall be for the present fixed at £300,000 sterling, divided into 6000 shares of £50 each;"—"that the office-bearers of the company shall consist of fifteen ordinary directors, including a chairman and deputy chairman, &c.; and no person shall be eligible as an ordinary director, who does not hold ten shares of the capital stock of the company;"—"that the following persons, having been chosen at the first general meeting of subscribers, are accordingly hereby nominated ordinary directors until the first annual meeting in July 1827,—viz. John Learmonth" &c.; and by § 17, "that there shall be advanced by the partners £2. 10s. per share, payable in two instalments; the first instalment, which shall be £1. 5s. per share, to be paid at the term of Candlemas 1826."

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These clauses of the contract were declared fundamental articles of the copartnery, only to be altered by a majority of three-fourths at a general meeting.

A printed copy of the contract was circulated among those who were considered as subscribers or partners, together with a request that they would sign the original, and a notice that the first instalment of £1. 5s. was payable on the 2d of February 1826. Thereafter, on the 30th of May 1826, a circular was addressed by the directors to the same parties, stating that the first instalment had been paid on so few shares, and so heavy an expense had been already incurred, that a general meeting was requested for the 8th of June, to determine whether the company should proceed, and how the expenses were to be provided for. Very few attended the meeting; the company was thenceforth held as dissolved, and the extended contract remained without a single signature.

The manager and secretary having made claims against the directors, a submission was entered into, and a decree issued against the directors for £1000 and £234 in favour of these officers respectively. On the 8th of August 1828, a general meeting was called, which approved of an immediate call being made upon the whole subscribers for 25s. per share, with interest from Whitsunday 1826, and authorized a committee to prosecute those who did not comply with this call.

About a twelvemonth thereafter, a summons was raised against Adams and Co. in the name of John Learmonth and nine others, designed "acting directors of an intended society or company bearing the name of the Commercial Marine Insurance Co. of Scotland," setting forth the above circumstances, and particularly that a prospectus had been circulated in 1825 in terms already quoted, with this variation, that the proposed capital, instead of being one million, was stated to be "not less than £500,000," and the instalments on subscriptions, instead of being limited to five per cent., were to be to twenty per cent.; "that the defenders had subscribed for, and obtained shares; that the pursuers, in consequence of the proceedings already detailed, and relying upon the powers given to them under the said prospectus, of making calls for the establishment and business of the said company, and upon the defenders' accession thereto, rendered themselves personally responsible" in various sums; that they were "entitled to make the foresaid call of 25s. per share effectual for indemnifying themselves for the advance or responsibility under which they may have come, &c.; and that the defenders, by becoming subscribing partners of the projected concern to the extent of 100 shares, became bound to pay the foresaid call of 25s. per share, and interest thereof from Candlemas 1826;" and therefore concluding that, in terms of the prospectus and the 17th article of the contract, they should be ordained to pay £125, "being the first call, at the rate of £1. 5s. per share, on the number of shares subscribed for by or allotted to them as aforesaid, with interest from the 2d of February 1826;"—"reserving always to the pursuers all claims competent to them

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against the defenders for payment of their rateable share of the loss sustained by the said concern," &c.

In defence Adams and Co. maintained—

1. That the pursuers had no title to pursue such an action as the "acting directors of an intended society or company," there being thus confessedly no existing company.

2. That the prospectus and contract libelled were essentially different from the prospectus circulated, and on the faith of which the defenders had agreed to take shares in the projected company, if ever that company should be established; and,

3. That no such company had ever been formed, and no contract containing the obligations libelled subscribed; and that as the reservation in the summons excepted from its conclusions the claim for the "rateable share of the loss sustained," which was the only thing that could have been relevantly asked, even if the defenders were liable to any effect, the action ought to be dismissed.

The Lord Ordinary, "in respect the action is brought at the instance of the directors of a company, or an intended company or society, termed the Commercial Marine Insurance Co. of Scotland, with powers which, it is stated, were to be defined in the contract of copartnery; and that it concludes for payment of an instalment said to be due by virtue of the seventeenth article of the said contract, while it is admitted that the contract was never signed by the defenders, nor by a great majority of the other subscribers; and while it also appears that the said intended contract was not in conformity with the prospectus issued, and on the faith of which the defenders became subscribers to the undertaking; sustains the defences, assoilzies the defenders, and decerns; reserving to the committee or board of management of the said intended Commercial Marine Insurance Co., or other party having title and interest, to insist for payment of the defenders' share of the expenses necessarily incurred in the affairs of the said company, or intended company, and to the defenders their defences against that claim as accords;" and found the defenders entitled to expenses.

The pursuers having reclaimed, the Court, without hearing the defenders' counsel, unanimously adhered.

H. G. Dickson, W. S.—D. Clyne, S. S. C.—Agents.

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Andrew M. Wellwood, Pursuer.—*Keay.*

Capt. John Ross, Defender.—*D. F. Hope—G. G. Bell.*

David Syme, Defender.—*Ivory.*

Trust—Reparation.—Circumstances in which it was held that statutory trustees had received, or become liable for, the price of a superiority sold by an heir of entail to his vassal; and that, having failed to invest it in terms of the statute, their representatives were bound to account for it.

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1st Division.
Ld. Corehouse.
D.

Wellwood v. Ross &c.

In the year 1806, Mr. Wellwood of Garvock, the heir of entail in possession, and as such the superior of property belonging to John Wilson, merchant in Dunfermline, sold to him the superiority at the price of £280. 12s. 8d. Mr. Wellwood's law-agent was Mr. Adair, W. S., and Mr. Wilson's was Mr. Syme, W. S. The statute, under which the sale was effected, (20. Geo. II. c. 50), provides, that the price shall be paid to trustees "appointed by the vender of such superiority, and the purchaser thereof respectively; and such trustees, and the survivor of them &c., shall lay out the monies arising from such sale" in buying and entailing land, or paying debts which affect the entailed estate. Pursuant to this sale, Wellwood disponed the superiority to Wilson, who was infeft. The disposition narrated that Wilson had paid the price to Messrs. Adair and Syme, trustees &c., "which I (Wellwood) hold as if paid to myself; therefore I do hereby sell, alienate," &c. This deed was dated the 19th of June 1806; and, of the same date, a joint deed of trust was executed by Messrs. Wellwood and Wilson, nominating Messrs. Adair and Syme, their respective statutory trustees, and also narrating that Wilson had paid the price of the superiority to them. The trusters then bound themselves to ratify the actings of the trustees in applying the money under the statute; "and they, the said Thomas Adair and John Syme, by acceptance hereof, promise and engage to invest the foresaid sum of £280. 12s. 8d. in terms of the foresaid Act of Parliament." The writer of this deed was a clerk of Mr. Adair.

In 1829, after the death of Messrs. Wellwood, Wilson, Adair, and Syme, Mr. Wellwood, now of Garvock, raised an action against Captain Ross, R. N., and Mr. Syme, advocate, as the representatives of Messrs. Adair and Syme, libelling on the proceedings already mentioned, and setting forth that the trustees had never applied the sum in terms of the statute, and concluding against their representatives to pay or consign the amount. Both defenders stated that they were entirely ignorant of the facts alleged, and that there was no legal evidence of the receipt of the money by the trustees; the only deeds referred to being subscribed, not by them, but by Wellwood and Wilson.

The Lord Ordinary having decerned in terms of the libel, the defenders reclaimed; and the Court granted a diligence for recovery of writings. The question, therefore, came to be one of evidence,—viz. Whether there was sufficient evidence that the money had been received by the trustees, it not being alleged to have been applied in terms of the statute? The Court (with the exception of Lord Gillies) being of opinion that there was, adhered; but, in respect of the delay in making the claim, found no expenses due.

W. H. Sands, W. S.—J. Wemyss, W. S.—Gibson-Craigs, Wardlaw, and Dalziell, W. S. —Agents.

No. 420.

June 23. 1831. Miller v. Paterson &c.

WILLIAM HENRY MILLER, Advocator.—*D. F. Hope—Forsyth.*
J. PATERSON and T. IRELAND, Respondents.—*Cuninghame—Cowan.*

Et è contra.

Landlord and Tenant—Interdict.—1.—A landlord having obtained sequestration in security and payment of a half-year's rent as already past due, and the rent not being then due, sequestration recalled—2.—Horses and oats being sequestrated, and the tenant having thrashed six bolls of the oats, and given them to the horses, without applying for judicial authority,—held that no breach of sequestration was committed. —3.—Opinion intimated by Lord Ordinary, that a process of sequestration for rent, after the term is past, containing also a prayer for a warrant of sale, is essentially different from a process of sequestration for rent currente termino, and the one is not convertible into the other.

June 23. 1831.

1ST DIVISION. Ld. Corehouse. H.

IN 1810, Mr. Miller of Craigentinny let a farm to George Paterson for ten years from Martinmas, at a certain rent, payable half-yearly, and binding him that he should, "if required, pay the last half-year's rent one month before removal, or otherwise find caution to the proprietor's satisfaction within the said space of one month before removal." For implement of the obligations of the tenant, his brother John Paterson became bound as cautioner. George, having incurred an arrear of rent, executed an assignation of the lease in favour of John; and, on the 29th of October 1816, a deed of agreement was entered into between Mr. Miller, John Paterson, and Thomas Ireland as his cautioner,—narrating, inter alia, "that it has been agreed upon by the said parties to alter and innovate the terms and conditions of the said lease, as after specified." In particular, John as principal, and Ireland as cautioner, bound themselves "to pay the rent in two equal portions at Lammas 1817, and the next at Whitsunday 1818, and that in full of crop &c. 1817 &c., and so forth thereafter, termly and yearly, during the subsistence of the same." Nothing was expressly said as to paying the last half-year's rent a month before removal.

On the 28th of October 1820, being within a month from the expiry of the lease, Mr. Miller presented a petition to the Sheriff of Edinburgh, founding on the original lease, and setting forth that the half-year's rent "due at Lammas now past is still unsettled, and the said John Paterson is due and owing the petitioner the sum of £600 as the last half-year's rent under the said lease and agreement, which was stipulated to be paid a month before the removal of the tenant from the farm;" and he therefore prayed for sequestration "in security and payment of rent for crop 1820, now due," and for warrant "to roup the whole, or as much thereof as will pay the petitioner the foresaid half-year's rent, and others already due." The Sheriff granted sequestration "in security and payment of the last half-year's rent due and payable upon the 11th day of October current, as mentioned in the lease produced, and that for crop and year 1820." The sequestration was executed, and subsequently warrant to roup was granted in absence. Thereafter defences were lodged by John

Paterson and Ireland, maintaining, that as the original lease had been altered and innovated by the agreement of 1816, and the rent under this agreement was not payable till Whitsunday 1821, the petition was incompetent; and a petition was presented, praying for recal of the sequestration and warrant of roup. The Sheriff Depute, "in respect that the defender Thomas Ireland did, by the agreement in 1816, become bound for the last moiety of the rent payable under the lease of November 1810, as altered by said agreement, as well as for all the previous termly payments, found that the last moiety does not become payable till Whitsunday next; therefore recalled the warrant to roup, but not the sequestration, unless on the defenders judicially finding caution for payment of the rent in question." A sufficient bond of caution being lodged, the Sheriff recalled the sequestration, but found neither party entitled to expenses. During the currency of the process, the rent was paid at Whitsunday 1821.

Among the goods which were sequestrated were several stacks of oats and several horses; and Paterson, having in the mean time entered to a new farm, presented a petition to the Sheriff for leave to remove the horses to his new farm, which lay within the sheriffdom, and offering caution that the landlord should not thereby be prejudiced. This was opposed; but the Sheriff granted the application, on caution being found. In the mean while Paterson thrashed six bolls of the sequestrated oats, and applied them in feeding the sequestrated horses. The landlord presented a complaint against him as guilty of a breach of sequestration, and craved interdict. The Sheriff granted the interdict, and found Paterson liable in the expenses of process.

Mutual advocations having been brought, two questions were argued—1. Whether the original lease was innovated; and if so, whether the landlord was entitled, with reference to the agreement of 1816, to apply, in October 1820, for sequestration and warrant to sell; and, 2. Whether, under the circumstances, Paterson was guilty of a breach of sequestration? In relation to the former, it was maintained by the landlord, 1. That the original lease remained in subsistence, the agreement being merely a relative and additional deed, not intended to supersede the lease; and therefore he was entitled to apply for sequestration, and a warrant to sell, as the rent was past due; and, 2. That at all events, supposing it were innovated, still the circumstances of the parties justified him in applying for this species of security.

To this it was answered, 1. That the deed expressly set forth that the parties had agreed to alter the lease in several respects, and accordingly an alteration was made as to the terms at which the rent was to be payable; and, 2. That it was not true, nor was it relevant to say, that the circumstances of the parties justified the application, because that was not the ground of it, and the rent had been paid at the stipulated term.

In regard to the breach of sequestration, the tenant maintained that

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as it was necessary to prevent the cattle from starving, and as no provision had been made for this, he was compelled to make use of the grain for their support. On the other hand, the landlord contended that he was not entitled to do so without judicial authority.

The Lord Ordinary remitted to the Sheriff "to adhere to his interlocutors, in so far as they recal the sequestration, and to find the pursuer (Miller) liable in the expenses of that process; and, in the process of interdict, to adhere to his interlocutor; found the pursuer liable in the expenses incurred in this Court, in so far as they relate to the process of sequestration, and the defenders, in so far as they relate to the process of interdict," &c.*

Both parties reclaimed.

LORD BALGRAY.—I have no doubt that, pursuant to the agreement in 1816, which innovated upon the old lease, the term and payment of the last half-year's rent for crop and year 1820 was postponed till Whitsunday 1821. The tenant found a cautioner for all the rents from 1816 downwards, who was accepted by the landlord as sufficient. These termly rents were all placed on the same footing; and there exists in gremio of the transaction a postponement of the last half-year's rent. I would therefore adhere in so far as regards the process of sequestration; but I think the Lord Ordinary has gone too far in sustaining the process of interdict. It is no doubt a general principle, and an important one, that when the law has fenced certain subjects by sequestration, a party must not put forth his hand to interfere with or abstract them without judicial authority. But the

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* "NOTE.—A process of sequestration for rent, after the term of payment is past, containing also a prayer for a warrant of sale, is essentially different from a process of sequestration for rent currente termino. Different defences are pleadable in them, and the one cannot be converted into the other. The petition for sequestration in this case stated, that arrears of rent were due for the first half of the year 1820—that the rent for the second half was entirely due, and had become payable; and prayed for a warrant to sequestrate for the second half of the rent, and a warrant to sell both for that and the arrears of the first half. The Sheriff's view seems correct, that, under the agreement 1816, the second half-year's rent was not payable till Whitsunday 1821, more than six months after the date of the petition; and no evidence was brought in the Inferior Court, nor does it now appear after investigation, that any part of the first half-year's rent was due. It is thought, therefore, that the petition for sequestration and sale ought to have been dismissed, reserving to the pursuer to apply for a sequestration currente termino, in which case it would have been necessary for him to have made a different statement of facts, and to have set forth different pleas in law. It cannot be overlooked also, that in a case now resolving into a question of expenses, the conduct of the pursuer, in the course of the process, with regard to the removal of the turnips, finding of caution, and other particulars, was harsh and unjustifiable. It is with some reluctance that the Lord Ordinary finds the defender liable in the expenses of the interdict obtained in consequence of the alleged breach of sequestration, as it is not alleged that he thrashed more than six bolls of oats, for the necessary purpose of feeding the stock which had been sequestrated. But it must be clearly understood that, after sequestration, a tenant can have no intromission with the sequestrated goods, except by judicial authority. Any other rule would make way for obvious frauds."

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application of every general rule is subject to occasional modification; it is impracticable to enforce it inflexibly at all times. Here, then, are live stock, which make part of the sequestrated estate—an estate which it is equally the interest of the landlord and his tenant to preserve entire. They require to be fed, and they may starve while a judicial application for leave to maintain them out of the crop is under discussion. What, then, is to be done to save them? It is not alleged that in this case more than six bolls of sequestrated crop were thrashed, and it is not denied that these were all applied in feeding the sequestrated live stock. I cannot view this as a breach of the sequestration; and, in these circumstances, I would alter as to the process of interdict, and allow the tenant his expenses in opposing it in both Courts.

Lord President.—I concur; and I hold that the terms in the Lord Ordinary's note express too absolutely the rule as against the very peculiar and definite species of interference with the sequestrated crop which has taken place in this instance.

Lord Gillies.—Only six bolls were thrashed, and these were necessary to keep the horses under sequestration alive. The measure was preservative of the sequestrated effects, and essential to their preservation. I concur with both your Lordships.

Lord Craigie assented.

Gairdner and Robertson, W. S.—C. and D. Stewart, S. S. C.—Agents.

No. 421.

Robert Knox, Suspender.—*A. Wood.*
James Robertson, Charger.—*Wilson.*

Process—Bill-Chamber.—A certificate of refusal of a bill, if no execution have followed, does not render a reclaiming note incompetent.

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2d Division.
Bill-Chamber
Ld. Moncreiff.

A bill of suspension presented by Knox having been refused, in respect of the caution tendered being insufficient, he reclaimed, but omitted to append the bill to his reclaiming note, in consequence of which the Court refused to receive it. This defect was corrected before the expiry of the reclaiming days; but in the mean time a certificate of refusal had been issued, though no execution had followed. On the amended note appearing in the rolls, it was objected that it was incompetent after the issuing of the certificate of refusal. The Court, however, overruled the objection; and thereafter caution having been found to the satisfaction of the charger, they remitted, of consent, to pass the bill.

W. Forbes,—Adam and Brown,—Agents.

No. 422.

W. F. CAMPBELL and Others, Suspenders.—*Walker.*
ANDREW JACK and Others, Chargers.—*Jardine—Cuninghame.*

June 23. 1831.
2D DIVISION.
Ld. Mackenzie.
F.
Campbell &c. v. Jack &c.
Magistrates of Edinburgh v. Brown.

Church.—Sequel of the case mentioned ante, VI. 47, and VIII. 196, (which see.) The Lord Ordinary had approved of a plan which placed the whole of the seats in the new part of the building, leaving the old building to be occupied by stairs and session-house, and in part vacant. On a reclaiming note, however, by Campbell and other heritors, the Court having expressed an opinion that this was inconsistent with their former judgment, the parties agreed to a plan, according to which a proportion of the sitters were to be accommodated in the old building; and the Court, of consent, pronounced judgment accordingly.

STEUART and SPROT, W. S.—R. RUTHERFORD, W. S.—Agents.

No. 423.

MAGISTRATES of EDINBURGH, Pursuers.—*Tawse.*
JAMES BROWN, Defender.—*D. F. Hope—Milne.*

Process.—An objection, founded on the act 1696, c. 19, relative to summonses of interruption of prescription, found not effectual against a summons registered in the Record of Interruptions, and proceeding on a bill as a summons of interruption, when pleaded in bar of its being insisted in as an ordinary action.

June 23. 1831.
2D DIVISION.
Ld. Fullerton.
R.

THE Magistrates of Edinburgh, claiming right to certain heritable property in the extended royalty, raised a summons against the possessor, James Brown, proceeding upon a bill praying for a summons of interruption of prescription, and concluding to have it declared that the property belonged to them, and to have Brown ordained to remove therefrom. To this summons, which was not merely registered for interruption, but followed out as an ordinary action, Brown pleaded as a preliminary defence, that when it passed the Signet, and was served on him, it was blank in the date of an instrument of resignation founded upon by the Magistrates, as well as in the date of registration of that instrument; and consequently, that it was defective in the requisites of the act 1696, c. 19, in regard to summonses of interruption of prescription.

The Lord Ordinary repelled this preliminary objection, for the reasons stated below;* and the Court unanimously adhered.

TWEEDIE, GRAHAM, and ANDERSON, W. S.—A. P. HENDERSON,—Agents.

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* "NOTE.—The summons proceeds upon a bill praying for a summons of interruption of prescription. The main objection taken by the defender is, that when it passed the Signet, and was served upon him, it was blank in the date of an instrument of resignation founded upon, and in the date of the registration of that instrument of

E. M'PHERSON and J. M'PHERSON, Pursuers.—*D. F. Hope—A. Wood.*
EWEN ROSS, Defender.—*Keay—Skene—Marshall.*
Et è contra.

No. 424.
June 23. 1831.
M'Phersons v. Ross.

Arbitration—Process—Jury Trial.—1.—In a reduction of a decreet-arbital, on the ground that the arbiter had decided without hearing parties, not necessary to aver corruption on his part.—2.—In conjoined processes of reduction of a decreet-arbitral, and a petitory action for implement, the pursuer of the reduction entitled to stand as pursuer on issues as to the validity of the decree.

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2D DIVISION.
Ld. Moncreiff.

Ross, the outgoing tenant of a farm belonging to M'Pherson of Cluny, entered into a submission with Cluny, and John M'Pherson, the incoming tenant, for valuing the stock of the farm. A decree having been pronounced by an oversman, Cluny and his tenant, after some interval, instituted a reduction of it, on the grounds chiefly that it had been obtained by fraud and deceit practised on the oversman by Ross, and that the oversman had decided without hearing them on an essential point; and Ross, on the other hand, brought an action for implement of the decree. These actions having been conjoined, issues were prepared to try the cause, and approved by Lord Moncreiff, Ordinary, of which the leading issues were in these terms:—"Whether, by fraud and deceit practised by the defender, the said oversman was induced to pronounce the decreet-arbitral No. 12 of process? Whether the said oversman wrongfully pronounced the decreet-arbitral, without hearing the parties in the matter submitted?" Ross objected to these issues, and, inter alia, moved the Court to substitute the word 'corruptly' for 'wrongfully;' and, in support of his motion, he contended that decreets-arbitral being, by the regulations 1695, § 25, protected from reduction, except on the grounds of corruption, bribery, or falsehood, it was necessary to aver such a degree of undue partiality in the refusal to hear parties, or in any other respect, as amounted to corrup-

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resignation; and that, in consequence, the summons is defective in the requisites introduced by the act 1696 in regard to summonses of interruption of prescription. But it does not appear to the Lord Ordinary that there is any room for discussing that point in the present case. The inquiry how far the present summons, if not followed forth, might become, by mere registration, an effectual interruption of prescription in virtue of the act 1696, is one which could only arise properly with singular successors acquiring right from the defender, as the statute appears, both from its preamble and enactments, to be intended only for their benefit. The single question here is, whether the present summons, not considered merely as a registered summons of interruption, but as a summons insisted in and followed forth for the purpose of declaring the right of the pursuers, and of removing the defender from the subjects in dispute, is or is not sufficiently explicit, and properly executed against the defender, according to the forms and practice of the Court. Now the Lord Ordinary understands that, in this point of view, the blank in the date of a deed founded upon, more particularly when the deed itself is actually produced with the summons, does not form a good objection."

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tion in the arbiter; and consequently that it was not enough to put in issue whether the oversman had 'wrongfully' decided without hearing, but that it was necessary to put whether he had done so 'corruptly.' To this it was answered, that it had been decided in various cases[1] that the not hearing parties was of itself a sufficient ground of reduction of a decreet-arbitral, without specially proving or alleging corruption on the part of the arbiter.

The Court refused to alter the issues, and approved of them as framed, on an understanding as to another objection, that it should be competent to Ross to plead under them that the decree had not been tempestive objected to.

It was further moved by Ross, that he, as pursuer of the petitory action founded on the decree-arbitral, to which the reduction, he contended, was truly a defence, should stand as pursuer at the trial; but to this it was answered, that the reduction, besides having been first brought into Court, was necessarily the leading action.

The Court ordered that M'Phersons should stand as pursuers.

J. Macdonell, W. S.—H. Macqueen, W. S.—Agents.

No. 425.

Alexander Mackenzie, Advocator.—*Skene—Cuninghame.*
A. J. Robertson, Respondent.—*D. F. Hope—Buchanan.*

Agent and Client — Approbate and Reprobate. — Parties to processes having, before any judgment was pronounced implying a right to expenses, submitted them to arbiters; and one of the parties having required the arbiters, if they awarded expenses, to do so in favour of his agent in the processes; but the arbiters, while they found them due, having stated them as part of an account, and decerned for a balance against the party to whom the expenses were found due—Held that the agent, founding on the decree-arbitral, could not enforce payment of these expenses from the party in whose favour it was pronounced.

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1st Division.
Ld. Corehouse.
D.

Several processes having been instituted between Robertson of Inches, and Mackintoshes his tenants, in the Supreme Court, and in the Sheriff Court of Inverness, the parties entered into a submission of them, "and the expenses thereof on either side." At this date the processes were not in such a condition as to find expenses due directly, or by implication, to either party. Mackenzie, solicitor in Inverness, was the country agent of the Mackintoshes, was aware of the submission, and made no objection to it. The Mackintoshes claimed, in the submission, inter alia, £155. 3s. as law expenses incurred by them in consequence of alleged illegal proceedings by Robertson, "which expenses having been disbursed by Mr. Mackenzie, their agent, the arbiters are requested to award them directly

[1] Sharpe in H. of L. Feb. 24. 1815, (3. Dow, 102); Heggie, Feb. 1. 1825, (ante, III. 488); Glennie, Feb. 24. 1825, (ante, III. 574.)

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to himself, for his relief and payment;" and thereafter they lodged a formal minute, of consent, that the arbiters should "award the expenses mentioned in our claim, and also the expense incurred in the present submission, directly in favour of Mr. Mackenzie, our agent, who has disbursed the same on our behalf," &c. Two days thereafter, Mackenzie wrote to the clerk to the submission, enforcing the same claim. The arbiters pronounced a decree finding "John Mackintosh &c. entitled to the expenses incurred by them to their agents at Edinburgh and Inverness, in regard to the several processes instituted against them at the instance of A. J. Robertson, and the processes of advocation and suspension, and action of damages, and for payment, pursued at their instance against him before the Court of Session, and restrict and modify the same to £145; and decern and ordain the said A. J. Robertson to allow credit to the said John Mackintosh &c. for that sum at this date accordingly." But, after allowing this and other credits, and debiting the Mackintoshes with sums due by them to Robertson, the result was a a decerniture for a balance of rent &c. due to Robertson.

Mackenzie then raised an action against Robertson before the Sheriff of Inverness-shire, setting forth the submission and decree-arbitral, the mandate lodged in the submission by the Mackintoshes, that he was the disburser of the expenses, and stating, "but, in place of complying therewith, the said arbiters were pleased to decern and ordain the said Arthur John Robertson to allow credit to the said John Mackintosh, Donald Mackintosh, and Robert Mackintosh, for the foresaid modified sum of £145 sterling, at the date of the said award; whereas they should, in law and justice, have decerned and ordained the said Arthur John Robertson, defender, to make payment of the foresaid modified expenses to the said Alexander Mackenzie, pursuer, as the real and bonâ fide disburser thereof." He therefore concluded for payment of the sum of £145.

Robertson pleaded in defence—1. That as the claim against him was founded entirely on the decree-arbitral, Mackenzie could only claim in terms of it; and as he could not both approbate and reprobate it, and it did not award these expenses to him, but appointed them to form part of the account as between the defender and the Mackintoshes, there were no termini habiles for pronouncing decree in favour of Mackenzie; and, 2. That as the processes, at the time of the submission, were not in such a situation as to give Mackenzie a jus quæsitum in the expenses; and at all events, as he was fully aware of the submission, and had homologated it, he could make no claim on the footing of being agent in the processes.

The Sheriff, "in respect that the decreet-arbitral libelled on ordains the defender to take credit for the sum of £145 sterling (now pursued for) in accounting with John, Donald, and Robert Mackintosh, parties to the submission, assoilzies the defender, finds him entitled to expenses, of which appoints an account to be given in, and decerns; reserving to

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the pursuer to insist in the different actions said to have been submitted to his prejudice, to the effect of recovering the expense of such actions, if so advised."

Mackenzie brought an advocation; but the Lord Ordinary repelled the reasons simpliciter, and found him liable in expenses.*

Mackenzie reclaimed, and contended that the case of Warburton referred to by the Lord Ordinary did not apply, because in that case one agent's claim of expenses was allowed to compensate the opposite agent's claim, both being of the same preferable nature; whereas here the arbiters had allowed a claim competent to the principal party, and not to the agent, to be set off against the opposite agent's claim.

Lord President. — This is a hard case for Mr. Mackenzie; but I think the interlocutor well founded. He was just a creditor of the Mackintoshes, at the time of the submission, for the account which they had incurred to him. Although they authorized the arbiters to award payment of the debt to Mr. Mackenzie instead of them, that did not impose any obligation on the arbiters to do so. On the contrary, Mr. Robertson never gave his consent, so as to enable the arbiters to have so appropriated the debt. The arbiters accordingly at the same time find the debt due, and order Mr. Robertson to allow credit for it in account with the Mackintoshes. There is no reduction of the decree attempted, and I must adhere.

Lord Balgray. — I concur. There was just a personal claim for these expenses competent to Mr. Mackenzie when the submission was entered into. All claims of expenses were expressly submitted; and we cannot interfere with the award of the arbiters, whose decree indeed is not brought under reduction.

Lord Gillies. — I also incline to concur; but I do not think the case free from doubt. Had the lawsuits proceeded in Court instead of being submitted, and had these expenses been there allowed, the agent's claim for their amount would have been of a preferable kind. But the opinions expressed imply that by the submission this preference flew off, and Mackenzie's claim became the same with any other personal claim against the Mackintoshes. I am not prepared to assent to that doctrine, nor at present to dispute it. It would require more mature deliberation before I could adopt either course. But it is not necessary to resolve this point, in order to decide the question before us. Mr. Mackenzie brings his action upon the decree-arbitral, but it contains not one finding in his favour. It is not enough for him to say that he was no party to the decree, and that therefore it cannot make against him. I conceive he must show that he can found some claim under it, and that he has failed to do. I am therefore for adhering, but not without some hesitation, as it appears to me to be doubtful whether the arbiters had the power to direct the mode of payment of this sum, and to

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* "Note.—There were no expenses found due, expressly or by implication, in the actions submitted previous to the reference. The reference was made bona fide, and with the privity and consent of the advocator. The decree-arbitral, which is the only ground of the advocator's action, does not find the Mackintoshes entitled to expenses singly, but sets off those expenses against the sums found due by the Mackintoshes to the respondent. The case therefore seems to fall under the principle adopted in Warburton v. Hamilton, May 30. 1826."

decern that it should be made by Mr. Robertson allowing credit to the Mackintoshes. They had previously consented, and required the arbiters to order payment to their agent, the disbursement of the expenses being his; and, in the face of that, I doubt whether it fell within the power of the arbiters to prescribe any different mode of paying a debt of the sort.

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Lord Craigie concurred.

The Court accordingly adhered.

Advocator's Authorities. — Mactavish, June 13. 1826, (ante, IV. 704); Hamilton, June 17. 1813, (F. C.); Stephen, June 1. 1830, (ante, VIII. 847.)

Respondent's Authority.—M'Lean, June 19. 1824, (ante, III. 190.)

T. B. Ferrier, W. S.—Hugh Macqueen, W. S.—Agents.

James Curle, Pursuer.—*Jameson—A. Murray jun.*
Duke of Roxburghe and Curators, Defenders.—*Skene—W. Forbes.*

No. 426.

Public Burden—Statute Labour.—By the statute labour conversion act for the county of Roxburgh, (46. Geo. III. c. 48,) superiorities or feu-duties, and teinds, though rated in the valuation-books of the county in cumulo with lands, are not liable to assessment.

June 24. 1831.

1st Division. Lord Newton.

By the statute 46. Geo. III. c. 48, regulating the conversion of statute labour for the county of Roxburgh, it is provided, "that in lieu of the statute services, there shall (with the exception herein after specified) be paid an assessment or conversion in money, to be levied from the heritors, landholders, or feuars, or from such other person or persons as may be entitled directly to draw or receive the rents or profits of lands in the said county of Roxburgh, according to the respective valued rents at which their lands stand rated in the cess and valuation books of the said county, such assessment not exceeding £3 sterling upon each £100 Scots of valued rent." The statute further provided, "that the assessment to be imposed in manner as herein before directed shall be borne between the heritors or proprietors, and tenants or occupiers, in manner following: Where the rate of assessment shall not exceed 10s. for each £100 Scots of valued rent, the whole shall be paid by the tenant or occupier; where such assessment shall exceed 10s., but shall not exceed 20s., for each £100 Scots of valued rent, the first 10s. shall be paid by the tenant or occupier, and the excess by the heritor or proprietor; and when the said assessment shall exceed 20s. for each £100 Scots of valued rent, and shall not exceed £2, the first 10s. shall be paid by the tenant or occupier, the second 10s. by the heritor or proprietor, and the remainder shall be divided and paid in equal moieties between the heritor or proprietor, and tenant or occupier; and when the said assessment shall exceed £2 for each £100 Scots of valued rent, the whole of such excess shall be paid by the heritor or proprietor, or person entitled directly to draw or receive the rents or profits of lands alone: And all heritors or proprietors who shall have paid the assessment to be imposed in manner as herein before directed, shall be entitled to relief and repayment from the actual tenants or occupiers in the proportion and in manner before mentioned, &c.; or, in case the lands so occu-

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pied by different persons be valued in cumulo, in a sum bearing the same proportion to the assessment payable for the whole lands, as the real rent or value of each possession bears to the real rent or value of the whole, a just share of the said assessment being always laid upon lands in the natural possession of the proprietor; and the like action and execution shall be competent to such heritors or proprietors, for their relief and repayment of the said assessment, as by law is competent to them for the payment and recovery of their rents." It was also provided that the trustees "may require the proprietors of land within their respective districts, or their factors, to deliver to the clerk of the district, &c., a true statement of the valuations of their respective lands, according to which they are in use to pay the land-tax and other public burdens; which declaration shall specify all the farms belonging to each heritor, and the parishes wherein they are situated, and the proportion of valued rent falling upon each farm suitable to the yearly rent of the same, when the proprietor has been in use to pay the land-tax himself," &c.

In the cess and valuation books of the county of Roxburgh, the following lands and others belonging to the Duke of Roxburghe stand rated thus: "Hallidean and Fauchill, Millburn of Bowden, Mains of Clarilaw, and teinds and lands formerly belonging to the feuars of Bowden, teinds of Bowden, Midlem, Newhall, Kippielaw, Langside, and North Prieston, and feu-duties of Bowden, at the sum of £4121. 11s. Scots."

Upon this amount the trustees assessed the Duke from 1823 to 1826 inclusive. His Grace's tutors made certain payments to account, but refused to admit the legality of the assessment in so far as the valuation in cess-books embraced teinds, or feu-duties, or superiorities, and ultimately declined to pay it. The clerk of the trustees therefore raised an action, in 1829, against the tutors of the present Duke, which was now insisted in against him and his curators.

They pleaded in defence, that the assessment was directed by the statute to be laid on those only who had either the substantial property or the occupancy of lands; that this excluded superiorities and feu-duties from liability, although these had been valued in the cess-books; and also teinds, which were an estate of a totally distinct character from lands.

The pursuer answered, that the statute, when fairly construed, meant to render the whole amount of the valuation of the county liable to assessment, whether such valuation related to the rents and profits of lands, or teinds, or feu-duties; and that the term 'lands,' as used in the statute, was synonymous with 'estates.'

The Lord Ordinary "found that the Duke of Roxburghe is not liable to be assessed for statute labour conversion money, under the statute libelled, in respect of that part of his valued rent which applies to superiorities, or feu-duties, or to teinds; but as these subjects, or a part of them, are rated in the valuation-books of the county in cumulo with lands whereof his Grace is the actual proprietor, sists process until a divi-

sion of the cumulo valuation shall be obtained, ascertaining the proportions thereof which apply to lands, superiorities or feu-duties, and teinds respectively."

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The pursuer reclaimed.

D. F. Hope for Pursuer, besides contending that the interlocutor was erroneous, maintained that, in regard to those cases in which the Duke had not merely the superiority or teind of an estate belonging to another, but possessed these rights affecting estates of which he was also the proprietor, the pursuer was entitled to have a reservation inserted in the interlocutor, saving the claim against the Duke as heritor.

Skene for Defenders.—We have no objection to that.

The Court accordingly adhered, "reserving all claim against the Duke of Roxburghe in respect of those lands of which his Grace is proprietor of the dominium utile, for which he is liable in the same manner as the other heritors."

Pursuer's Authorities.—Bell's Elect. Law, p. 66; Trail, Feb. 28. 1791, (8639.)
Defenders' Authorities.—Dundas, July 2. 1788, (8511); Swinton's Relict, Jan. 16. 1663, (8499); Heritors of Selkirk, Feb. 9. 1738, (7915.)

C. B. Scott, W. S.—Mackenzie and Innes, W. S.—Agents.

James Banks, Suspender.—*Monro.*
James Smith, Charger.—*D. F. Hope—Marshall.*

No. 427.

Diligence.—Diligence on a bill of exchange suspended, in respect of a decree in a judicial reference finding the bill extinguished, which, though challenged subsequently to the date of the diligence, had not been reduced.

June 24. 1831.

2d Division.
Lord Medwyn.

Banks and Smith having entered into a judicial reference of a multiplepoinding, in which was involved the question how far a bill of £30 held by Smith against Banks had been extinguished, the referee found that the only subsisting claim under the bill was £2, to which extent he preferred Smith on the fund in medio; and the Sheriff interponed his authority thereto. Smith, notwithstanding this decree, charged Banks on the bill; but immediately afterwards instituted a reduction of the decree, on grounds of irregularity in the procedure, which it is unnecessary to specify. Banks thereupon brought a suspension, maintaining that while the decree stood unreduced, it was incompetent to do diligence on the bill.

The Lord Ordinary, "in respect it was incompetent for the charger to proceed with diligence while the decreet of the Sheriff, proceeding on the award of the judicial referee, was unchallenged and unreduced," suspended simpliciter, and the Court adhered.

J. Burness, S. S. C.—J. Pattison, W. S.—Agents.

No. 428.

June 25. 1831.
Muckarsie v. Walker.

THOMAS MUCKARSIE, Complainer.—*D. F. Hope—Forbes.*
ARCHIBALD WALKER, Respondent.—*Keay—Cheape.*

Public Officer—Road Statute.—A party subjected in the penalty imposed by the General Road Act for acting both as clerk and treasurer, though nominally holding only one of the offices.

June 25. 1831.

2D DIVISION.
Ld. Moncreiff.
T.

THE General Road Act, 4th Geo. IV. c. 49, (§ 11,) empowers "the trustees under any Turnpike Act, at any general meeting, to appoint a clerk and treasurer, &c., with remunerating salaries to such clerk &c., and to apportion such salaries among the several wards within their trust." But by the 13th section of this act it is provided, "That it shall not be hereafter lawful for any trustees or commissioners to continue or appoint the person who has been or may be appointed to act as their clerk in the execution of any Act or Acts of Parliament for repairing and maintaining any turnpike road, or the partner of any such clerk, to be or to hold the offices of clerk and treasurer for the purposes of such act or acts, or to continue to appoint the person who has been or may be appointed treasurer, or the partner of any such treasurer, to be the treasurer and clerk for the purposes of such act or acts; and if any person shall act in both the capacities of clerk and treasurer, or if any person, being the partner of any such clerk, shall act as treasurer, or, being the partner of any such treasurer, shall act as clerk, in the execution of this or any other act, every person shall, for every such offence, forfeit and pay the sum of £50 to any person or persons who shall prosecute for the same, to be recovered, with expenses, by summary action in the Court of Session". The 113th section further provides, "that all prosecutions for the penalties &c. imposed by this act &c. shall be commenced within six months after the same are incurred, or the wrong committed."

In April 1828, the committee of trustees of the road leading from the great north road to Cupar by Auchtermuchty appointed the respondent Walker, writer in Auchtermuchty, to be their clerk and treasurer; and in March 1829, they recommended to the annual general meeting of trustees to appoint Walker as their clerk, and one West, his brother-in-law, as their treasurer; which recommendation was adopted at the meeting held in April following.

Thereafter, in December, a petition and complaint was presented to the Court of Session by Muckarsie, merchant in Auchtermuchty, alleging that Walker had acted in the capacities of clerk and treasurer, and concluding for the penalties imposed by the statute.

Walker, while he admitted his appointment to both offices in 1828, denied that he continued to act in the double capacity after March 1829, when West was appointed; and he contended that the complaint was incompetent, as not brought within the six months prescribed by the 113th section. On an investigation, however, directed by the Court, it appeared, and was admitted in a minute given in by Walker,

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that, after the appointment of West, he continued to transact the money matters of the trust, and made no alteration in the manner of keeping the accounts, which remained in his own name till three months before the date of the prosecution, when he opened a separate account in his books in the name of West. An account of charge and discharge with the latter was also produced, in which the trustees allowed West "a commission upon the sum drawn by him for the trustees, at the rate of 1¼ per cent., instead of 2½ per cent. as charged by him." Walker alleged that it was at the express desire, and for the convenience of his brother-in-law, that he had continued to do the duties of treasurer after the appointment of the latter; and he founded on the per centage allowed to West, as evidence that that gentleman enjoyed the emoluments of treasurer.

The Court, upon a view of the whole circumstances, being unanimously of opinion that the actings of Walker brought him within the provision of the statute, found him liable in the penalty of £50, which, in terms of the statute, they awarded to Muckarsie, the complainer.

Lord Justice-Clerk.—When this case was last advised, we were anxious to obtain a little more light as to the facts; but on reading the defender's own statement of the circumstances, I am of opinion that an extremely thin veil is attempted to be thrown over this double acting. Mr. Walker admits that, for a certain time at least, he continued to keep the same books, and transact money matters after his brother-in-law is alleged to have been appointed treasurer. I am not disposed to press the matter further than this, that for that period at least the penalty was incurred; and being of that opinion, we must enforce the statute.

The other Judges concurred.

A. Duncan, S. S. C.—J. Ferguson, W. S.—Agents.

Single Bills.

A v. B.

Process—Reduction—Reduction of Admiralty decrees in maritime causes must be enrolled in the Regulation roll, and not before the junior Lord Ordinary.

June 25. 1831. 2d Division.

Lord Moncreiff reported that a reduction of an Admiralty decree in a maritime cause having been enrolled before him as junior Ordinary, it had been insisted by the defender that great avizandum must be made with it, in respect of its being excepted in the 27th section of the Judicature Act, from the reductions therein directed to proceed without avizandum; but that it had occurred to his Lordship that there was no authority for enrolling such reductions before the junior Lord Ordinary at all; consequently that it ought to have been enrolled in the Regulation roll. The Court, being satisfied that this was the case, instructed his Lordship to strike it out of his roll.

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2d Division. Bill-Chamber. Ld Moncreiff. R.

Hay v. Jopp's Trustees.

Johnston &c. v. Greigs.

General A. Hay, Suspender.—*Gordon.*
Jopp's Trustees, Chargers.—*Dingwall.*

Process.—Where a bill of suspension has been presented on caution, and this has not been found within the time prescribed by the A. S. June 14. 1799, and the bill has been refused, the Court will not, on a reclaiming note, allow juratory caution.

General Hay, being charged by Jopp's trustees on a bond of annuity, presented a bill of suspension on caution; but having failed to find caution within the time prescribed by the A. S. June 14. 1799, the Lord Ordinary refused the bill. General Hay now reclaimed, and prayed to have juratory caution received; but the Court, considering that the only proper course was to have amended his bill within the proper time, refused his reclaiming note.

Gordon and Burnett, W. S.—J. Jopp, W. S.—Agents.

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1st Division. Ld. Corehouse. S.

George R. Johnston, Pursuer and Claimant.—*Marshall.*
James C. Johnston and Others, Claimants.—*Marshall.*
Mrs. Greig and Husband, Defenders and Claimants.—*Jameson—Gillies.*

Succession—Substitution or Conditional Institution—Heritable or Moveable—Legacy.

1. A party having, by a trust-deed of settlement, conveyed his property to his daughter, under the burden that she should pay to each of J. and W., his two grandchildren, "£2500 at the first Whitsunday or Martinmas after they have respectively attained the age of twenty-one years complete, with the legal interest of the same" from the first term after his death till paid, "provided that in the event of the death of either of the said J. and W. without lawful children, the survivor shall succeed to the share of the predeceaser; and in the event of the death of both without lawful children," his daughter "and her foresaids shall succeed to the whole of what is herein provided to them;" and W. having died in minority, and J. after majority, both without issue, and intestate—Held that the fund belonged to the heir-at-law of J., and not to the daughter.

2. Question raised as to the effect of a requisition of payment, and other acts of a creditor, in converting an heritable bond into a moveable quoad succession.

3. A testator having conveyed to trustees a sum to "be paid to J. at the first term of Martinmas after he shall attain the age of twenty-one years complete; but failing his surviving that term, or if he should survive that term, then, failing his specially disponing the same himself, I appoint, in both of these events, my said trustees to accumulate the trust-fund" for behoof of grandchildren; and the trustees not having accepted, and J. having survived the above term, and uplifted the fund, and thereafter died intestate—Held that it belonged to his executors, and not to the grandchildren.

John Whittet of Potterhill had two daughters, Jane and Margaret, the latter of whom married William Glen Johnston of Perth. She thereafter died, leaving two infant children, John Whittet Johnston and Wilhelmina Johnston. In 1801 Mr. Johnston married again; and of this marriage the pursuer George R. Johnston, James C. Johnston, and others, were born. Mr. Whittet executed a deed of settlement, on the 12th of May 1802, in favour of his surviving daughter Jane, (who was then a minor,)

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by which he disponed his property to her, " and the heirs of her body, and her assignees; whom failing, my grandchildren John and Wilhelmina Johnston, equally between them, and the heirs of their bodies," &c.; under the burden, inter alia, that " the said Jane Whittet and her foresaids shall pay to each of my grandchildren, John and Wilhelmina Johnston, the sum of £2500 at the first Whitsunday or Martinmas after they respectively have attained the age of twenty-one years complete, with the legal interest of the same from and after the first term of Whitsunday or Martinmas after my death, ay and until the same is paid;—it being provided, that in the event of the death of either of the said John and Wilhelmina Johnston without lawful children, the survivor shall succeed to the share of the predeceaser; and in the event of the death of both without lawful children, the said Jane Whittet and her foresaids shall succeed to the whole of what is herein provided to them; and in the event of the said Jane Whittet succeeding to the whole of the said £5000 provided to the said John and Wilhelmina Johnston between them, she shall be bound to pay, at the Whitsunday or Martinmas after the death of the longest liver of the said John and Wilhelmina Johnston, the sum of £1000 to William Glen Johnston, their father," &c. In the general clause of destination he directed, that failing his children and grand children, the fund should go to the children of his sister; and he named tutors and curators to his daughter and grandchildren.

He died in December 1802; and in 1804, while John and Wilhelmina Johnston were pupils, Jane Whittet (with consent of their respective tutors and curators) granted an heritable bond to them, proceeding on the narrative, " that it is proper and expedient I should follow forth the intention of my father, by giving to the said John and Wilhelmina Johnston an heritable security over the property conveyed to me in the said disposition, in a complete and legal form." Therefore, and " in further corroboration and security of the burden imposed on me by my father's disposition," she granted a bond to the Johnstons in terms of the disposition, but with this addition, " that in the event of the death of both without lawful children, I and my heirs, executors, and assignees, shall succeed to the whole of the said sums," &c. On this deed infeftment was duly taken. It extended over lands situated in the parishes of Kinnoul and Kinnaird; and the former having been sold, the tutors and curators executed, in 1807, a renunciation of the bond in relation to them. Thereafter, on the 6th of January 1810, Miss Whittet granted a new heritable bond, in terms similar to the former, over the lands of Pitkindie and Ballairdie, which she had purchased,—it being stated that the former bond was to be renounced. Infeftment was taken on this new deed, but at this time the renunciation was not executed.

In 1814, Wilhelmina Johnston, before attaining majority, died intestate, and without issue; and about the same time Miss Whittet was married to Mr. Alexander Greig, W. S. John Johnston attained majority in July 1820; and a few weeks thereafter his agents, Messrs. Miller, writers in

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Perth, wrote, by his desire, to Mr. Greig, intimating that the provision became payable at Martinmas next, and asking "a state of such payments as fall to be allowed in compensation of the above heritable debt." An account was thereupon prepared by Mr. Greig, entitled "State of Sum due by Mr. and Mrs. Greig to Mr. John Johnston, in terms of the deceased Mr. Whittet's deed of settlement," bringing out "a nett balance, due 11th March 1820, of £7047. 3s. 9d." It was dated the 30th of December 1820, and signed by Mr. Greig and John Johnston. Mr. Greig afterwards paid £1047. 3s. 9d. of the arrears of interest, and promised to grant his bill for £1000 more, as the balance of these arrears, so as to form them into a capital bearing interest, without prejudice to the heritable security already held by John Johnston. The bill, however, was never granted. On the 6th of February 1821, Johnston executed a deed narrating Mr. Whittet's disposition and deed of settlement of 1804, and particularly the clause as to the eventual destination in favour of his daughter Jane, and the heritable bonds; after which it proceeded in these terms—"And considering that I the said John Whittet Johnston attained to majority upon the 19th day of July last,—that by the death of my said sister Wilhelmina in July 1814, unmarried, and still in minority, I have succeeded to the whole of the foresaid sum of £5000 sterling, and interest due thereon,—and that, as stated in the heritable bond last above mentioned, it had been agreed that, on granting thereof, the bond and disposition first above mentioned, executed in 1804, was to be discharged and renounced as to the whole lands therein specified, but which has not hitherto been done as to the lands in the parish of Kinnaird, but only as to the lands in the parish of Kinnoul;—and now seeing that I am fully satisfied with the sufficiency of the said security held by me over the said lands of Pitkindie and Ballairdie for the foresaid principal sum of £5000, and interest due thereon,—I have agreed to grant the discharge and renunciation underwritten." He then discharged Mrs. Greig of the bond of 1804, and renounced the infeftments over the lands situated in the parish of Kinnaird; "but declaring always, as it is hereby specially provided and declared, that neither the before-mentioned discharge granted in 1807, nor this present discharge, nor the renunciation thereby granted of the security created by the said bond over the foresaid lands in the parishes of Kinnoul and Kinnaird, shall in any way prejudice or affect the foresaid heritable bond and disposition in security granted in my favour in 1810, and instrument of sasine following on the same, which constitute the foresaid principal sum of £5000 sterling, and interest due thereon, a burden upon the foresaid lands of Pitkindie and Ballairdie, with their pertinents; but the same shall remain and subsist in full force and effect in the whole heads, tenor, clauses, and contents of the same, in favour of me, and my heirs, executors, and successors, ay and until the principal sum of £5000 sterling, interest due thereon, liquidate penalty and termly failures, if incurred, therein specified, are fully satisfied and paid; the said last-mentioned bond and disposition in security, and lands and others thereby conveyed,

coming in the room and place of the foresaid heritable bond of corroboration and disposition in security granted in 1804, hereby discharged." No. 480. June 28. 1831. Johnston &c. v. Greigs.

In August 1825, Johnston, being about to go abroad, executed a factory, empowering the factor "to pursue for all debts &c., and in particular, without prejudice to the foresaid generality, the principal sum due by a heritable bond, of date the 6th of January 1810, by Miss Jane Whittet, now Mrs. Greig, &c., for £5000." He also left written instructions with his factor, directing him, inter alia, to intimate to Mr. and Mrs. Greig that the debts due to him, principal and interest, "must be paid up at Martinmas next; failing which term, the sum of five per cent. must be paid on the same," or legal steps to be taken, "and beyond Whitsunday 1826 it ought not to be allowed to lie." Immediately after, on 2d September 1825, Johnston wrote to Mr. Greig that his factor was instructed "to receive from you, at Martinmas first, payment of the two bonds, and discharge them. As I formerly mentioned to you, it is of the utmost importance to me to receive payment at that term; and I sincerely trust nothing will be in the way to prevent a settlement, for I have left most positive instructions with Mr. Johnston (the factor,) that if the bonds are not then paid, five per cent. will be charged after that term, and also to adopt the necessary legal measures to obtain a settlement."

After Johnston sailed, his factor made repeated demands for payment of the debt, and Mr. Greig acknowledged that he held such demands to be sufficient 'notice of intimation as to the payment,' and informed him that certain property was advertised for sale, 'for the purpose of paying off Mr. Johnston.' In April 1826, the factor employed a law-agent to compel payment by legal measures; and various steps of requisition were adopted, and an action raised; but they were interrupted by the intelligence that Johnston had died at sea on the 10th of March 1826. He left no issue, and died intestate. Mrs. Greig then obtained herself infeft as heir of provision to him and Wilhelmina under the destination in her father's settlement, in virtue of a precept of clare constat by herself in her own favour. George R. Johnston, the brother-consanguinean of John Johnston, subsequently presented a claim of service "as heir of line and conquest in special" to John and Wilhelmina Johnston. Mrs. Greig objected that the fee was full by her infeftment, and the Sheriff sustained the objection, and dismissed the claim. George R. Johnston then obtained himself served heir of line and of conquest in general of John and Wilhelmina Johnston, raised a reduction of the titles made up by Mrs. Greig, and brought an advocation of the judgment of the Sheriff, dismissing his claim for a special service.

Thereafter a process of multiplepoinding and exoneration was raised by John Johnston's factor, relative to certain sums, consisting of interest on the £5000, (of which £250 accrued after Johnston's death, and which had been paid, in ignorance of that event, to the factor,) and to which sums it was admitted that, excepting the £250, the executors of John-

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ston were entitled. Another sum of £511 was in the following situation: Mrs. Whittet, grandmother of John Johnston, had executed a settlement, appointing trustees to convert her estate into money, and invest the trust-funds on good security; which funds "shall, with the accumulated interest thereon, be paid to John Johnston at the first term of Martinmas after he shall attain the age of 21 years complete; but failing his surviving that term of Martinmas, or if he should survive that term, then, failing his specially disponing the same himself, I appoint, in both of these events, my said trustees to accumulate the trust-funds" for behoof of Mrs. Greig's children. At the date of this settlement, John Johnston was in minority, but at the death of Mrs. Whittet he was major. The trustees declined to act; but one of them gave up an inventory containing a debt originally amounting to £320, but increased by interest to the above sum of £511, and obtained a confirmation as executor in 1822. When John Johnston went abroad in 1825, he left instructions in relation to this matter with his factor; in consequence of which the factor, during the life of Johnston, recovered payment of the £511, and therewith retired two bills of his father, amounting to £500, for which the factor took an heritable bond payable to John Johnston, "and his heirs and assignees whomsoever." On the intelligence of Johnston having died intestate, Mr. and Mrs. Greig, as administrators in law for their children, insisted that the trust-funds of Mrs. Whittet, including the sum of £511, belonged to, and must be accumulated for behoof of their children. On the other hand, the half brothers and sisters of Johnston, as his executors, claimed the sum of £511 as part of his estate. The processes having been conjoined, the Lord Ordinary ordered Cases on the whole cause.

Pleaded for George R. Johnston—

1. As John Johnston died intestate, the claimant, as his heir at law, is entitled to the £5000, including the interest thereon posterior to his death. The claim made by Mrs. Greig is unfounded, because, (1.) The clause in the settlement of Mr. Whittet was a conditional institution, and not a substitution; and as Johnston survived majority, the condition ceased. The heritable bonds taken by the tutors, containing a repetition of the destination, could not affect their pupil's succession; and the circumstances of Johnston, after he attained majority, allowing the money to remain thus secured, was not meant to operate any destination in favour of Mrs. Greig. On the contrary, he inserted an express clause in the deed of restriction of the heritable security in 1821, declaring that, so far as unrestricted, the bond "should remain in full force, in the whole heads &c., in favours of me, my heirs, executors, and successors." And (2.) even if Johnston were held to have homologated the destination in favour of Mrs. Greig, and it were held to be a substitution, still his acts in calling up the money, and leaving explicit directions with his factor for its recovery, and the subsequent requisitions by the factor, were sufficient to revoke or extinguish the substitution. Had the money

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been paid when demanded, as it ought to have been, the substitution must have been evacuated; and the delay in making payment could not be allowed to operate in favour of the party indebted.

2. The Sheriff's judgment was erroneous in dismissing the claim of service. The titles made up by Mrs. Greig were inept, as she was not heir of provision, and they could not bar the service of the claimant as 'heir of line and of conquest in special.'

Pleaded by James C. Johnston and Others—

As executors of John Johnston, they are entitled to be preferred to the £1000 for which Mr. Greig agreed to grant his bill,—to the arrears of interest on the debt of £5000 prior to his death, and to the £511 falling to Johnston under Mrs. Whittet's deed of settlement. In relation to this latter sum, they maintained that the provision in favour of Mrs. Greig's children was merely a conditional institution, which was evacuated by John Johnston surviving the term of payment; and at all events, as the sum of £511 had been actually uplifted by Johnston, and mixed with his other funds, it belonged to him irrevocably, and fell to his executors.

Pleaded for Mrs. Greig and Husband—

1. They are entitled to be preferred to the £5000, and interest thereon, posterior to Johnston's death; because, (1.) By Mr. Whittet's settlement a substitution was created, first of the survivor of his two grandchildren (if childless), and next of Mrs. Greig to such substitute dying childless. Had John and Wilhelmina survived majority, and one of them then died childless, the other, as substitute, would have taken the succession. In the same way Mrs. Greig was entitled to succeed on the death of John Johnston without issue, though he survived majority. Besides, by his acts after becoming major, he homologated the destination in Mr. Whittet's settlement, and thus placed the question on the same footing as if he himself had made the substitution from the first. The clause in favour of Johnston's "heirs, executors, and successors," which was inserted in the deed restricting the heritable security, was not meant to alter the destination of the heritable subject, and could not have that effect, especially as these words were flexible, and referable to the heirs as set forth under the destination in a prior part of the deed. And (2.) The mere intention of calling up the money, or a private request for payment, was of no effect in evacuating the substitution. But Johnston had done no more than this, nor had his factor done more. No delay had occurred in making payment of the debt, such as to affect the question. Johnston had authorized his factor to allow the investiture to remain undisturbed till Whitsunday 1826, on getting five per cent. He died before Whitsunday arrived. Had the non-payment deprived him of the power of disposing of the subject as he pleased, Mrs. Greig might be barred from pleading it; but as he was full proprietor, and had power to dispose of it by executing a deed to that effect, it followed that his not doing so

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was not because of the non-payment, but solely because he preferred leaving it to the disposal of the law as it stood.

2. The Sheriff's judgment was well founded. The titles of Mrs. Greig were aptly made up, as she was heir of provision; and the fee being thereby full, the service sought was incompetent.

Pleaded for Mrs. Greig's Children—

Under Mrs. Whittet's deed of settlement, they are entitled to the fund thereby conveyed. The right conferred on Johnston by that deed was of a qualified nature. It was specially given to him, only subject to the condition, that if, after attaining majority, he did not dispone it, it was to go the children of Mrs. Greig. But he never executed any such deed, and therefore the destination must receive effect. The sum of £511 stands precisely in the same situation, because it was irregularly uplifted by the factor, as none but Mrs. Whittet's trustees were in titulo to receive it.

The cause came to be advised on the 26th and 27th of November last, when the following opinions were delivered:—

Lord Balgray.—This is a case of importance, both as concerns the parties, and as respects the question of law. There are two claims brought under discussion—the one arising from Mr. Whittet's settlement, and the other from that of his widow Mrs. Whittet.

1. As to Mr. Whittet's settlement—

The claim as to the £5000 depends partly on the meaning of the terms used by Mr. Whittet in his settlement, and partly on that important document, the discharge and renunciation, and restricted heritable security granted by Mr. John Johnston himself after his majority in 1821; and also in his acquiescence in that arrangement for several years thereafter. The foundation and origin of the right arises and depends on the import of Mr. Whittet's settlement. If no right is created thereby, then Mr. Johnston's declaration in 1821 cannot alter its nature; but it is a most important document, in explaining the intention of all concerned. The primary question, therefore, is, what is the import of Mr. Whittet's settlement of 1802 relative to the £5000? Whether does it mean a conditional institution, or a true and proper substitution? In deciding a question of this nature, the intention of the party is ever the governing principle. This would lead into a most tedious discussion and examination of all the decided cases, and comparing the clauses there occurring with the one now in question. All this is proper for forming an opinion on the matter, but very unnecessary to detail on the present occasion. All that is necessary seems to state briefly the grounds upon which it is apprehended that the late Mr. Whittet, in his settlement, intended a true substitution, and in no respect a conditional institution. 1. Mr. Whittet had already given a portion with his second daughter when she married Mr. Glen Johnston. This was a separate provision for grandchildren—a burden laid on the eldest daughter Jane, evidently the persona prædilecta of Mr. Whittet. 2. The words used by Mr. Whittet are strong and peculiar, "It being provided, that in the event of the

death of either of the said John and Wilhelmina Johnston without lawful children, the survivor shall succeed to the share of the predeceaser; and in the event of the death of both without lawful children, the said Jane Whittet and her foresaids shall succeed to the whole of what is herein provided to them." 3. Mr. Whittet, in the general destination clause of his settlement, calls, after the failure of his children and grandchildren, and the heirs of their bodies, "his sister's children, Henry and Janet Johnston, equally between them." 4. Upon Jane Whittet's succeeding, she is taken bound specially to pay £1000 to Mr. Glen Johnston, evidently marking Mr. Whittet's intention, that, failing the grandchildren, Mr. Glen Johnston should receive no more of that fund. 5. Mr. Whittet appears to be so anxious to preserve the £5000 as a separate fund, that Mr. Glen Johnston is not allowed, as father, to be administrator for his children; but Mr. Whittet constitutes tutors and curators of his own to manage that provision. 6. It was most natural for Mr. Whittet to wish that, failing his grandchildren, his funds should return to his own daughter, and his own connexions. What concern could he have for Mr. Glen Johnston's children by another lady? He was not bound to provide for them; on the contrary, it was more agreeable to the feelings and propensities of human nature to look prospectively on such family with jealousy and suspicion. 7. The provision of £5000, with its interest, is not payable or exigible till majority. If a failure before that period is to be held at common law a lapsed right, then for what end or purpose could so anxious a clause be devised, but to constitute a real and proper substitution?

The extrinsic circumstances, if they may be so called, are no less material, and cannot be overlooked. 1. The trustees named by Mr. Whittet, and who accepted, are most correct men, and some of them well-versed in law business; and it appears that, soon after Mr. Whittet's death, they authorized their ward, Miss Jane Whittet, to grant an heritable bond precisely in terms of the settlement. This occurred first in 1804, and was renewed in 1814. It is hardly possible to conceive that this step would have been taken, unless it had been to secure the provision in a stable form, and as following out Mr. Whittet's intentions. 2. But what puts an end to all dispute on the subject is Mr. John Johnston himself, after his majority, taking the heritable security in the same terms. It marks two things—first, That he was conscious that it was the intention of his grandfather as to the matter; and, second, That he then had no intention to alter that destination.

If Mr. Johnston had taken up his money, and lent out the money in the same terms, no doubt could have existed. But what difference does there exist, when he took such security from his own aunt? The matter does not rest upon the simple taking of the bond; for Mr. Johnston allows it to continue in that shape, without the least objection, for several years.

The terms of Mr. Whittet's settlement, and the heritable bond accepted by Mr. Johnston conjunctly, are sufficient grounds for the decision of this cause.

The pursuers have resorted to much authority; but it must be evident that in a question of this kind, above all others, the whole depends upon the special circumstances of each case. No doubt there have been general principles of law laid down as applicable to such questions, and they have been well elu-

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cidated by the Court. But it is always to be remembered that 'ex facto jus oritur.' The pursuers rely much on the case of Brown v. Coventry, 2d June 1792; but it is apprehended that the very principles which are there laid down ought to regulate the determination of the present case. In short, the true consideration for the Court is, what is the intention of the testator? and where that is clear, there is an end of controversy. In these questions there has been a certain change in the law, arising from the most natural causes. Perhaps, down to 1750 or 1760, there was hardly any provision created, but what had either a substitution or clause of return—at least if the provision was considerable; and most of them were either heritable suâ naturâ, or constituted real burdens; and as mere personal bonds were frequently created and granted in the same terms, it was natural to consider them as feuda pecuniæ, and so interpret them in the same way. In such personal obligations the law presumed too much, and in the progress of time that presumption was held most properly not to operate so strongly as formerly. The case of Coventry can be carried no further; it has been always held a correct decision. The case most analogous to the present, and which indeed is an exact epitome of it, is that of Smith v. Smith, 14th December 1710, (Mor. 3512.)

In the last place, the pursuers found a great deal upon the conduct of Mr. Greig in the delaying of making payment, when the same was so peremptorily demanded; and it seems to be argued that it constitutes a sort of personal exception to the claim. But the answer to this is obvious.

1. The fact, if any thing be in it at all, must be proved, and it must be established that the delay was created for a sinister purpose. If the period is looked at when the demand was so peremptorily made, a far more natural cause may be assigned for not complying with the demand. Unless a person had it in his coffers, few men in Scotland could at that time have commanded £5000. 2. Mr. Johnston was in no worse a situation than other creditors who have their money well secured, and cannot get payment with all their exertions; and if Mr. Johnston could qualify any damage by the non-payment, there may arise in certain cases a claim of damages; but no such thing is alleged here. 3. The delay of payment deprived Mr. Johnston of no power over his property. He could have assigned his bond. He could have transferred it to whom he pleased; and what is more, if he inclined, in ten minutes, and in ten lines, he could have annihilated the substitution, and settled his provision as he chose.

The plea of the pursuer, that the whole is to be held moveable or personal as payment was demanded, would be subversive of the whole principles of succession in the law of Scotland, and ought not to be listened to for a moment.

2. The settlement of Mrs. Whittet in 1814.

This is still more clear. She executed a trust-deed. Her whole property was vested in trustees, for the behoof of such as might be concerned. The right cannot be taken out of them without order of law. The destination and condition of her settlement are most peculiar. The accumulated funds "are to be paid to the said John Johnston at the first term of Martinmas immediately after he shall attain the age of 21 years complete; but failing his surviving that term of Martinmas, or if he should survive that term, then failing

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his specially disponing the same himself, I appoint," &c. Now, as it is admitted that Mr. Johnston did no such thing, how can the will of the testator be disregarded? Every step taken after his death was null and void, and cannot avail. Even the terms of Mrs. Whittet's settlement are a strong corroboration of what was the meaning of her husband when he executed his settlement in 1802.

Lord Craigie took a different view, and conceived the substitution to be limited to the event of the Johnstons dying in minority. His Lordship considered, that as the claims of service by Mrs. Greig and Mr. G. R. Johnston were made by parties standing in different situations, the Sheriff should not have held the latter to be precluded by the former.

Lord Gillies.—My opinion as to the substitution inclines to that of Lord Craigie, though the case is one of great nicety. The provision of £5000 was left as a personal burden on Mrs. Greig, and the question is, whether it was the intention of the testator to create a substitution, in the event of either of the Johnstons surviving majority, which was the term of payment? On this subject I would refer to the case of Brown v. Coventry, as being of much authority. The Lord Justice-Clerk there observed, that the law of Scotland differed from the Roman law, inasmuch as with us a "testator may make a substitution, if he declares his intention properly," &c. After several other observations, the purport of them is summed up in the following question by Lord Eskgrove:—"Then the Lord Justice-Clerk's opinion is, that a man may make a proper substitution in money, but that when the intention to do so is not clearly explained, the Roman law must regulate the question." To which his Lordship answered, "that is my opinion." In that answer I entirely concur. What, then, was the intention of the testator Whittet? He leaves a money provision as a burden on Mrs. Greig, which "she shall pay to each of my grandchildren," &c., at the first term after majority,—"it being provided, that in the event of the death of either of John and Wilhelmina without lawful children, the said Jean Whittet and her foresaids shall succeed," &c. This is just a conditional institution. Put the case, that either of the Johnstons had died in minority, leaving children; the institution was thereby evacuated. Suppose that these children also predeceased the term at which their parents would have attained majority, would not the money in this provision have gone to the legal representatives of the children? I recur to the fundamental principle, that where a substitution is intended in a money provision, the intention must be clearly expressed. Now I cannot hold such intention to be clearly expressed here, if there be any attempt to express it at all. What are the instructions of the testator himself? He directs that the party burdened with this money provision 'shall pay it' at the first term after Johnston reaches majority. The settlement of Whittet therefore contemplates and enjoins payment of the money at that term; and as soon as it arrived, the substitution was vacated. This is my opinion, which I rest upon the principles recognised in Brown's case, and the intention of the testator as expressed in his settlement. In regard to the other facts of the case founded on, if I thought it necessary to notice them, I would merely observe, that the heritable bonds for the pursuer were not directed by the testator, who, on the contrary, made the burden personal on his disponee; and as Johnston was a pupil at their date,

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his succession cannot be affected by that proceeding. I should hold it rash to infer, merely from the circumstance of Johnston's not immediately calling up the heritable bond, that he meant the sum to go to Mrs Greig; and a contrary inference arises from the clause in the deed restricting the security, which provided that the bond, so far as unrestricted, should subsist "in favour of me, my heirs, executors, and successors," &c., until full payment. Besides, when Greig and Johnston adjust accounts in December 1820, they refer to the provision as 'due in terms of Mr. Whittet's settlement,' and do not recur to the heritable bond. And when I look to the whole circumstances of Johnston's conduct and proceedings, especially the demand for payment, and the peremptory instructions left with his factor to recover payment of the provision, I cannot doubt that he meant this money to go to his legal representatives. When he went abroad, he did not contemplate his own predecease before his factor could recover the money; and therefore, if he meant not to evacuate the destination in favour of Mrs. Greig, he should have specially declared this when he ordered payment to be insisted for. On the whole, therefore, I am of opinion, 1. That Whittet did not make a substitution in favour of Mrs. Greig, in the event of Johnston surviving majority; and, 2. That the conduct of Johnston, and the delay of Mr. and Mrs. Greig, would have extinguished the destination in Mrs. Greig's favour, if there had been one.

Lord President.—It appears to me that much argument is wasted as to the true construction of old Whittet's settlement, viz. As to whether the provision to J. W. Johnston, his grandson, is to be held as a pure legacy, and subject to the law applicable to such; and whether the destination to Mrs. Greig is to be held as a substitution, or conditional institution. Those are questions which it would have been necessary to consider, if the provision to J. W. Johnston had rested on old Whittet's settlement. But it does not so rest. After old Whittet's death, the tutors and curators of Mrs. Greig, then an infant, who were also the guardians of John W. Johnston, also an infant, and creditor in the provision, granted to him an heritable bond over Mrs. Greig's estate, containing the destination of old Whittet to her, failing John. It is true that this being done by John's tutors merely for security could have no effect on his succession. But John became of age, when he certainly had it in his power to regulate his succession as he pleased; for though there was a destination of old Whittet engrossed in the heritable bond, yet there was no prohibition or restriction to prevent him from altering that destination, which he might have done in many ways. But he lived for several years after he became of age, leaving the provision of his grandfather, not standing on his settlement, but on heritable bond taken to him by his tutors, with the destination in favour of his aunt Mrs. Greig. He made no alteration of that destination—he drew the interest of the heritable bond—he took a partial payment;—he may be even said in a manner to have himself taken a renewal of the heritable bond, with the destination in favour of Mrs. Greig; for he renounced the heritable security over certain lands, and restricted his security and infeftment over the remaining lands, which is much the same as if the original bond had been out and out discharged, and a new bond taken by himself over the other lands, or over the lands of another person. Therefore I hold the destination of old Whittet in favour of Mrs. Greig to have been adopted,

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ratified, and renewed by John himself. Then, did he ever alter it? Certainly not in any way that could affect this provision, now made, by his own act and deed, an heritable estate in his person. All that he did was to appoint a factor when he went abroad, with instructions to uplift the money; but neither he nor his factor did uplift it. Nay, they did not even make any formal requisition or judicial demand for payment, even if that could have altered the nature of the subject from heritable to moveable; still less did he indicate any wish or intention to alter the destination in favour of Mrs. Greig. But even if he had done all these, it would not do. Requisition, or even an action for payment followed by decreet, does not render an heritable bond moveable,—the presumption being, that the creditor only meant to lay it out on some other lands. Nor would the most express declaration of his will in a formal testament have carried the bond to any other person than the heirs in the bond. But there is not the slightest evidence, even of the most informal kind, that he had altered his intention as to the destination in favour of Mrs. Greig. There is nothing but a few letters from him and his factor, not relating to his succession, but to the payment of the money; and these addressed, not to the debtor in the bond, but to her husband, to whom a formal requisition or judicial demand would not have been sufficient without calling his wife. Therefore I am clear that the bond remained heritable, and that the destination in it to Mrs. Greig never was altered, or, as far as I see, even intended to be altered. But then the arrears of interest due on it were moveable, and must go to John Whittet Johnston's executors, whoever they are. There is a separate fund left by John Whittet Johnston in dispute under the following destination of Mrs. Whittet, the widow of old Whittet. She conveyed her whole property to trustees, and specially the sum of £511, owing to her by Miller of Lincoln's Inn, with orders to them to pay it to the said John Whittet Johnston (with the accumulated interest) at the first term of Martinmas after his majority; but failing his surviving that term, or if he should survive that term, "then failing his specially disponing the same himself, I appoint, in both of these events, my trustees to accumulate the said trust-funds until due," and then pay the same to Mrs. Greig's children. The trustees do not appear to have acted; and Miller, the debtor, after some correspondence, paid up the money to John Whittet Johnston's factor after he went abroad; and the money was applied to pay off some debts of his father Glen Johnston. But all this was unwarranted. Miller had no right to pay up the money to John Whittet Johnston or his factor. If the trustees of old Mrs. Whittet did not choose to accept or act, all parties should have applied to have a curator bonis appointed, who must have held the money in terms and for the purposes of her trust-deed; and we must hold it as still vested in the factor for such purposes, and as John Whittet Johnston has not specially disponed the same himself, it must be held by the factor, or by same person appointed by the Court for Mrs. Greig's children, in terms of the old lady's settlement.

Lord Gillies.—That is a separate question, and would require to be maturely considered. Miller, in making payment to Johnston, was just doing for Mrs. Whittet's trustees what they themselves were bound to do, and no more. It would be a matter of some difficulty to hold that such a payment must go for nothing. The trustees were bound to pay as Miller did.

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THE COURT being equally divided, directed the opinions of the other Judges to be taken on the following questions:—

1. Whether, by virtue of the deed of settlement, executed by old Mr. John Whittet, dated 12th May 1802, in relation to the provision of £5000, now in dispute between these parties, Mrs. Greig is entitled to succeed to it under the substitution or destination in her favour? Or whether the settlement is to be considered as a conditional institution; and that as John Whittet Johnston survived the term of payment, and died without issue, the succession opened to his own heirs and representatives?

2. Whatever would have been the right of succession, if the provision of £5000 had vested on old Whittet's settlement, Whether the conduct of John Whittet Johnston, in regard to the heritable bond taken to him by his tutors for said £5000, operated as a confirmation of the destination therein contained in favour of Mrs. Greig?

3. Supposing John Whittet Johnston to have thereby adopted and confirmed the destination in favour of Mrs. Greig, whether his subsequent conduct, and instructions to his factor on the eve of his going abroad, and the conduct and proceedings of his factor and agent, and also the conduct and proceedings of Mr. and Mrs. Greig, operated as an extinction of said destination, so as to open the succession to the £5000 to his own heirs and representatives?

4. Whether, in all the circumstances of the case, the right to the £5000 in dispute belonged, upon John Whittet Johnston's death, to his legal representatives, or to Mrs. Greig?

5. Whether, by the trust-deed and settlement of Mrs. Whittet, dated 12th December 1814, and the subsequent proceedings thereto, the sum of £511 ought to be laid out for behalf of Mrs. Greig's children till they shall come of age, and to be then divided between them? Or whether said sum now belongs, or ought to be paid, to the heirs and representatives of John Whittet Johnston?

The following opinions were returned:—

LORD JUSTICE-CLERK.—1. On attending to the terms of the provision in the deed of settlement of John Whittet, of the 12th of May 1802, I am of opinion that it must be viewed as a conditional institution, and that Mrs. Greig is not entitled to succeed to the sum of £5000 which was provided to the testator's grandchildren, John and Wilhelmina Johnston. The deed binds Mrs. Greig and her foresaids to pay to each of them £2500 "at the first Whitsunday or Martinmas after they respectively have attained the age of twenty-one years complete, with the legal interest of the same from and after the first term of Whitsunday or Martinmas after my death, ay and until the same is paid;" it being provided, that "in the event of the death of either of the said John and Wilhelmina Johnston without lawful children, the survivor shall succeed to the share of the predeceaser; and in the event of the death of both without lawful children, the said Jane Whittet and her foresaids shall succeed to the whole of what is herein provided to them." Here the term of payment is positively defined as to these provisions; and while the legatees are entitled to the interest from the death of the testator, there can be no doubt that when that term of payment did arrive, the legatees, or the survivor, who is, by the subsequent words, declared to succeed to the share of the one predeceasing

'without lawful children,' are or is entitled to insist against the general disponee for immediate payment of the whole provision.

As John Whittet Johnston, who survived his sister, did also survive the term of payment, the provision was not only fully vested in him, but must be considered as held by Mrs. Greig, (whether in virtue of the heritable security or not, is of no importance,) from and after the term of payment, solely as his debtor, and on his account.

I am further of opinion, that, according to the principle recognised in the case of Brown against Coventry, there are not to be found in this clause such clear and precise words as are necessary to show that a direct substitution, as in a tailzied succession, was intended by the testator. It is manifest that there was no sort of restriction on the grandchildren's right to dispose of their provisions, the moment that the term of payment arrived,—there being no such stipulation as occurs in the subsequent deed of Mrs. Whittet, that if, after majority, the legatees should die without executing a deed disposing of their legacies, they should descend to Mrs. Greig's children.

2. I am of opinion that the proceedings of the tutors and curators of Mrs. Greig, or of John and Wilhelmina Johnston, in regard to the heritable securities granted for the above provisions, and the conduct of John Whittet Johnston in regard to them, do not affect the question as to the proper construction of Mr. Whittet's settlement, or alter the relative interests of the parties in his succession.

3. I also consider that none of the proceedings adopted by John Whittet Johnston, in regard to the instructions to his factor or otherwise, can be held as equivalent to an actual alteration of the destination of the provision of £5000, supposing it established in Mrs. Greig's favour by his grandfather's settlement; and that the proceedings of Mr. and Mrs. Greig cannot be held as operating an extinction of said destination.

4. I am of opinion, that, under the construction which I entertain of the clause of destination in Mr. Whittet's settlement, the £5000 in dispute belongs to the legal representatives of John Whittet Johnston.

5. I am of opinion, that, according to the true construction of Mrs. Whittet's settlement and subsequent proceedings, the sum here referred to ought to be laid out for behoof of Mrs. Greig's children till they become of age.

Lord Mackenzie.—I rather think the provision in question is a substitution. The primary provision is the obligation to pay at majority to John and Wilhelmina Johnston, not expressly to their heirs. But it appears certain that heirs of their bodies were understood and intended; for, in case of either having children, the other is not to succeed to that one's share; nor is Jane Whittet, the general disponee, to succeed, so that the children must have been intended to take. The clause is then to be read, "to each of John and Wilhelmina Johnston, after they respectively have attained the age of twenty-one years complete, and to the heirs descended of their bodies;" and then, in the event of the death of either without children, the survivor, and the heirs descended of his or her body, shall succeed to the share of the predeceaser; and, in the event of the death of both without children, Jane Whittet shall succeed, and the heirs of her body, and her assignees." The granter had made a destination very nearly similar respecting John and Wilhelmina Johnston in his

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disposition of the estate. Jane Whittet gets it to herself, and her heirs and assignees; but the Johnstons only to the heirs of their bodies. In this way, in respect to each share, there is a destination differing very little from a destination to A. and the heirs of A.'s body; whom failing, to B. and the heirs of B.'s body; whom failing, to C. and the heirs of C.'s body, and to C.'s assignees; and this is a destination of a sum bearing interest, though not payable, i. e. the principal not payable immediately. For I incline to hold the interest to have been payable immediately for the aliment of the children, while I hold that the term of payment of the principal sum to each of these two nominees was his or her own majority; and to the heirs of the body of each nominee the term seems to have been immediately on the death of their parent; and to Jean Whittet, in case of her succeeding to this money, it seems to have been payable immediately on her survivance. Now all this being provided by a man having reason to desire to exclude the heirs at law of the two Johnstons, John and Wilhelmina, and having, in the previous destination of his heritable property, actually excluded those very heirs at law, while he called John and Wilhelmina Johnston, and that by calling only the heirs of their bodies in a substitution of heirs—in such circumstances, I think it more safe, and agreeable to the probable inference as to his intention, to hold this provision also to have been a substitution, rather than a conditional institution. To the first question, therefore, I would answer affirmatively, and negatively to the alternative question which is attached to it.

2. In this view, the second question must of course be answered in the affirmative. But in the view that the provision relative to the £5000 had been merely a conditional institution of a legacy intended to fall, and falling by the vesting of the legacy, I think this second question ought to be answered in the negative. I do not think that the taking of heritable security for this legacy in terminis could change its nature; and I do not see that even the adoption of that security by John Whittet Johnston, in the way he did adopt it, made any change in this respect. If the legacy was merely qualified by a conditional institution, then, "the heirs, executors, and successors," for whose behoof he adopted the security, cannot be held to have been the conditional institutes, whose spes successionis had already ceased to exist before he adopted it.

3. I incline to answer this question in the affirmative. John Whittet Johnston decidedly intimated his desire, and made demands, to have the money paid up, both in his own person and by his mandatary; and therefore I think that Mrs. Greig ought not to benefit by her failure to pay it up, to the effect of taking this money herself, under a destination which that payment would have extinguished. There is not a trace of any intention by John Whittet Johnston to re-invest in such a manner as would have kept up the destination in her favour; particularly there is no direction to such effect left with his mandatary. He must have intended, by recovering payment of the money, to evacuate her chance of succeeding to it; and I do not think she can be allowed to baffle that intention, and succeed to the money by withholding payment of it.

4. To his legal representatives, not to Mrs. Greig.

5. To the heirs and representatives of John Whittet Johnston. It was competent for him to recover the money, in which case the substitution ended. But

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he did recover it, and mingled it with his other estate. The trustees could not have sued him to take it from him, as they were to hold it subject to demand on his part.

Lord Moncreiff.—I concur in this opinion. I am satisfied, in regard to the first question, that it was the intention of the testator to create a substitution, and not a conditional institution; and I am of opinion that this is purely a question as to the true intention of the testator, in so far as it can be discovered from the deed. I concur in Lord Mackenzie's reasoning on this point. I had at first considerable doubt on the point involved in the fifth question, from the precise form of the provision of clear substitution, in the event of John Johnston dying without having 'specially disposed' of the legacy. But, on full consideration, I am inclined to think that that term must be taken as referring to the case of the money remaining unuplifted in the hands of the trustees, and that by actually demanding and receiving it, and mixing it with his own funds, John Johnston evacuated the substitution. On the other points, I also concur in Lord Mackenzie's opinion.

Lord Newton.—I am disposed to think Lord Mackenzie right in his view of the first question, and I concur with him entirely on all the other points.

Lord Meadowbank.—My opinion entirely coincides with that formed by Lord Mackenzie and Lord Moncreiff. At first I was inclined, like the latter, to entertain considerable doubt on the point involved in the fifth question; but, for the same reason as that assigned by his Lordship, I have arrived at the same conclusion.

Lord Glenlee.—In answer to the first question, it appears to me that there is no declaration on the part of the testator of any intention to the contrary, sufficiently distinct and explicit to take the case out of the general rule which was laid down as such by the Judges in the case of Coventry, with respect to legacies of money; and therefore I think that the provision in favour of Mrs. Greig falls to be considered as a mere conditional institution, which evanished by John Whittet Johnston surviving the term of payment.

2. In answer to the second question, it appears to me that nothing was done by John Whittet Johnston, in regard to the heritable bond mentioned in the question, which could operate as a confirmation of the destination therein contained to Mrs. Greig.

3. 4. and 5. In regard to the remaining questions, I concur in the opinion expressed by Lord Mackenzie and Lord Moncreiff.

Lord Corehouse.—I am rather inclined to think that the destination to Mrs. Greig is a conditional institution. The presumption of law is against a substitution in the case of a moveable sum payable to the institute, and left at his free disposal. The destination in this case is not to John Whittet and the heirs of his body, whom failing, to Wilhelmina, and the heirs of her body, whom failing, to Mrs. Greig, the usual form of a substitution. Indeed no such right was meant to be conferred; for if either John or Wilhelmina was survived by a child, though the parent died in minority, and the child survived only a few hours, Mrs. Greig's right would have been evacuated. In this respect, the destination of the heritable property is quite different from the destination of the legacies.

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If a substitution existed, therefore, it was only a conditional substitution, and that is still less to be presumed than an ordinary substitution in opposition to a conditional institution. The case of Brown v. Coventry, mentioned in the pleadings, appears to be a precedent much in point. In other respects, I agree in the opinion of Lord Mackenzie, and, in so far as the interests of parties are concerned, I arrive at exactly the same result.

Lord Cringletie.—In this case the late Mr. Whittet was married to Isobel Tod, by whom he had several children, none of whom need be mentioned except Margaret, and Jane, the defender in this cause. Margaret married Mr. Glen Johnston, by whom she had a son, John Whittet Johnston, and a daughter, Wilhelmina, and predeceased her father.

Mr. Whittet, on 12th May 1802, executed a settlement of his whole estate, heritable and moveable, in favour of his only surviving daughter Jane, whereby he conveyed the whole to her, the heirs of her body, and her assignees; whom failing, to his two grandchildren already named, equally between them and the heirs of their bodies, &c.; "but always with and under the burdens and provisions after mentioned—viz. 1. Of his debts. 2. The said Jane Whittet shall pay to each of my grandchildren, John and Wilhelmina Johnston, the sum of £2500 sterling at the first term of Whitsunday or Martinmas after they respectively have attained the age of twenty-one years complete, with the legal interest of the same from and after the first term of Whitsunday or Martinmas after my death, ay and until the same is paid; it being provided, that in the event of the death of either of the said John and Wilhelmina Johnston without lawful children, the survivor shall succeed to the share of the predeceaser; and, in the event of the death of both without lawful children, the said Jane Whittet and her foresaids shall succeed to the whole of what is herein provided to them."

Here I must remark, that the interest is ordered to be paid on the principal sum from the first term of Whitsunday or Martinmas after his death; but, from the structure of the provision, it is clear to me that the interest was not to be paid yearly, but in whole with the capital, to the children on their coming of age;—1st, Because the interest is not ordered to be paid yearly or half-yearly to them; but, 2dly, and principally, Because it is declared, that "in the event of both dying without lawful children, the said Jane Whittet and her foresaids shall succeed to the whole of what is herein provided to them." Now what was therein provided to them was £2500 to each, payable at the first term of Whitsunday or Martinmas after their attaining to twenty-one years complete, with interest from the first term after his death; and consequently, as the said Jane Whittet was to succeed to the whole, being principal and interest, it is not possible that the interest could be payable to the children before they came of age; because, if it had, it would have been taken out of the destination, and spent on their education and maintenance, and their aunt could not have succeeded to it.

The same circumstances lead me to conclude that Mr. Whittet meant the substitution, or rather conditional institution of his daughter, to take the provisions for his grandchildren, in case of their deaths without children, should endure till the term of payment only, and was then to be at an end; because, beyond all power of dispute, they had then right to uplift their money, principal and interest; and if they chose to allow the capital to lie with their aunt

unuplifted, still they could naturally call for their interest as it became due; and if they did so, she could not succeed to what was uplifted and spent; yet she has just the same right to it as to the capital, both being destinated to her, which proves to me that the destination was intended to endure till the term of payment of both, and no longer.

I must further remark, that the sums left to John Johnston and his sister were not made real burdens on their grandfather's landed property in particular. They were declared by his settlement to be burdens on his whole estate, heritable and moveable, and consequently they were merely personal rights to the grandchildren.

Mr. Whittet died in December 1802; and in February 1804 his daughter Jane, then a minor, with consent of curators, executed an heritable bond, in favour of her nephew and niece, over her landed property, for security to them of the money left to them by their grandfather. The clauses in her father's settlement are correctly enough detailed in the bond, in which there occurs this declaration:—"And, in the event of the death of both without lawful children, I and my heirs, executors, and assignees, shall succeed to the whole of the said sums," viz. the principal and interest, which last is not made payable yearly and termly, till after the term of payment of both.

Afterwards Miss Jane Whittet sold the lands over which she had granted this heritable bond; but having acquired others, she obtained from the tutors of the minors a renunciation of their infeftment, and in 1810, after she was of age, granted another heritable bond, in the same terms, over the other lands which she had acquired, on which infeftment was taken. As John Johnston was then in pupillarity, and his sister only about twelve years old, these heritable bonds would confer on them a security for their money, but could in no way alter their rights, in so far as they arose out of Mr. Whittet's settlement.

In July 1814 Wilhelmina died, whereby her brother John had direct right to her money; and of course the whole £5000, with interest, was due and payable to him when he should arrive at twenty-one years of age complete. Accordingly, that event took place in July 1820, when he demanded a settlement with his aunt; and, without entering into particulars, it was ascertained that there was due to him £5000 of principal, and £2047. 3s. 9d. of interest. Before this, Miss Whittet had married the defender Alexander Greig. The statement made out on this occasion is dated 30th December 1820, and signed by Mr. Greig and John Johnston. £1047. 3s. 9d. was paid by the former to the latter, and the remaining £1000 was left in his hands, for which he agreed to grant his bill, but which was not done, though he afterwards acknowledged it to be a capital sum bearing interest.—"As Mr. Johnston (says he) wants only £1000 at present, it is quite proper and reasonable that the other £1000 (leaving the £5000) should be brought to a capital, so as to bear interest from Martinmas; and I shall accordingly give him a bill or promissory note for the same, with security, if he desires it." Although Mr. Greig did not give his bill or note, that can surely not make any difference on this question. That sum, being interest, must be held to have been paid and re-lent to Mr. Greig by Mr. Johnston.

It appears that Mrs. Greig had the property of lands called Pitkindie and

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Ballairdie, and also Hoole and Franklidden, over all which the heritable bond 1810 extended; and wishing to have the free power of disposing of the latter two subjects, the defender applied to Mr. Johnston to renounce his security over them. I have already observed that the heritable bonds, having been granted to John Johnston while he was in pupillarity, could make no change on the rights arising out of his grandfather's settlement. But now, when he had attained to majority, his attention was called to it by the request of the defenders, that he would renounce his infeftment over Hoole and Franklidden, and it was in his power to recognise the heritable bond in whole or in part, or refuse to hold it by demanding payment of his money. In my opinion, he recognised it as a right in his favour, but to a certain extent only. It bore a clause in these words: "And in the event of the death of both (viz. John and Wilhelmina Johnston) without lawful children, I and my heirs, executors, and assignees, shall succeed to the whole of the said sums." Now John renounced his right over Hoole and Franklidden, as desired by the defenders; but in his renunciation he inserted this clause, viz. declaring that his renunciation should not affect the heritable bond and instrument of sasine thereon, "which constitute the foresaid principal sum of £5000, and interest due thereon, a burden upon the foresaid lands of Pitkindie and Ballairdie, with their pertinents; but the same shall remain and subsist in full force and effect, in the whole heads, tenor, clauses, and contents of the same, in favour of me and my heirs, executors, and successors, ay and until the said principal sum of £5000, and interest due thereon, liquidate penalty and termly failures, if incurred, therein specified, are fully satisfied and paid."

It appears to me, that as this renunciation was granted at the desire of the defenders, and accepted of and acted on by them, it formed a contract between the parties, and was to the precise same effect as if the defenders had renewed the heritable bond to John Johnston, his heirs, executors, and successors, and left out the clause of destination to Mrs. Greig.

This was in February 1821, and matters appear to have been left in the same situation till the harvest of 1825, when John Johnston, having been in bad health, resolved to go to Bordeaux, and granted a factory and commission to Henry Johnston, joint manager for the Leith Banking Company, giving him full power to uplift and discharge all sums of money due to him, and in particular, the sums involved in the present conjoined actions, and accompanied it with instructions to intimate to Mr. and Mrs. Greig that the money must be paid up at Martinmas 1825. He also wrote to Mr. Greig a letter, dated the 2d of September 1825, informing him of the factory, and instructions "to act for me in my absence, and particularly to receive from you, at Martinmas first, payment of the two bonds, and discharge them. As I formerly mentioned to you, it is of the utmost importance to me to receive payment of these bonds at that term," &c.

This letter is not forthcoming, and Mr. Greig says that he has no recollection of it; but his want of recollection arises from the lapse of time between its date, and the time he was called on to produce it, for in my opinion no one can reasonably doubt that he did receive it. Mr. Johnston the factor, soon after its date, wrote to Mr. Greig, saying that his constituent had sent the said letter to Mr. Greig, of which he had left a copy, and desired to know whether Mr. Greig

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was ready to comply with the request in it. Having got no answer, the factor wrote again, to which Mr. Greig answered in a few lines, that he would see the factor some of these days regarding his constituent's matters.

The factor again wrote Mr. Greig—"I have also to request the favour of your informing me, in due course, if you hold Mr. J. W. Johnston's last letter to you (viz. the letter 2d September) a sufficient intimation and demand for payment of the principal sum, and accumulated interest thereon, of the bond mentioned in Mr. Johnston's said letter."

Mr. Greig made no answer, which obliged the factor to write him again, begging an explicit answer; and at last Mr. Greig was pleased to answer. But did he ask what letter was it that was alluded to as having been written to him by John Whittet Johnston? or did he deny the receipt of it? No—he wrote, "I have just received your letter of the 30th ult. Though I did not answer your last in writing, I have repeatedly seen and spoken to you on the subject since; and as I never once thought of disputing the notice of intimation as to the payment, I am surprised you should express any anxiety on that point."

That Mr. Greig, therefore, received the letter of the 2d of September can admit of no doubt, although it has now escaped his recollection; and at any rate it is still clearer that a demand for payment was made on him as husband and manager for his wife, which he held to be sufficient; and accordingly it is proved that he and his wife publicly advertised their land for sale, and were taking other measures for paying the debt. At last an action was raised against them for payment; but in the mean time John Whittet Johnston had sailed for Bordeaux for South America, and died at sea in March 1826, whereby the action abated.

Such being the facts attending this cause, in so far as it relates to the £5000 left by Mr. Whittet to his grandson Johnston, I am of opinion, in answer to query first, that, for the reasons already explained, the institution or substitution (for whichever it may be called does not influence me) evanished, and was evacuated by John Johnston's attaining to majority, and having right to receive payment of the principal and interest thereon, on the principles laid down by the Court in the case of Coventry, 2d June 1792. I think that at that period the right to the money vested in him; and that Mrs. Greig could no more demand the capital than the interest, which was then paid,—her right to both being constituted by the same words.

To queries 2 and 3, I am of opinion that the granting by Mrs. Greig of the two heritable bonds to John and Wilhelmina Johnston could not operate any change on their rights as constituted by their grandfather's settlement, further than operating as a security for their money,—in respect that both were in minority, John having been then even in pupillarity; and I think that when he became of age, and at the desire of the defenders executed a renunciation of these bonds, in so far as related to certain subjects contained in them, he recognised the bond as a security only in favour of himself, his heirs, executors, and successors, which I hold to be his heirs-at law. And this deed having been accepted of and acted on by the defenders, it appears to me to have the same effect in a question with them, as if they had granted a new bond for the money payable to him, his heirs, executors, and successors.

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I further think that the demand for payment having been made by John Johnston himself, and repeated by his factor by his express instructions, the defenders cannot derive any benefit from their having retained the money, as that would be deriving right from an act of injustice. Beyond all dispute, the money was payable to Johnston in July 1820. If he had then, or at any after time, got the money, it became his own, descendible to his heirs; and I do not think that any man can dispute the justice of the 161st law de Regulis Juris. "Quoties per eum cujus interest, conditionem non impleri fiat, quo minus impleatur, perinde haberi ac si impleta conditio fuisset, quod ad libertatem, et legata, et ad hæredum institutiones perducitur." This rule is of course adopted by our institutional writers. If, therefore, the payment had been made, I do not think that it could be maintained that the destination was not evacuated. The defenders admit that there was no prohibition nor restriction upon John Johnston to alter it.

Their words are, (Case, p. 42,) "Now the defenders do not deny that John Johnston could have evacuated the destination in Mrs. Greig's favour by a deed distinctly expressing his purpose, and containing apt legal clauses for accomplishing it; but they have yet to learn that any person can put an end to a destination of a feudal subject by merely indicating an intention to do so."

In the first place, it is a gratuitous assumption that the gift of Mr. Whittet was a feudal subject. It was merely a provision in money, which was not a real burden on his land, but made by him a burden on his daughter, receiving his whole property in land and money. She it was who granted the heritable bonds to pupils; and I have already said, that when John became of age, and able to judge for himself, he recognised that bond as a security only for the money in favour of himself, his heirs, executors, and successors. He did, therefore, alter the destination in the bond by a regular deed, containing an apt clause for the purpose.

But, secondly, attend to the nature of the feudal subject, and the constitution of its feudalization. It was an heritable bond; and if Johnston had meant to convey it to any one, he must no doubt have done so by a regular deed; but if he had uplifted his money, he by that act alone annihilated the bond, and all its clauses and destinations. Now, who prevented him from getting his money, and extinguishing the bond? The defenders, beyond all dispute; and consequently, in this question with them, I am of opinion that the regularly admitted demand for the money was to the same effect as if he had received it. The demand was a deed alterative of the destination, if it had not been already altered by the renunciation above mentioned, which reserved the bond as a security to himself, his heirs, executors, and successors.

The defenders have quoted the opinions of our authors that a demand for payment of money secured by heritable securities does not alter the nature thereof, in so far as regards the question of succession; but that no way applies to the present question, which is not one between heirs and executors, to which these dicta refer; and accordingly, in the circumstances applicable to this case, we find them explicitly adopting the doctrine which I have quoted.

4. I am therefore of opinion, in answer to query 4th, that, in all the circumstances of the case, the right to the £5000 in dispute belonged, upon John Whittet Johnston's death, to his legal representatives, and not to Mrs. Greig.

The remaining query applies to a different subject, to which I will now advert.

By Mr. Whittet's settlement, he left it in the power of his widow to dispose

of £500 of his estate. By her will, dated in 1814, she appointed certain trustees, to whom she conveyed all her property, with directions "to pay them, with accumulated interest, to the said John Johnston, at the first term of Martinmas immediately after he shall attain the age of twenty-one years complete; but failing his surviving that term of Martinmas, or if he should survive that term, then failing his specially disponing the same himself, I appoint, in both of these events, my said trustees to accumulate the said trust-funds, adding the interest thereto," &c. till the children of her daughter Mrs. Greig should all attain to twenty-one years complete, &c.

Mrs. Whittet lived till 24th October 1821, before which her grandson John had become of age; and of course, as by her deed the trustees would have had immediately to denude in his favour, it is said that they never accepted nor acted, which I think is highly probable. However, among her funds was a debt due by a Mr. John Miller in London of about £500, and in John Whittet Johnston's factory and instructions this debt was particularly specified, and the factor was desired to uplift it. Accordingly he did uplift it on the 21st of November 1825; and it is admitted by the defenders themselves that the factor applied the money by retiring two bills, one for £300, and another for £200, in which his constituent's father was the debtor, and took from him a bond for £500, payable to his son, his heirs, and assignees whatsoever.

5. It thus appears to me, that John Johnston having attained the years of majority before his grandmother's death, at which period her funds were to become his property, and by means of his factor, to whom he had given express injunctions for the purpose, having uplifted this sum due by Mr. Miller, and disposed of it, by lending it on a bond payable to himself, his heirs, executors, and assignees, he evacuated the destination in his grandmother's will; and that the sum belongs to his representatives, and ought not to be laid out for behoof of Mrs. Greig's children till they shall become of age.

There is a sum of £1300, which is composed of the interest due on the £5000 after Whitsunday 1825, and the £1000 of accumulated interest, for which Mr. Greig agreed to grant his bill; all which money was paid to the factor for Mr. Johnston after his death, and is now the subject of the multiplepoinding. The sum of £1000 is claimed by John Johnston's executors, and the defenders do not dispute this claim, but plead that they are entitled to a discharge pro tanto of their heritable bond, which they seem to doubt whether that granted by the factor amounts to. As to the balance of the £300, your Lordships ask no questions relative to it, so I presume that you have no doubts concerning it.

Lord Medwyn.—I had at first the same doubt on the point involved in the fifth question as Lord Moncreiff; but I now concur in his answer to it, on the views stated by him; and further, I concur in the opinion of Lords Glenlee and Corehouse on the other points.

Lord Fullerton.—1. I agree with Lord Glenlee and Lord Corehouse in thinking that the provision in favour of Mrs. Greig is a conditional institution. In the first place, her right was clearly dependent on the condition of John and Wilhelmina Johnston dying without children; so that, if a substitution at all, it must be held to be a conditional substitution—a kind of destination which would seem to require some very explicit expression of the testator's in-

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tention to support it. 2. The form of expression employed by the testator not only does not support, but is directly adverse to, any such presumption. He directs that his disponee, Jane Whittet, "shall pay" the legacy in dispute, at the first term of Whitsunday or Martinmas after the legatees have attained the age of twenty-one years; and there is then the provision, that, in the event of the death of either of the legatees without lawful children, the survivor shall succeed to the share of the predeceaser; "and in the event of the death of both without lawful children, the said Jane Whittet and her foresaids shall succeed to the whole of what is herein provided to them." Now, as the term of vesting is fixed in the form of a positive order to pay at a particular period, and as the necessary effect of payment confessedly is to extinguish the subject as a subject of destination altogether, it would seem to follow, according to every reasonable rule of construction, that the destination must be held to apply to the period prior to the term of payment, and cannot be extended beyond the term of payment, at which time it must be presumed that the right of credit forming the subject of destination was, in the contemplation of the testator, to expire. But this is just to express in other words, that the right created in favour of Mrs. Greig was dependent on the condition of both the legatees dying before the period when the legacies were to vest in them or the survivor.

As the competency of a substitution, even in cases of legacy, is admitted in the law of Scotland, plausible grounds might perhaps be urged, if the question were still open, for disregarding, on a broader reference to the intentions of the testator, the whole distinction between conditional institution and substitution. But it is now too late to question such a distinction; and on considering the terms of the present bequest, there seems to be no doubt that the presumptions against substitution, and in favour of conditional institution, are much stronger than those which received effect in the case of Brown against Coventry, referred to by the claimants.

2. As the heritable bond bears to be granted in corroboration and security of Mr. Whittet's disposition, and is expressed, in so far as regards the legacies, in the very terms of that disposition, I do not think that the bond, or measures taken by J. W. Johnston in regard to it, had the effect of altering, in any particular, the rights of the parties created by that disposition.

3. If the opinions above expressed are well founded, the answer to this question is unnecessary. But on the supposition of there being, either in virtue of the original disposition of Mr. Whittet, or of J. Johnston's adoption of the heritable bond, a substitution in favour of Mrs. Greig, I should have great difficulty in holding that "his subsequent conduct and instructions to his factor"—"the conduct and proceeding of that factor"—and "the conduct and proceedings of Mr. and Mrs. Greig, operated as an extinction of that destination." The circumstances of the case do not seem to admit of the application of the rule regarding conditional legacies, founded on by the claimants. If the right of the claimants, in competition with Mrs. Greig, depended on the vesting of the legacy in J. W. Johnston, which vesting had been prevented by the act of Mr. and Mrs. Greig, the rule would have applied; and there would have been perhaps grounds for maintaining its application, if J. W. Johnston had executed any deed of settlement, which would have been good, but for the failure of

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these parties to pay the legacies at the term named by the legatee. But the difficulty is, that neither J. W. Johnston's right to the legacies, nor the effect of any positive expression of his intention to dispose of them, is here in dispute. He had most unquestionably, and independently of any act to be performed by Mr. and Mrs. Greig, the power of disposing of these sums as he chose; but he did not so dispose of them; and the inference of an intention to dispose of them in favour of the claimants is drawn from the mere circumstance that he demanded payment, which, if made, would have had the effect of carrying ab intestato these sums to his legal representatives.

Now I question very much the legitimacy of this inference. The only acts of J. W. Johnston of importance on this point are his instructions to his factor, and his letter of 2d September 1825, written a few days afterwards to Mr. Greig. The letter requires payment at Martinmas 1825, intimating that five per cent. will be charged "after that term;" while, in the instructions, the factor is directed to intimate that payment is to be made at Martinmas, and, that "beyond the term of Whitsunday 1826 it ought not to be allowed to lie,"—he, J. W. Johnston, executing no deed whatever, either then or at any other time, for regulating his succession, though he must have been aware, on the present hypothesis, that until Martinmas 1825, and possibly until Whitsunday 1826, the destination in favour of Mrs. Greig was in force. The only inference then, which, as it appears to me, can be fairly drawn from these circumstances, is, that J. W. Johnston intended indeed to raise the money, but had formed no substantive intention at all in regard to his succession, leaving that to depend upon the legal distribution of his property, as it might happen to stand at his death. The case seems to be pretty nearly analogous to that of a party granting a commission to sell an heritable subject at a particular term, and dying intestate after that term, in ignorance whether it had been sold or not; in which case it would appear to me very difficult to hold, that because the sale would have rendered the price moveable, the mere direction to sell, though not executed at his death, had the effect of a disposition in favour of his executors, to the exclusion of the heir. I do not think that such a plea could be sustained; and considering that there was not here, on the part of J. W. Johnston, any right, or any expressed intention to bequeath, which can be said to have been frustrated by the act of Mr. and Mrs. Greig, I am, though with considerable difficulty, inclined to hold that if there was a substitution in favour of Mrs. Greig, that substitution was not extinguished by the circumstances referred to in this question.

4. For the reasons contained in my answers to the first and second questions, I am of opinion that the right to the £5000 in dispute belonged, upon J. W. Johnston's death, to his legal representatives.

5. On the grounds assigned by Lord Mackenzie and Lord Moncreiff, I am of opinion that the sum here mentioned belongs, and ought to be paid, to the heirs and representatives of J. W. Johnston.

In consequence of these opinions, the Court pronounced this interlocutor:—"The Lords, &c.—In the reduction and declarator, reduce, &c. in terms of the conclusions of the libel: In the advocations, remit to Lord Corehouse, the Ordinary in this case, to advocate the brieves, to alter the interlocutor of the Sheriff, and to remit to the junior perma-

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nent Lord Ordinary to be Judge in the services, and to proceed with the same: In the multiplepoinding and exoneration rank and prefer George R. Johnston, James C. Johnston, &c. upon the funds in medio, in terms of their respective claims and interests, and decern in the preference, and against the raiser; and upon his accounting for or paying the said funds in medio to them, exoner and discharge him in terms of the libel; but reserving all questions of preference or division between the pursuer, advocater, and claimants before named, inter se, and decern; further, find no expenses due to either party."

Pursuers' Authorities. — (1.) — Oswald, June 18. 1680, (2948); Ballantyne, Dec. 1687, (2953); Watt, Dec. 8. 1702, (2954); Lord Royston, Feb. 16. 1715, (2955); Drummond, July 7. 1738, (3002); Primroses, Feb. 26. 1754, (3002); Mitchelson, Nov. 15. 1820, (F. C.); Hamilton, Dec. 8. 1687, (14850, 6346); Smith, Dec. 14. 1710, (4332); Denholm, Jan. 1726, (6345); Brown, June 2. 1792, (Bell's Cases, and 14863); Gordon's Trustees, Dec. 4. 1821, (ante, I. 199); Sempille, Nov. 15. 1792, (8108); Dunlop, June 2. 1812, (F. C.); Thomson, Nov. 16. 1814, (F. C.); Lawson, Jan. 24. 1826, (ante, IV. 384); Dick, July 4. 1828, (ante, VI. 1065); 3. Ersk. 8. 44, note 465, (last edit.) — (2.) — Rose, March 10. 1784, (14955); Sandilands, June 17. 1680, (5498); 2. Ersk. 2. 12; Stewart, April 8. 1824, (2. Shaw's App. Ca. 155.)—(3.)—3. Ersk. 3. 85; 3. Ersk. 9. 9; Hutchison, Jan. 29. 1697, (2995.)

Defenders' Authorities. — (1.) — Binning, Dec. 15. 1749, (6337); Omey, Nov. 19. 1788, (6340); 2. Ersk. 3. 49; 2. Ersk. 2. 14 and 15; 1. Ersk. 7. 39; 3. M'Kenzie, 8. 20; 3. Stair, 5. 51; 3. Ersk. 8. 44; Campbell, June 12. 1740, (14855, and C. and S.'s Rep. of Appeals, Vol. I. Part 2. p. 343); Fouke, March 1. 1770, (8092 and 14861.)—(2.)—2. Ersk. 2. 16; 3. Ersk. 8. 47; Scot, Jan. 1665, (11344); Hay, Nov. 16. 1698, (14899); Skene, July 31. 1725, (11354); Monro, July 3. 1735, (11357); Duke of Hamilton, Jan. 8. 1740, (5615, points 4 and 5); Weir, Feb. 7. 1745, (11359); Robson, Feb. 18. 1795, (14958.)—(4.)—2. Ersk. 9. 64. and 66; 3. Mack. 9. 17. and 20; 3. Ersk. 9. 32. and 42; Forrester, March 10. 1627, (2194); Peock, March 4. 1824, (ante, II. 769.)—(5.)—1. and 2. G. IV. c. 38. sect. 11; Cuninghams, Feb. 27. 1812, (F. C.)

THOMSONS and ELDER, W. S.—A. GREIG, W. S.—Agents.

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ROBERT BROWN, Pursuer.—*More.*

ANDREW ALEXANDER and Others, Defenders. — *Greenshields.*

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1ST DIVISION.

Relief.—This was a question of relief between two partners to the extent of one-half of a bill,—the bill being accepted by the one, and indorsed by the other, in whose possession it now was.

The Lord Ordinary and the Court, being satisfied that the claim was well founded, decerned in terms of the libel.

J. R. STODART, W. S.—T. JOHNSTONE, S. S. C.—Agents.

ARCHIBALD BRUCE, (RENNIE'S TRUSTEE,) Pursuer and Advocator.—*D. F. Hope—Whigham.*
SIR DAVID KINLOCH, Defender and Respondent.—*Keay.*

No. 482.

June 28. 1831. Bruce v. Kinloch.

Landlord and Tenant—Bankrupt.—In a lease (including various farms previously possessed by different tenants,) where the term of entry was to certain of the farms from and after the separation of crop 1826 from the ground as to arable lands and out-houses; and as to grass lands and dwelling-houses from and after Martinmas of said crop; and the entry to certain other farms was from and after Whitsunday of the same year as to grass &c., and from the separation of the crop as to arable lands; and the term of removal as to the whole was from the grass and houses at Whitsunday 1845, and from the arable land the separation of the crop; and the rent was payable at "Candlemas and Lammas immediately succeeding the crop, for which such rent was payable;" and the tenant was bound to keep at all times a full and sufficient stocking on the lands; and it was declared, "that in case of the bankruptcy of the tenant, his creditors shall have no power under it to appoint a manager, or in any manner of way to interfere with the subjects let, or for the tenant himself to continue his possession, directly or indirectly, for behoof of his creditors;" and the tenant became bankrupt in August 1829; and the trustee for his creditors reaped the crop —Held, in a question with the creditors,—1.—That the above clause did not infer a voidance of the lease;—and,—2.—That, at all events, as each year's possession was to be considered as extending from Whitsunday to Whitsunday, the landlord was entitled to enforce performance of the prestations for the year 1829-30 against the creditors.

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2D DIVISION. Ld. Medwyn. F.

RENNIE of Phantassie, in October and November 1826, entered into a lease with Sir David Kinloch of the lands of Markle, and various others of Sir David's estate of Gilmerton, the object of which was to unite in one large farm certain lands previously held by separate tenants. The lease was granted for 19 years "from and after the periods following; viz. as to the lands in the first place above let, and so much of those in the second place above let, as are described as now or lately possessed by Mr. Robert Taylor &c., from and after the separation of the crop of this present year 1826 from the ground, as to the arable lands, and such of the out-houses as may then be given up by the present tenant under the obligation to that effect in the existing lease of said lands; and as to the dwelling-house, and whole other houses, and the grass lands, from and after the term of Martinmas in the said present year," &c. "As to the other lands in the second place above let, called Markle-mains &c., from and after the term of Whitsunday in this said present year 1826 as to the houses, grass, and pasturage, and the separation of the crop of this year from the ground, as to the arable lands in crop; and which several and respective terms and periods are hereby declared to be the entry of the said John Rennie to the whole premises respectively under this present lease."

The rent was made "payable at the two terms in the year, Candlemas and Lammas, immediately succeeding the crop for which such rent was

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payable; and Rennie was taken bound at all times to keep and maintain upon the lands, and others hereby let, a full and sufficient stocking, exclusively for their use."

It was further "specially declared, in terms of the other leases on this estate, that in case of the bankruptcy of the tenant, his creditors shall have no power under the present lease to appoint a manager, or in any manner of way to interfere with the subjects hereby let; or for the tenant himself to continue his possession, directly or indirectly, for behoof of his creditors;" and finally, Rennie bound himself &c., "notwithstanding the periods of actual entry to the premises, to remove &c. from the dwelling-houses, and whole other houses, and grass lands, at the term of Whitsunday 1845; and from the arable lands at the separation of the crop of that year from the ground," &c.

Rennie took possession in terms of this lease; and, in August 1829, having become bankrupt, his estates were sequestrated, and Bruce, who was appointed trustee, entered to the lands, and reaped the crops. Immediately thereafter Sir David Kinloch presented a petition to the Sheriff of Haddingtonshire, praying for sequestration of the crop and stocking of the farm, and warrant to sell for payment of the half of the rent for crop and year 1828 which fell due at Lammas 1829; and in security for the whole of the current year's rent of crop 1829 falling due at Candlemas then next, and Lammas thereafter; and the Sheriff granted warrant of sequestration as craved. At a meeting of Rennie's creditors, held in September, it was proposed to abandon the lease; and the trustee was instructed to communicate to that effect with Sir David. A long correspondence passed betwixt Bruce the trustee, and the agent for Sir David, in which the latter offered distinct propositions as the terms of transference, to be afterwards submitted to Sir David for approval; but to these Bruce would not accede, and the negotiation failed.

Bruce then proposed to sell the crop and stocking, and abandon the farm, which he conceived the terms of the lease entitled him to do; and as Sir David would not agree to this, he presented a petition to the Sheriff, craving warrant, in respect of the lease having terminated by the bankruptcy of Rennie, to sell the whole crop and stocking,—the proceeds to be applied, in the first place, in payment of the rents due to Sir David.

In opposition to this application, Sir David contended—

1. That the proper interpretation of the lease was, that Whitsunday 1826 was the term of entry, and every succeeding Whitsunday a new term for the whole farm; consequently, at Whitsunday 1829, a new term of possession had been commenced, which could neither be abandoned by the tenant, nor disturbed by the landlord, who was entitled to insist on the performance of the several prestations undertaken by the tenant; and, in particular, that there should be kept on the lands a full and sufficient stocking, exclusively for their use.

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2. That the clause in the lease declaring that, after bankruptcy, neither the tenant nor his creditors were to interfere with the farm &c., did not import an ipso facto forfeiture of the lease, or apply to a term entered upon and current at the date of the bankruptcy.

Various steps of procedure followed this application, in the course of which Bruce gave in a minute, praying for the appointment of a judicial manager, to prevent the lands lying waste; and accordingly the Sheriff appointed a manager to take charge of and cultivate the farms for the benefit of all concerned, reserving the pleas of all parties.

The Sheriff, on the 10th of December 1829, pronounced the following interlocutor:—" The Sheriff Substitute having considered the closed record, finds that, in virtue of the lease produced, Mr. John Rennie entered, in 1826, into possession of the lands of Markle and others therein specified, which had been previously let to more than one tenant;—that the terms of entry to these lands were then at the separation of the crop from the ground as to the arable lands, and at Whitsunday preceding as to the houses and grass lands, with the exception of the lands formerly let to Robert Taylor, to which the entry as to the latter subjects was at Martinmas thereafter;—that the lease was declared to be for 19 years, the year of expiry being 1845;—that thenceforward these lands formed one farm; and it appears to have been the intention of parties that the terms of entry to the whole should in future be at Whitsunday as to the houses and grass lands, and at the separation of the crop of the same year from the ground as to the arable lands;—that if it had been intended to preserve the former terms of entry as to each property, the periods of removing would have corresponded; but in the lease in question it is provided, that notwithstanding 'the periods of actual entry to the premises,' the tenant should 'remove from the dwelling-houses and whole other houses and grass lands at the term of Whitsunday 1845, and from the arable lands at the separation of the crop of that year from the ground;' and as the lease was to endure for 19 years, it follows, that to make that period complete, the terms of entry for the whole must be considered at Whitsunday 1826 as to the houses and grass lands, and at the separation of that year's crop from the ground as to the arable lands, although, from existing obligations as to a part of the lands, actual entry to some of the houses and grass lands could not be obtained till Martinmas;—that a rent in money and grain was to be paid half-yearly, at Candlemas and Lammas succeeding each separation of the crop from the ground;—that where a lease fixes a period of entry at Whitsunday as to the houses and grass lands, and at the separation of the crop thereafter from the ground as to the arable lands, the year's possession, for which the rent is paid, must be considered as extending from Whitsunday to Whitsunday, and that such must be held as the meaning of the lease in question;—that Mr. Rennie, at Whitsunday 1829, commenced a new year's possession of the said farm, and that he was declared notour bankrupt in August thereafter;—that in the lease in question is the following clause:

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'It is hereby specially declared, in terms of the other leases on this estate, that in case of the bankruptcy of the tenant, his creditors shall have no power under the present lease to appoint a manager, or in any manner of way to interfere with the subjects hereby let, or for the tenant himself to continue his possession, directly or indirectly, for behoof of his creditors;'—that the meaning of this clause is, that the bankrupt or his creditors shall not be entitled to enter upon a new year's possession of the farm after the term of bankruptcy;—that the only other interpretation, which, however, is not maintained by the petitioner, would be, that the bankrupt or his creditors should not have any interest in the farm after the bankruptcy, or reap the crop then on the ground, and that the landlord should at once enter into possession of the farm as it was at that period, but that this could not be the intention of parties;—finds, in conformity to the above interpretation of the lease, that the interest of the creditors of the bankrupt in the said farm cannot, without the landlord's consent, determine, before Whitsunday 1830, as to the houses and grass lands, and at the separation of the crop of the said year from the ground as to the arable lands;—that there were various communings between the petitioner, as trustee on Mr. Rennie's sequestrated estate, and the respondent, or his agent, respecting an agreement, the basis of which was the respondent's taking the farm off the hands of the creditors at once, but that no conclusion was come to by the parties;—that in consequence thereof, the point at issue is to be viewed as if no such communings had taken place;—that, by a clause in the said lease, it is provided that the tenant shall 'keep and maintain upon the lands, and others hereby set, a full and sufficient stocking exclusively for their use;' and that it is also stipulated that he 'shall consume upon the lands the whole straw produced yearly thereon for manure to the same, and at no time sell or carry away any potatoes, except to the extent of ten acres per annum, or any hay, dung, or straw, from the lands and others hereby let, to any farm he may possess, or for any other purpose or occasion whatever; all of which shall accordingly be consumed on the land hereby let, except the hay crop of the last year, which the tenant may carry away;—that the trustee for Mr. Rennie's creditors must observe the above-mentioned provisions, in order that crop 1830 may be efficiently managed; therefore refuses the desire of the petitioner in so far as respects the sale in general of the whole crop, cattle, sheep, bestial, and stocking of every description presently on the farm of Markle &c., without prejudice to his applying for a sale of such stock or articles which do not come under the stipulations of the lease;—finds neither party entitled to expenses, and decerns."

A few days after this interlocutor was pronounced, the judicial manager appointed by the Sheriff presented a petition, stating that he had entered upon the management as ordered, but that a fund was necessary for carrying on the operations; that both parties declined to make the necessary advances; and that the trustee had debarred him from

feeding the horses out of crop 1829; and therefore praying for instructions. No. 492.

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To this application Sir David answered, that the judicial manager had been appointed at the instance of the trustee, who was bound to furnish the means to carry on the operations:—And Bruce, that a distinct account ought to be kept by the judicial manager of the whole expenditure connected with the raising of crop 1830, including servants' wages, the work of the horses, and the use of the farming implements, all which fell to be defrayed, primo loco, out of the produce of that crop; or, at all events, that the right of parties might be afterwards ascertained. Upon this application the Sheriff pronounced as follows:—"In respect it has been found that the creditors of Mr. Rennie are not entitled to divest themselves, without the landlord's consent, of the farm of Markle before the expiry of the current year's possession, and that they are bound to keep a sufficient stocking on the same, in terms of the lease between Mr. Rennie and Sir David Kinloch,—finds it incumbent on them to give the judicial manager the use of a sufficient stocking, and of the farm-servants thereon, and in general every assistance in managing the said farm; reserving to them their recourse against Sir David Kinloch for any expenses incurred in so doing, and for a reasonable payment for the use of the said stocking and servants, in case it shall be afterwards found that he was bound to take the farm off their hands at the separation of crop 1829 from the ground, and reserving all other claims or grounds of action competent to them; therefore ordains the trustee for the said creditors to give the petitioner every assistance requisite to the proper management of the farm, under the said reservation; and appoints the petitioner to lodge in process a particular account of his intromissions with the stocking and produce on the farm, and expenses already incurred; and thereafter to lodge every month a report of his subsequent intromissions and expenses, and of the manner in which these have been defrayed."

Of these interlocutors Bruce brought separate advocations; and he also raised a summons of declarator, count, reckoning, and payment, against Sir David Kinloch, concluding,

1. That in virtue of the clause in the lease relative to the tenant's bankruptcy, "the said tack became terminated, and at an end, at the separation of crop 1829 from the ground, and the term of Martinmas of that year;" and that Sir David was then bound to resume possession of the farm, and relieve the creditors from all consequences.

2. That the creditors did not, and were not, bound to take possession of the lease, or to sow or cultivate the lands for another year after the crop and year 1829, nor to keep any stocking on the farm after the term of Martinmas 1829; but were entitled to sell off the whole stock and crop of that year, finding security to the landlord for rent due and secured by his right of hypothec.

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3. "That the judicial management of the lands has been, and now is, carried on for the sole behoof and on account of the said defender;" and lastly, for count, reckoning, &c.

Sir David defended on the grounds pleaded by him in the Inferior Court. The Lord Ordinary in the declarator assoilzied; and in both advocations remitted simpliciter, adding the subjoined note.*

Bruce reclaimed; but the Court unanimously adhered.

LORD GLENLEE.—I have no difficulty in this case, which must be settled upon general principles. It is clear that the lease did not terminate in consequence of the clause relating to the tenant's bankruptcy ipso facto. The purport of that clause I understand to have been, to protect the landlord from that mode of eluding the obligations; but the lease did not by any means thereby terminate in a question with the tenant; the tack still subsisted, and remained as to Rennie's obligation to perform all prestations. There were, I see, proposals for an arrangement most distinctly made by the agent of Sir David at a very early stage of the proceedings, to which Rennie's trustee might have acceded.

LORD CRINGLETIE.—I am clearly for adhering to the interlocutor.

LORD MEADOWBANK.—My opinion is the same. Sir David's agent acted with great caution and prudence; and the propositions which he offered, and which the trustee rejected, can rear no argument as to the rights of parties under the lease, for they were clearly intended to be submitted to the landlord for approval at any rate.

LORD JUSTICE-CLERK.—I agree with your Lordships. The trustee, up to

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* "NOTE.—The object of the parties in entering into the lease was to unite into one large farm, to be possessed during the currency of the lease as an unum quid, various possessions previously held by different tenants; and although the entry to a portion of grass was to be at Martinmas instead of Whitsunday, so that, for the first year's rent, there would not be a full year's possession, yet the clause as to the term of removal shows that this was just a lease with entry at Whitsunday to houses and grass, and at the separation of the crop for the arable land; so that the year's possession began at Whitsunday. The argument that it only commenced with the separation of the crop, seems quite untenable. If Mr. Rennie had entered to the houses and grass at Whitsunday on an informal missive, and, while the waygoing crop was still on the ground, the landlord had brought an action to remove him, it seems impossible to dispute that Mr. Rennie might have resisted that action on the ground that possession had been commenced, and the landlord could not have maintained that the proper term of entry to this arable farm was the separation of the crop. The creditors, then, having, subsequently to Whitsunday, taken the benefit of the lease, must be liable for the rent of the previous years, (which they do not dispute,) but also for the rent of the year from Whitsunday 1829 to Whitsunday 1830, and of course for crop 1830. And the communings between the trustee and the agent for the landlord, as to an instant surrender of the lease, have not altered in the slightest degree the legal rights of the parties. The clause in the lease relative to the bankruptcy of the tenant does not stipulate for an ipso facto forfeiture; and even if it had, it would probably have been held to take place only at the subsequent term. See the case of Forbes of Callander, June 2. 1812."

the latest date of the correspondence, had an opportunity of a fair arrangement offered; and his argument appears to me to have no foundation, either on the correspondence, or on the terms of the lease.

ALLAN and BRUCE, W. S.—J. and A. SMITH, W. S.—Agents.

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Renny v. Campbell.

MISS ISABELLA RENNY, Advocator.—*Keay—Christison.*
AGNES CAMPBELL or GRANT, Respondent.—*Monteith.*

No. 433.

QUESTION on evidence, whether the respondent Agnes Grant had given information which led to the detection and conviction of certain parties who had stolen some property from the advocator Miss Renny, and the discovery of the articles stolen, so as to entitle her to a reward offered by Miss Renny.

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2D DIVISION.
Ld. Fullerton.

The Sheriff of Stirlingshire, before whom Grant brought her action for recovery of the reward, found it proved that she had given the information which led to the detection and conviction of the offenders, and discovery of the articles stolen, and decerned for payment accordingly.

In an advocation the Lord Ordinary remitted simpliciter, and the Court adhered.

W. MILLER, S. S. C.—A. HAMILTON, W. S.—Agents.

L. H. FERRIER, Pursuer.—*Skene—A. Wood.*
R. DUNLOP and SPOUSE, Defenders.—*D. F. Hope—Jameson—Shaw.*

No. 434.

June 29. 1831.
Ferrier v. Dunlops.

Right in Security—Mails and Duties.—1.—An action of mails and duties by a creditor in an heritable bond having been raised before interest was due, but his debtor's estate being sequestrated, and the action not being called in Court till after a term's interest was past due, held not to be prematurely brought.—2.—Three months premonition being stipulated before calling up the principal sum, and no such premonition being used before raising the action, and its conclusions not being restricted to the extinction of the interest only, held, nevertheless, to have been regularly laid.

ROBERT DUNLOP, W. S. granted an heritable bond, with powers of sale, over a subject belonging to him; and afterwards, on the narrative of favour and affection, granted a postnuptial disposition to his wife, excluding the jus mariti. Subsequently the bond was assigned to Mr. Ferrier, and Mrs. Dunlop ratified it. Dunlop's estates were sequestrated on 2d November 1828, at which time no interest was due on the heritable bond. On the same day Ferrier raised a summons of mails and duties, which was called in Court on the 3d of December. In the mean time the Martinmas interest was not paid. In a defence, it was pleaded that the action was premature, because, 1. It had been raised before any interest was due; and, 2. That though three months premonition was necessary before calling up of the capital sum, yet the conclusions of

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1ST DIVISION.
Ld. Corehouse.
S.

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Ferrier v. Dunlop.

the action did not restrict the rents to be recovered under it to the extinction of the interest exclusively.

The Lord Ordinary repelled the defences, and the Court unanimously adhered.

J. and W. Ferrier, W. S.—J. Cook, S. S. C.—Agents.

Bremner v. Officers of State.

No. 435.

Rev. J. Bremner, Pursuer.—*Murray—Pyper.*

Officers of State, Defenders.—*Sol.-Gen. Cockburn—Speirs.*

Manse—Glebe.—Circumstances in which a dwelling-house, offices, &c. built as a manse, under a decree of the Presbytery, upon ground excambed for the old glebe, were found to form part of the benefice; and that the old glebe was not the only place where a manse could legally be erected.

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1st Division.
Ld. Corehouse.

Sequel of the case between the same parties reported ante, IV. 832, (which see.) The question raised there was discussed in the shape of a suspension by the Officers of State and others, as of a threatened charge by Mr. Bremner, minister of the parish of Walls and Flottay in Orkney, on a Presbytery decree for a sum to build a new manse. The letters were then suspended 'hoc statu,' until the minister should bring a proper action "for trying the question whether the manse formerly built for him, in property, or in possession for a time, be truly part of the benefice of that parish or not." The minister then brought a declarator to have it found that a certain threepenny land situated in Fea was the only glebe of his parish, and the only place on which a manse could legally be erected; and that a house, offices, &c., which he had built, in 1782, on land in Seater, formed no part of his benefice, but was merely occupied by him as a tenant under the proprietor of Seater; and concluding for a sum of manse rent as due to him by the heritors. The defences repeated the facts set forth in the suspension, and generally purported that, at or prior to 1782, an excambion was made with the proprietor of the estate of Melsetter of the old glebe land in Fea for other land in Seater; that this was done with the sanction of the pursuer and the Presbytery; that, in the same year, the pursuer obtained a Presbytery decree for various sums against the heritors to build a new manse, offices, &c. on the ground so acquired; that he was allowed a commission for superintendence of the work; that he had possessed the house for nearly forty years, when he removed voluntarily at the request of a purchaser of the estate of Seater; and although he had, under a private arrangement, paid rent for part of the period of his possession, yet this was unknown to the heritors. They therefore maintained that the dwelling-house &c. so built were the manse, and the ground was the glebe of the pursuer; and that he had no right to a glebe in Fea, nor to manse rent.

The Lord Ordinary "assoilzied the defenders from the action, in so far as it concluded that the threepenny land of Fea is the only glebe of the united parish of Walls and Flottay, and the only place on which a

manse can be legally erected,—and in so far as it concluded that that part of the land in Seater, on which the present dwelling-house of the pursuer, his offices and garden, are situated, is not a part of the pursuer's benefice, but that those subjects are occupied by him as a tenant of the proprietor of Melsetter; and, quoad ultra, appointed parties to be further heard."*

No. 435.

June 29. 1831. Bremner v. Officers of State.

Armstrong's Assignees v. Leith Banking Company.

The pursuer reclaimed; but the Court adhered.

Pursuer's Authorities.—Stat. 1563, c. 72; 1592, c. 116; 1612, c. 8; 1649, c. 45; 1663, c. 12; 1689, c. 3; 1690, c. 5; 2. Ersk. 10. 56 and 58; 2. Ersk. 3. 28; Potter, Dec. 5. 1710, (5130); Pitcairn, Dec. 12. 1566, (7963); Douglas, March 19. 1567, (7963); Scott, Feb. 15. 1827, (ante, V. 567); D. of Monmouth, June 22. 1671, (1240); Greig, Nov. 21. 1809, (F. C.)

Defenders' Authorities.—Stat. 1617, c. 12; 3. Ersk. 7. 3; 3. Ersk. 2. 33.

A. Peterkin,—J. Ker and H. G. Dickson, W. S.—A. Dallas and T. Innes, W. S.—Agents.

Armstrong's Assignees, Pursuers.—*Keay—Marshall.* Leith Banking Co., Defenders.—*Jameson.*

No. 436.

Bank—Principal and Agent.—A party having, at the request of a bank-agent, given him bills, which the agent ostensibly discounted, but the party allowed him to keep the proceeds for his private accommodation; and the agent having become bankrupt—Held that, although the discount of the bills was reported to the Bank, they were not liable for the money.

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* "Note.—The facts of this case, in so far as they can be ascertained from the records of the Presbytery in their present imperfect state, and from other documents, seem to be, that the glebe of the united parishes of Walls and Flottay was in the township of Fea; that, in 1782, the proprietor of the estate of Melsetter proposed to excamb part of the lands of Seater for part of the glebe, but to what extent does not appear. This excambion between the pursuer and Melsetter took place, and was authorized by the Presbytery, as may be inferred from the admitted fact that the pursuer presented a petition to the Presbytery to have a manse, offices, and garden-wall erected on the lands of Seater, for which the Presbytery accordingly decerned, and allocated at different times certain sums on the heritors for defraying the expense. With these sums, and an addition from the vacant stipend of the parish, the buildings were erected under the superintendence of the pursuer, who was appointed by the Presbytery undertaker of the work, and with the acquiescence of Melsetter, the principal heritor. Nine or ten years afterwards Melsetter and the pursuer seem to have attempted to get quit of the excambion, but without the sanction of the Presbytery, or the consent of the other heritors; and the pursuer agreed to pay, and did pay, a rent of £6 for his possession in Seater. It is thought that this private and unauthorized agreement could not deprive the heritors, or others interested in the manse, offices, and glebe, of their rights to maintain these subjects as parts of the benefice; for though no written contract of excambion does now appear, and may never have existed, the agreement was completed by what followed on the faith of it. But while the defenders have a title and interest to insist that the present manse, offices, and garden shall remain a part of the benefice, it does not yet appear that they have an interest, quoad ultra, that the excambion shall not be departed from, if Melsetter, the pursuer, and the Presbytery agree that the whole threepenny land of Fea shall remain glebe land in addition to the ground in Seater, on which the present manse, offices, and garden stand, with the buildings themselves."

No. 436.

June 29. 1831.
1st Division.
Lord Newton.
D.

Armstrong's Assignees v. Leith Banking Company.

The Leith Banking Co. established agencies at Langholm and Carlisle, which they placed under the management of Scot, with whom Armstrong, a cattle-dealer in Yorkshire, occasionally discounted bills. On the 8th of July 1826, Scot wrote him—"Dear Sir, As I have occasion to employ a large sum in bills in London at three months in the course of the ensuing week, I could pass two or three of £500 each at that date, if it be convenient for you to send them; and if so, you can receive value for them when you go to the first Tryst at Falkirk in our notes. In case you send them, they must be here by Friday next. You are of course aware that the Bank will scarcely discount any thing just now but bankers' bills at two months date." Armstrong answered, "I was from home all last week, and did not return till late Saturday night, when I met your letter, which was too late, I fear, for what you request. I have sent you three bills, £500 each; if they are too late, you can return them. I have not put on the date. This transaction is of no use to me; if to you, I am very ready to serve you. I don't get time to pay these bills, if notes are paid me the September Tryst Falkirk. If you give me notes the first Tryst at Falkirk, which is August, then I can do it without loss," &c.—"You will date those bills after the 20th, if you can, which gives me the return of some markets. I am, &c.—P. S. If you use these bills, write me; I may advise of them."

The bills were drawn by Armstrong on a London firm, and indorsed by him to Scot.

In the weekly states rendered to the head-office of the Leith Banking Co., Scot took credit for the amount of these bills, less the discount, as if their proceeds had been paid by him to Armstrong. When the bills fell due, which was on the 24th of October, they were regularly retired by the acceptors in London. In the mean while Armstrong wrote to Scot that he was going to the Falkirk Tryst, and added, "I was depending on you to send me an order to raise the £1500 for the bills I sent you in July last, which you said I should have for the Falkirk Tryst," &c. Scot answered, "You shall have your cash at Falkirk, and you shall be advised through what channel you are to receive it there." He accordingly remitted £1000 to Armstrong at Falkirk, saying, "Any difference between the amount received from you, and that now sent, will be settled when we meet." He again wrote, "I am sorry you suffered inconvenience at the fair, &c. I could not spare more than the £1000." About the middle of October Armstrong called at the Leith Bank, and got a sum of £250 on his promissory note, which fell due on the 15th of December, and was retired of that date. In February 1827, he wrote to a Mr. Brown in the following terms:—"I had my accounts from Mr. Scot in May last,—one called the Bank account,—the other, he says, his account. I was at the time surprised to see two. I never understood or was acquainted with any account opened for us with the Bank; all the money we received from the Bank was, by orders from Mr. Scot, to place to his account."

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June 29. 1831. Armstrong's Assignees v. Leith Banking Company.

Hobbs &c. Petitioners.

Scot having become bankrupt, without paying up the balance under the three bills, Armstrong raised an action (now insisted in by his assignees) against the Bank as Scot's constituents, and responsible for the amount.

The Bank pleaded in defence, that Armstrong had transacted with Scot, not as Bank agent, but as a private individual, and for his accommodation, as appeared from the correspondence; and accordingly he had acted on this footing, because, if he had known he had a claim against the Bank for the balance of £500, he never would have allowed himself to have been put to inconvenience at the Tryst; nor would he thereafter have granted and retired his promissory note to them for £250.

The Lord Ordinary assoilzied with expenses.

The pursuers reclaimed, and founded on the case of Normand, July 4. 1823, (ante, II. 452.)

Lord Balgray.—This is quite a different case from Normand's. It is clear that Mr. Armstrong, in depositing the proceeds of these bills with Mr. Scot, dealt with him, not as the Bank's agent, but as an individual whom he privately desired to accommodate. It was no transaction with the Bank through their agent, but between two private individuals.

Lord President.—I concur. The correspondence of the parties satisfies me that we should adhere to the Lord Ordinary's judgment. In the letter of the 17th of February 1827, Armstrong, alluding to his accounts with Scot, says, "I was surprised to see two. I never understood or was acquainted with any account opened for us with the Bank," &c. I think Armstrong transacted with Scot as an individual, and not as Bank agent.

The other Judges concurred, and the Court adhered.

R. W. Niven, W.S.—Bisset and Morison, S.S.C.—Agents.

No. 437.

Mrs. H. Hobbs or Lamont and Others, Petitioners.—*Outram.*

Tutor—Process.—1.—A dispensation granted in an action for making up tutorial inventories from citing the next of kin on the mother's side, as they lived beyond the jurisdiction of the Court.—2.—The dispensation can be granted only on a petition to the Court stating the circumstances.

June 29. 1831.

2d Division. T.

Mrs. Hobbs or Lamont and others, as tutors and curators of the children of the late Major-General Lamont, raised an action for the purpose of making up inventories. There were no relations on the mother's side resident in Scotland; and the summons therefore concluded for a dispensation as to citing them, and declarator, "that the inventories to be made up at the sight of the next of kin on the father's side, or at the sight of the delegate to be named by their Lordships, shall be as effectual as if the next of kin on the mother's side had resided in Scotland, and had been called as parties hereto."

The process came before Lord Medwyn, who named a delegate to concur with the pursuers; and inventories being made up, his Lordship made a verbal report to the Court as to the dispensation. The Court

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Hobbs &c. Petitioners.

Inglis's Trustee v. Commercial Insurance Company.

directed a written petition to be presented, which was done, praying their Lordships "to dispense with the citation of the next of kin on the mother's side, and to find that the inventories made up by the petitioners at the sight of the delegate named by the Lord Ordinary are as effectual as if the next of kin on the mother's side had resided in Scotland, and had been cited, &c.; and to remit to his Lordship to proceed," &c.

The Court, "in the circumstances of the case, dispensed with the citation of the next of kin on the mother's side, and remitted to the Lord Ordinary to proceed accordingly." Under the remit, his Lordship afterwards decerned in terms of the libel.*

J. and L. Davidson and T. Syme, W. S.—Agents.

No. 428.

W. Paul (Inglis's Trustee), Pursuer.—*Skene.*
Commercial Insurance Company, Defenders.—*D. F. Hope—M'Neill.*

Proof—Process.—Production of Writs.—An Insurance Company resisting payment of a policy effected by an agent on the life of a client, on the ground that he was addicted to habits which rendered his life not insurable, and that the declaration made by the agent as to the client's state of health was not true, nor in bona fide, held entitled to recover, preparatory to trial of an issue, letters of the agent written after the date of the policy.

June 29. 1831.

2d Division.

The late William Inglis, W. S. agent of the late Earl of Mar, effected a policy of insurance on his Lordship's life, with the Commercial Insurance Company, on the 1st of October 1827. On the Earl's death, Paul, trustee on Inglis's sequestrated estate, brought an action against the Company for payment of the amount insured. In defence they pleaded, that Lord Mar had been addicted to habits which rendered his life not insurable; that Inglis had withheld the certificate as to the Earl's health, which had been made out by his Lordship's ordinary medical attendant; and that Inglis's declaration to the Company as to his Lordship's health was not true, nor was he in bona fide in making it. An issue having been ordered to be tried, the Company obtained a diligence for recovery of all correspondence between Lord Mar and Inglis, subsequent to the 1st of October 1824, (being three years prior to the date of the policy,) relative to, or wherein mention was made of, his Lordship's state of health. Under this diligence, the Company demanded production of letters of Inglis subsequent to the date of the policy, as well as prior thereto. This was objected to by Paul, but the commissioner repelled the objection. Paul then craved the judgment of the Court, and contended that the fact of the state of Lord Mar's health at or prior to the date of the policy was

* On the same day the Court adopted the same procedure in regard to a similar action by the tutors and curators of De Maria's children, in which case one of the next of kin on the father's side did not live within the jurisdiction of the Court.

alone relevant to be proved, and that the Company could not therefore call for letters written after the policy was executed. To this it was answered, that the Company were not merely entitled to prove the state of Lord Mar's health at the date of the policy, but that it was relevant for them to show Inglis's prior knowledge of this, and his mala fides in effecting the policy; and this they were entitled to prove by letters subsequent as well as prior to its date.

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Inglis's Trustee v. Commercial Insurance Company.

Buchanan v. Yuille.

The Court, without determining how far such letters would be evidence on the trial, held that the Company were entitled to recover them, and affirmed the commissioner's judgment.

THOMAS BRYCE BUCHANAN, Advocator.—*Skene—Brown.*
ANDREW YUILLE, Respondent.—*D. F. Hope—More.*

No. 489.

Landlord and Tenant—Title to Pursue.—A fiar not entitled to remove a tenant without concurrence of the liferenter.

June 29. 1831.

2D DIVISION. Ld. Mackenzie.

THE late Miss Buchanan of Boquhan disponed a farm (of which the respondent Yuille held possession from her) to one Gray, in liferent, "but declaring, that in the event of the said three parks being under lease to a tenant or tenants at the time of my death, the rents thereof, during the existence of such lease, shall form part of and belong to my estate; and, in lieu thereof, the persons succeeding to the fee of the said property shall make payment of £10 sterling yearly to the said William Gray, commencing the first Whitsunday after my death, and to continue ay and until he obtains the natural possession of the said parks, when the said payment of £10 sterling yearly shall cease," &c.

R.

A few years thereafter, Miss Buchanan executed a deed of entail in favour of the advocator Bryce Buchanan and certain substitutes, "but under the burden always of the said William Gray's liferent of the lands," &c.

Miss Buchanan having died, Bryce Buchanan instituted a process of removing before the Sheriff of Stirlingshire against Yuille, who pleaded in defence that Buchanan had no title or interest to insist without concurrence of the liferenter. The Sheriff having sustained this defence, and dismissed the action, Buchanan brought an advocation, in which the Lord Ordinary remitted simpliciter. Buchanan reclaimed and contended, that a distinction was to be drawn betwixt this and an ordinary case of liferent in consequence of the clause relative to the payment of £10—that as the fiar was bound to pay the liferenter £10 yearly while the latter remained out of possession, the liferenter might prefer the sum to the possession; and therefore, if the fiar could neither obtain his concurrence, nor institute a removing without it, the anomaly might occur that the tenant could not be removed at all. But the Court disregarded the argument, and adhered.

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June 29. 1831. Buchanan v. Yuille.

Duguid v. Caddall's Trustees.

LORD CRINGLETIE.—The liferent grant certainly contains the condition referred to, but no argument can be founded upon it; for the fiar might say, 'the lands are not under lease, enter into the natural possession.' His remedy is to refuse to pay the £10.

J. MOWBRAY and A. HOWDEN, W. S.—W., A. G., and R. ELLIS, W. S.—Agents.

No. 440.

JOHN DUGUID, Pursuer.—*Keay—Buchanan.*

MRS. CADDALL'S TRUSTEES, Defenders.—*Sol.-Gen. Cockburn—Maitland—Brown.*

Legacy or Obligation—Revocation.—A lady having delivered to a relation a letter binding her heirs and successors to pay him an annuity of £200 per annum after her death—Held,—1.—That the provision was not testamentary;—and,—2.—That, though gratuitous, yet having been delivered, it was not revocable.

June 29. 1831.

2D DIVISION. Ld. Fullerton. T.

IN the year 1816, the pursuer Duguid went to reside with the late Mrs. Caddall of Ladybank, a relation, and assisted her in the management of her affairs. In January 1818, Mrs. Caddall addressed to him a holograph letters in these terms:—"Ladybank, Jan. 3. 1818.—Captain Duguid—Dear Sir, Considering that you have for some time past resided with me at Ladybank, and taken charge of my affairs in a confidential and satisfactory manner, and it now being my wish to settle something yearly upon you for the trouble you are likely to have in my general business, therefore I hereby bind and oblige myself to pay to you yearly, during the period you may reside with me, the sum of £40 sterling: And further, I hereby bind and oblige my heirs, executors, and successors whomsoever, to pay to you the sum of £200 sterling, after my death, yearly during your life; this sum to be considered as a burden upon my estate, irrevocably settled during your life: And in case I should die before granting a legal deed upon a stamp, I hereby declare that this letter, upon your getting it stamped, shall be as binding upon my heirs and successors as if it had been upon a stamp. I am, dear Sir, yours, Isabella Caddall." This letter was delivered to Duguid at the time of its date, or shortly afterwards; and he continued to reside with her till the end of that year. In July 1819, a settlement of accounts took place between them, in which she allowed him credit for £40 for the year he had resided with her subsequent to the date of the letter. On this occasion she requested him to give up the letter; but this he refused to do. Some years afterwards, in executing a trust-deed of settlement, she inserted the following clause:—"And considering that I was imposed upon to grant an obligation, of date the 3d day of January 1818, for payment of an annuity, after my death, of £200 sterling to Captain Duguid of the Aberdeenshire militia, I hereby revoke and recal said annuity, and declare the writing by which it was granted, to be void and null to all intents and purposes." On Mrs. Caddall's death, which happened in 1829, Duguid de-

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June 29. 1831. Duguid v. Caddall's Trustees.

manded from her trustees, payment of the annuity of £200 a year contained in the above letter. This the trustees refused, on the ground that it was a donatio mortis causâ, testamentary in its nature, and consequently revocable, and that it had been revoked by the declaration in the trust-deed. Duguid thereupon raised an action for payment, in which the Lord Ordinary ordered Cases.

Pleaded for Duguid—

1. The obligation imposed by Mrs. Caddall on her heirs is not gratuitous, but in consideration of his services in the management of her affairs; and being thus onerous, and the deed being delivered, it was of course irrevocable on her part.

2. Even supposing that the annuity of £200 was not onerous, still it is not a donatio mortis causâ, nor testamentary in its nature—it is not granted intuitu mortis; but the death is merely the term at which it is to become payable; it is an obligation inter vivos, which, though gratuitous, became irrevocable by delivery.[1] Nor is it of any consequence that the obligation is imposed on Mrs. Caddall's heirs, and not on herself; for that is truly the proper form of an obligation not to take effect till after death; and it was decided in the case of the Lord Justice-Clerk v. Hamilton,[2] that an obligation on heirs is as effectual, as if the deceased had taken himself bound. Further, the letter itself bears the annuity to be irrevocable, and it is at least doubtful whether that does not prevent the recal even of a testamentary bequest

Pleaded for Mrs. Caddall's Trustees—

1. Although the annuity of £40 during the period while Duguid might reside with Mrs. Caddall may perhaps be considered remuneratory, there is no pretext for holding that the annuity of £200, to commence after her death, was otherwise than gratuitous, and it was revoked by the trust-deed.

2. It is also of a testamentary nature, as is evinced by the terms of the letter, which, as to the £200, only bind her heirs and successors, while, as to the £40, she binds herself; for although an onerous obligation will be effectual though heirs only are taken bound, yet this mode of expressing a gratuitous donation proves it to be nothing more than a testamentary bequest. Then, if the annuity be testamentary, it is necessarily revocable in its own nature, the will being ambulatory till death; and the power of revocation cannot be excluded either by delivery of the deed,[3] (which, besides, is not very clearly made out,) or by any declaration in it renouncing the power which essentially attaches to it as a testamentary bequest.[4]

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[1] Stair, 3. 2. 12; Ersk. 3. 2. 91; Thomson, Dec. 8. 1675, (3593); Grant, Jan. 10. 1679, (3596); Stair, 3. 8, 28; Bank. 3. 8. 53; Ersk. 3. 9. 6. [2] Jan. 21. 1708, (5909.) [3] Dougall, Feb. 25. 1789, (15949); Somerville, May 18. 1819, (F. C.); Miller, July 11. 1826, (ante, IV. 822); Balders, Dec. 22. 1814, (F. C.) [4] ff. de. Leg. l. 22. § 3; Pothier, de Don. Test. 6. 2. 3; 2. Blackstone, 502; Curdy v. Boyd, Dec. 7. 1775, (15946.)

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The Lord Ordinary repelled the defences, and decerned,—adding the subjoined note.*

Mrs. Caddall's trustees reclaimed.

Lord Meadowbank.—There is a similar case at present depending in the First Division; and if difficulty was felt in that case, there is more here; and I rather think we should delay till we see what is done with it. The Inner House ordered Cases, and afterwards waived deciding the question whether the deed was testamentary; but on another point they sent an issue to the Jury Court, to try whether it was the deed of the granter.

Lord Justice-Clerk.—I should not have entertained the slightest doubt in the case alluded to that Lord Moncreiff's interlocutor was right, and that the deed there was a mortis causâ deed; and at all events it cannot affect this, which is clearly not a testamentary deed. After the fullest consideration, I see no ground for altering the Lord Ordinary's interlocutor. I am of opinion that it

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* "Note.—There seems no reason to doubt that the deed was delivered. In the first place, it was placed in the hands of the pursuer; 2dly, It was to a certain extent acted upon, inasmuch as the annuity or salary of £40 provided by the first part of it was allowed to the pursuer in accounting with the granter Mrs. Caddall at the settlement which took place in the year 1819; and lastly, though upon that occasion the granter was made aware that it was held by the pursuer for his own behoof, no steps were taken by her during the nine years which she survived for recovering it. She contented herself with revoking the grant of the annuity of £200; and the only point which admits of any question here, is the effect of that revocation. In considering this, the Lord Ordinary is inclined so far to adopt the argument of the defenders, as to hold that the provision of the annuity of £200 a year, after Mrs. Caddall's death, is distinct in its character and quality from that of the salary provided in the first part of the deed, and must be considered as gratuitous. If the terms of this latter provision were unequivocally testamentary, there would arise the question how far the declaration of its being irrevocable was an effectual and conclusive surrender of the power to revoke, usually implied in all bequests—a question which is attended with considerable difficulty, and appears to have been considered by the Court, in some late cases referred to in these pleadings, as still open; but the Lord Ordinary does not think that that question properly arises in the present case. The terms employed here are not those of bequest, but of obligation; and though the obligation is laid only on the granter's heirs, executors, and successors, that very circumstance has been found not to invalidate an obligation intended to take effect at the granter's death, (Lord Justice-Clerk against Hamilton of Bangour, Morison, 5909.) It is true, in that case it was admitted in argument that the deed was revocable. But that seems to have arisen from the circumstance that it was one by a husband in favour of a wife. The decision is evidently considered by Ross (Lectures, I. 56) as determining the general point that a bond binding merely the granter's heirs and successors is good; and even supposing, which is certainly a very favourable admission for the defenders, that this form of expression might raise a question of construction whether the grant was intended to be obligatory or testamentary, that question must, in the present case, be determined by the express explanation subjoined in the deed, that this annuity was to be considered as a 'burden upon the granter's estate irrevocably settled during the pursuer's life.' Keeping in view, then, the whole passage of the deed regarding the annuity now claimed, the Lord Ordinary must hold that it does not import a legacy, but an obligation which became effectual and irrevocable by delivery."

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is a deed of obligation to operate from and after the granter's death, and that the burden was necessarily laid on her representatives. It is declared irrevocable, and was actually delivered; and I am satisfied, therefore, that it cannot be revoked.

Lord Cringletie.—I entirely agree. This is a much stronger case than that mentioned by Lord Meadowbank; and if the Court doubted whether the deed then in question was mortis causâ, they must have been satisfied that this was not so. It appears wonderful to me that people ever should have doubted that an obligation on a party's heirs to perform something after his death was good. I have no sort of doubt that this is an obligation with payment postponed, and not a testamentary deed.

Lord Meadowbank.—I am not clear that this woman might not have brought an action for re-delivery of the deed in her lifetime on various grounds, and I have some doubts.

Lord Glenlee.—The Roman doctrine of mortis causâ donation has no application to this case. A person may contract an onerous obligation of which he cannot get quit, though to be performed after death. Another sort of case is when he merely declares his last will, which is ambulatory till death. We have nothing like the Roman doctrine as to their peculiar donatio mortis causâ. It has been attempted to be applied to common mortis causâ settlements; but the decisions do not support that. In the case of Curdy, it was held that a settlement of the whole estate might be irrevocable, when there was a proper quid pro quo. Whenever the obligation appears to be granted in consideration of what the granter considers a sufficient consideration, or when, for love and favour, he comes under express obligations, it is too late to revoke after delivering the deed. It therefore appears to me that the principles of the Lord Ordinary's interlocutor are sound. The only doubt I had was, that the obligation should appear to have been granted in remuneration for services, or as an absolute gift; and that is not quite so plain. It is a very odd sort of deed. It bears, "And it now being my wish to settle something yearly upon you for trouble," not that you have had, but "are likely to have." This is in consideration of something to be done; and after a year we see that he performed no services, and that he ceased to live with her. I doubt whether it was not granted in contemplation of the parties remaining together, which did not take place. He, to be sure, may perhaps say, I was ready to have done so, if called upon. This, however, is not the way the case has been pleaded; and perhaps we are only called upon to decide on the ground upon which the defenders themselves have put it—that it was gratuitous.

The Court accordingly adhered.

C. F. Davidson, W. S.—Tod and Romanes, W. S.—Agents.

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&c., or in the event of a sequestration &c.; or, finally, of the said Alexander Fraser &c. deserting or leaving possession of the farm, then the present tack shall be ipso facto at an end, and void and null, of no force &c., with liberty to the landlord to enter into possession of the premises without any declarator or process of law, &c.; and that this present conventional irritancy, if incurred, shall not be purgeable, except by consent of the landlord."

The landlord bound himself to pay certain meliorations to the tenant at the end of the lease, to be fixed by valuators, including some made under a prior lease, the value of which was ascertained by appreciators mutually chosen by the parties.

Alexander Fraser died intestate in 1814, without exercising the power of nomination. His paternal uncle Charles Fraser was his heir-male, and Elizabeth Fraser and others his executors. The executors took possession of the farm, including the stocking; and an action of removing and declarator being brought against them in name of Charles Fraser, the Court "found that the defenders are entitled, as the nearest of kin and executors of the deceased Alexander Fraser of Dell, to the succession of the whole moveable estate, and, inter alia, to the stocking upon the farms in question which belonged to him at his death, and therefore in so far sustained the defences, assoilzied the defenders, and decerned; and quoad ultra, in respect the pursuer does not now explicitly state that he is in a situation, as the heir-male of the said Alexander Fraser, to stock and labour the farms, and to perform the obligations incumbent upon and prestable by the tenant, found that he is not entitled, in hoc statu, to insist in the conclusions of the present action of removing against the defenders."

It was alleged that the name of Charles Fraser was improperly used in this action, he being fatuous, and that the executors had concerted the above interlocutor. Meantime they continued for several years in possession of the farm; but on the death of the survivor of them, Charles Fraser, along with a curator, obtained an assignation to the farm-stocking from their next of kin. He then paid the last half-year's rent to the landlord, and, after the expiration of the lease, obtained a decree in absence against the representatives of the executors, declaring "that the pursuer, in virtue of the said leases and contract before narrated, had, since the death of the said Alexander Fraser, which happened on the 10th of September 1814, and now, of the date of said summons, has the only good and undoubted right and title to the said leases and contract of the said farms until the expiry thereof, and to the whole claims of meliorations, or others whatsoever, thereby stipulated in favour of the tenant, or arising due to him therethrough, with the said leases and contract themselves, whole clauses, tenor, and contents thereof, and all following or competent to follow upon the same."

During the currency of the lease, the granter of it died, and his suc-

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cession divided,—Mr. T. A. Fraser, now of Lovat, succeeding to the lands under the entail, while Mr. Fraser of Abertarff succeeded as general disponee and executor. On the expiration of the lease, a valuation of the meliorations was made by appreciators appointed by Lovat and Charles Fraser, who thereupon raised an action against Lovat for their amount; but he was assoilzied, as not being the proper party.[1] He then brought the present action against Mr. Fraser of Abertarff, as the general representative of the granter of the lease.

In defence he pleaded, inter alia—

That the pursuer had no title under the lease to pursue, because the right to it was provided to the heir-male, only in the event of the complete farm-stocking being left to him free of debt, and that this condition had not been complied with.

The pursuer answered—

That he was the party to whom the lease was destined; that although the landlord might have excluded him from the succession, so as to make way for another party, he had not done so, and it was jus tertii to the defender whether he did or not; that, even at the landlord's instance, a declarator of irritancy or removing would have been necessary to void the right; but no such action was brought; and that, on the contrary, he was recognised as tenant by the landlord, who accepted payment of rent from him, and concurred with him in naming valuators.

The Lord Ordinary, on the 23d of February 1830, "sustained the pursuer's title; found the defender liable in the meliorations libelled, so far as due under the leases &c.; and, quoad ultra, remitted to the Jury Court."

The defender reclaimed; and the Court, on the 24th of June 1830, "adhered to the interlocutor reclaimed against, in so far as respects Abertarff's liability for the meliorations; but, quoad ultra, recalled the interlocutor, and remitted to the Lord Ordinary to inquire further into the right of the pursuer to claim the meliorations in question."

Under this remit the Lord Ordinary found, "that by virtue of the clause of destination in the tacks founded upon, Charles Fraser, paternal uncle of Alexander Fraser, the original tenant, was entitled, on the death of his nephew, to succeed as his heir-male, on condition that the subjects let were left by Alexander to his heir-male fully and completely stocked, and free of all debts and burdens;—that Alexander Fraser did not leave the subjects to his heir-male fully and completely stocked, his executors and nearest of kin having right to the stock in consequence of his dying intestate;—that, in these circumstances, the landlord was entitled to exclude Charles Fraser, and to irritate or put an end to the lease;—that he did not irritate the lease, but allowed the executors to continue in possession;—that, before the term expired, Charles Fraser and his curator

[1] June 7. 1825, (ante, IV. 73.)

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obtained right by assignation to the stock on the farm, and raised an action against the executors to have it declared that Charles Fraser was entitled to enter into possession as tacksman, in which decree was obtained after the term had expired;—that Charles Fraser was not opposed in that action by the landlord, who, on the contrary, recognised him as tenant by concurring with him and his curator in appointing appraisers to value the meliorations, and by receiving the last half-year's rent on his account;—that Charles Fraser being thus recognised as tenant by the landlord, it is jus tertii to the defender to plead that the landlord was entitled to exclude him, or that he did not actually take possession of the lands;—therefore sustained the pursuer's title, and of new remitted the cause to the Jury roll."

The defender reclaimed, and pleaded—Had the pursuer ever possessed the farm under the lease, an action of removing might have been necessary to terminate it before its natural period. But there was no possession, and there was no room for a removing as against him; and he being destitute of farm-stocking, and for many years entirely unconnected with the farm, the irritancy of the lease was incurred; and the lease provided that it should operate ipso facto, leaving the landlord to enter to the farm if he chose, and consider the lease at an end without declarator.

Lord President.—We cannot put so judaical a construction upon this lease as the defender asks. Although the original tenant died intestate, and his succession split between his heirs and executors, the last of whom thereby acquired the farm-stocking, it was impossible to forfeit the pursuer's right at once, without giving him time to stock and possess the farm. Besides, any such irritancy, if incurred, was purgeable by consent of the landlord, who recognised the pursuer as his tenant. I concur with the Lord Ordinary in the interlocutor under review.

Lord Balgray.—I know no way, but a declarator or removing, by which a landlord can put an end to a current lease. The private provision in the lease, dispensing with a declarator, is not enough. Nay, if a tenant quits his possession, and goes off, and the landlord enters to it without using the precaution of a declarator or removing, so as to shut the door against the tenant's return, I conceive him entitled to return and call the landlord to account. But that is not the case before us, as to which I adhere to the Lord Ordinary's judgment.

The other Judges assented, and the Court adhered.

L. Mackintosh, S.S.C.—Æ. Macbean, W.S.—Agents.

No. 443.

WILLIAM EWING, Suspender.—*Jameson.*
JOHN SLATER, Charger.—*Cuninghame—Wilson.*

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2D DIVISION.
Ld. Mackenzie.
F.

Ewing v. Slater.

Landlord and Tenant—Bankrupt.—Special case, in which a trustee on a bankrupt estate having taken possession of a shop under lease to the bankrupt, who was bound to leave it in good tenantable repair at the end of the lease, was found liable to the landlord in the expense of repairing the broken windows.

J. BURNESS, S. S. C.—J. B. BRODIE, W. S.—Agents.

No. 444.

A. MANSON, Pursuer.—*D. F. Hope—Maitland.*
D. CLYNE, S. S. C., Defender.—*Sol.-Gen. Cockburn—Brownlee.*

June 30. 1831.
Manson v. Clyne.

Agent and Client.—An agent who, after his client was admitted to the poor's roll, and one of the agents of the poor appointed, continued to conduct the cause under the name of that agent, and took decree in his name for expenses awarded to his client, including charges allowed to a witness, which he recovered, but withheld from the witness, ordained to pay the amount, and his conduct recommended to the consideration of the Preses of Solicitors, of which body he was a member.

June 30. 1831.

2D DIVISION.
Lord Medwyn.
T.

CLYNE, S. S. C., was employed by one Davidson to conduct an action of damages against Lord Duffus. In the course of the proceedings Davidson was put upon the poor's roll, and one of the agents for the poor was appointed his agent. Although thereafter the pleadings bore the name of the agent for the poor, Clyne continued to conduct the cause; and, on a verdict in favour of Davidson, decree was pronounced for expenses of process in name of the agent for the poor, under which Clyne recovered the amount from Lord Duffus. Manson, the pursuer, had been cited as a witness for Davidson; and, in the expenses awarded, a sum was included as paid to him, but which had not, however, been paid to him. Clyne having refused to pay him the amount, Manson brought an action. The Lord Ordinary decerned against him; and the Court refused a reclaiming note by Clyne, directing, at the same time, the attention of the Preses of the Solicitors in the Supreme Court, of which body Clyne was a member, to his conduct in this matter.

GOLDIE and PONTON, W. S.—D. CLYNE, S. S. C.—Agents.

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June 30. 1831. Ferrie &c. v. Woodward &c.

FERRIE and FAIRLEY, W. S., Pursuers.—*G. G. Bell.*
R. WOODWARD &c. (CLARK'S TRUSTEES), Defenders.—*J. Anderson.*

Jurisdiction—Foreign.—Possession of a real estate in Scotland creates a jurisdiction against the proprietors, though foreigners, in ordinary personal actions, and if merely trustees—in such actions against them qua trustees.

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2D DIVISION. Ld. Mackenzie. T.

THE defenders, Woodward and others, domiciled Englishmen, trustees for the deceased Mrs. Ann Clark, purchased an heritable property in Aberdeenshire, in which they were infeft as trustees. Having been involved in litigation before the Court of Session, arising out of the management of this property, Messrs. Ferrie and Fairley, W. S., who had conducted the business, and acted as their mandataries, brought an action against them for payment of their account, to which they also called William Clark (husband of the deceased), who had a liferent interest in the property, and by whom also they alleged they had been employed.

In defence Woodward &c. pleaded, that being domiciled Englishmen, the action was incompetently brought against them in a Scotch Court. The pursuers having restricted their libel to a conclusion against the defenders qua trustees only, the Lord Ordinary, "in respect that, in their character of trustees, the defenders hold heritable property in Scotland," repelled the preliminary defences, and sustained the jurisdiction of the Court, and the competency of the action.

Woodward &c. having thereupon reclaimed, the Court ordered minutes of debate.

Pleaded for the Pursuers.—The object of this action is to attach the heritable property in Scotland held by the defenders, and this cannot be effected otherwise than by first obtaining decree constituting the debt. Every Court has jurisdiction over the property situated within its territorial limits; and it must have all powers necessary to explicate its jurisdiction. Where the property is moveable, it is necessary to fix it by arrestment jurisdictionis fundandæ causâ, as otherwise it would be held to follow the person of the owner; but being fixed by arrestment, this creates a jurisdiction against the proprietor, who must either appear to defend his property in the Courts which have power over it, or the Court will proceed, in absence, with the steps necessary towards attaching it. This arrestment is not necessary where the moveables are otherwise legally fixed within the jurisdiction, as for instance by a previous multiplepoinding; and no previous procedure can be necessary where the property is heritable, that being fixed in its own nature, and subject to the jurisdiction of the Courts where it lies. In the present case, the defenders are proprietors of heritable property in Scotland; they would, as such, be entitled to demand for it, from the Courts of this country, the protection of the laws; and they must in like manner appear to defend any proceedings,

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the object of which is to attach that property. There is no room for any distinction between real and personal actions; the same principle applies to both, that the Courts, having jurisdiction over the subject, possess all the powers necessary to explicate their jurisdiction.

Pleaded for Woodward &c.—It is true that the Courts of this country have jurisdiction over heritable property situated within their territory; but this cannot infer a personal jurisdiction over the proprietors. When the action is real, and involves a question as to the property itself, then the Courts have jurisdiction; but there is no authority for extending this to personal actions having no immediate connexion with the property. Thus, as to moveables, arrestment jurisdictionis fundandæ causâ is necessary, not to fix or keep the property within the jurisdiction, but to make it the subject of competition; and being thus made the subject of competition, the Court has jurisdiction in all questions for obtaining possession of it, just as it has in real actions as to land within its territory; but such arrestment does not create a general jurisdiction in all matters over the person of the owner; nor can the possession of heritable property create any other jurisdiction than that which necessarily subsists as to real actions affecting the property itself.

The Court, without expressing any doubt of the Lord Ordinary's interlocutor, but in order to have the question 'authoritatively settled,' ordered the minutes to be laid before the other Judges for their opinion.

The following unanimous opinion was returned by the consulted Judges:—

We are of opinion that the interlocutor of the Lord Ordinary, sustaining the jurisdiction of this Court against the defenders qua trustees, is well founded.

When persons hold property in this country, whether heritable or moveable, either for their own benefit, or in trust for others, they are entitled to the benefit of the law of this country for vindicating or protecting that property, and they always receive such benefit; and therefore, when a claim is made against them, which either directly affects such property, or can be made to affect it, they are bound to answer the demand made against them in this Court; or if they do not choose to appear, decreet will go against them to the effect of attaching the property in this country, and subject to its laws.

It is on this principle that process is rendered competent against a foreigner possessed of moveable property here, by means of the arrestment jurisdictionis fundandæ causâ.

This has the effect to fix the moveables (which otherwise would be held to follow and be attached to the person of the defender) in this country; and that being done, and an action raised against the proprietor, he is held bound to appear to defend himself in the action, and to save, if he can, his property from the effect of the claim, and decree against him; and, on the dependence of such action, the pursuer can use a common arrestment, which interpels the common debtor, or holder of the moveable property, from delivering it up to the defenders.

But no such circuitous process is necessary in regard to heritable property, which is, suâ naturâ, fixed within the jurisdiction of this Court, and subject to its diligence under the laws of the country.

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And therefore, as the defenders in this cause employed the pursuers in their character of trustees on this property, they must appear and defend this property from the claim made against them qua trustees, or be content to allow the pursuers to recover their claim out of it by the ordinary diligence of the law, which they may do by inhibition and arrestment of the rents on the dependence, and by adjudication, and action of mails and duties, after decreet. A case almost precisely similar, but not so strong, occurred between Haldane and the York Buildings Company, 29th December 1724, who pleaded, that notwithstanding their great estates in Scotland, they were not bound to answer to an action here. But the Court sustained their jurisdiction in respect of their heritable estate, though the action did not specially relate to their heritable estates;—multo magis in this case, where the employment of the pursuer related to business regarding those estates.

THE COURT accordingly adhered.

Pursuers' Authorities.—Lawson, Feb. 28. 1581, (4811); Galbraith, Nov. 15. 1626, (4813); Lord Blantyre, Dec. 8. 1626, (4813); Hepburn, July 3. 1627, (4814); Haldane v. York Buildings Company, Dec. 29. 1724, (4818); Wilson, 1758, (5. Brown's Supp. 938); Ashton and Co. v. Mackrill, June 16. 1773, (4835); Mansfield, June 17. 1795, (2594); Black, June 7. 1805, (App. Foreign, 7); Lord Eldon in Pedie v. Grant, (1. W. and S. 720); Mackenzie's Inst. 1. 2. 9.

Defenders' Authorities.—Mackenzie's Inst. 1. 2; Bankt. 4. 2. 31; Erak. 1. 2. 17-18; Lamb, March 11. 1624, (4812); Broomley, Feb. 1682, (4817); Forrest, Feb. 20. 1789, (4823); Brunsdone, Feb. 9. 1789, (4784); Lord Kames in Douglas, Heron, and Co. v. Palmer, June 29. 1777, (5. Brown's Supp. 449.)

T. LANDALE, S. S. C.—J. LIVINGSTON, W. S.—Agents.

No. 446.

GEORGE DOUGLAS, Pursuer.—*D. F. Hope—M'Neill.*
JOHN JONES, Defender.—*More—A. M'Neill.*

Jurisdiction—Arrestment Jurisdictionis Fundandæ Causa.—1.—An arrestment used by the creditor of a foreign partner of a company in Scotland, in their hands, and over goods belonging to them, held to create a jurisdiction over the partner, although he alleged that he had no claim on the company funds, and an investigation as to this refused in support of a preliminary defence founded on the alleged want of jurisdiction.—2.—Question raised, if, in an action to determine whether a lease of premises in Scotland had been entered into by a foreigner, the subsistence of the lease can be assumed to the effect of sustaining, in the mean time, the jurisdiction to try the question.

June 30. 1831.

2D DIVISION.
Lord Medwyn.
T.

IN January 1828, the pursuer Douglas, proprietor of a shop and house in Argyll street, Glasgow, in consequence of some communications with the defender Jones, who had previously been domiciled in England, addressed to him a missive, offering to let him the premises for seven years, at a rent of £500 per annum, to which missive Jones returned a holograph answer in these terms:—"Glasgow, Jan. 5. 1828.—Mr. George Douglas.—Sir, I hereby accept of your premises situated in Argyll street, at £500 per annum, for the term of seven years, agreeably to the propositions in yours of this day. I am," &c. (Signed) "John Jones." About Whitsunday thereafter, possession of the premises was

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taken by a company, who established there a business as tea and coffee merchants, under the firm of Jones Brothers and Co. Of this company the defender was a partner, and the only one qualified to carry on business in Glasgow as a merchant, by having entered as a burgess or guild-brother of the burgh. The rent was paid for two terms; but, at the expiry of a year, Jones having returned to England, and having refused to enter into a regular lease, and a sale of the stock in the shop having been advertised as preparatory to breaking up the establishment, Douglas used arrestments in the hands of the company, for the purpose of founding jurisdiction against Jones, of "the sum of £3000 sterling, more or less, due and addebted by them to the said John Jones, or to any other person or persons for his use and behoof; together with all and sundry moveable goods, gear, debts, sums of money, and other effects whatsoever lying in their hands, custody, and keeping, pertaining or in any manner of way belonging to the said John Jones." He thereafter raised a summons against Jones, in which, after setting forth the missives above quoted—that possession had followed thereon—that Jones had refused to execute a regular lease—and that arrestments had been used to found jurisdiction, he concluded to have Jones ordained to make payment of the rent due, and to fall due during the years of the lease yet to run. Jones pleaded as a preliminary defence, that the Court had no jurisdiction over him, in respect he was an Englishman domiciled in England, and that the arrestment jurisdictionis fundandæ causâ had attached nothing,—Jones Brothers and Co., in whose hands it was laid, not being, as he alleged, indebted to him in any thing; and he further denied, on grounds to which it is unnecessary to advert, that the missives constituted a lease for seven years; and averred that the possession by Jones Brothers and Co. did not follow on the missives, but on a new bargain with the company for a lease of one year only. In regard to the preliminary defence, it was admitted that when the arrestment was laid on, there were in the shop occupied by Jones Brothers and Co. tea and coffee belonging to them, of very considerable value; but Jones alleged that the whole stock of the company had been purchased with the funds of a partner named Hunter; that he (Jones) had no share in it, and was only to contribute his services, and that the concern had been a losing one from the beginning, so that he had no claim on the funds of the company.

The Lord Ordinary reserved the defence of want of jurisdiction till a record had been made up on the merits. A record was accordingly prepared, in which, in addition to the arrestment, Douglas founded on the lease, and the possession by Jones, as rendering him subject to the jurisdiction of the Courts of Scotland. The Lord Ordinary pronounced this interlocutor:—"Finds that by the holograph letter from the defender, 5th January 1828, in answer to a letter of the pursuer of the same date, the defender agreed to become tenant, for seven years, of certain premises in Glasgow belonging to the pursuer, and that he entered

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to possession thereof at Whitsunday thereafter;—finds, under these circumstances, that the said defender is subject to the jurisdiction of the Courts of this country in any action relative to the said premises, and so decerns against the defender in terms of the conclusions of the libel as restricted;—finds expenses due."

Jones having reclaimed, the Court remitted to the Lord Ordinary to hear parties further on the question of jurisdiction; and his Lordship thereupon ordered Cases, with which he subsequently made avizandum to the Court.

In these, besides discussing the general question involved in the preceding case, (Ferrie and Fairley v. Woodward,) as to how far the possession of heritable property in Scotland could found a jurisdiction in regard to merely personal actions, it was pleaded—

For the Defender—

1. It is incompetent for the pursuer to support the competency of his action by the alleged possession of heritable property in Scotland, because that is not founded on in the summons as constituting jurisdiction against the defender, which is there laid on the arrestment alone.

2. A lease, as between the lessor and lessee, is a mere personal contract, and cannot be considered an heritable estate, to the effect of founding jurisdiction.

3. The question on the merits is, whether there be a lease or not; and it is impossible to assume the subsistence of a lease, to the effect of establishing a jurisdiction to try whether it does subsist or not; and,

4. As to the arrestment, the mere form will not create jurisdiction—there must be something attached thereby; while, in the present case, there is nothing due by the company to the defender, and consequently nothing over which this Court can exercise jurisdiction, so as to entitle them to entertain an action against him.

For the Pursuer—

1. If a summons set forth facts which infer jurisdiction, it is not necessary that the legal conclusion should be specifically deduced in the summons. It is enough that jurisdiction exists, and that the facts on which it rests are set forth in the summons; and here the missives of lease &c., as constituting a lease for seven years, are distinctly narrated.

2. According to the law of Scotland, a lease is undoubtedly an heritable right.

3. In discussing the preliminary plea, it is necessary to assume as true the pursuer's statement—the question being, whether the Court has jurisdiction to try the question brought before them; but, at any rate, the subsistence of the lease is clearly proved by the documents in process; and,

4. Whatever may be the result of a count and reckoning between Jones and his partners, and whatever counter claims the company may have against him, still he, as a partner, has an interest in the stock of goods arrested in their hands, sufficient to found jurisdiction; and it is

not incumbent on the pursuer to show that he will be able to make any special amount forthcoming, as jurisdiction would be founded by an arrestment, even though a prior arrestment had been used for an amount more than sufficient to exhaust the fund arrested.

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The Court, on the general point involved in the preceding case, were agreed on the law as there decided. In regard to this particular case, their Lordships delivered the following opinions:—

Lord Justice-Clerk.—I have considerable difficulty, when the question is if there be a lease, in taking it for granted that there is, so as to create a jurisdiction; but no valid answer is made to this, that there has been an effectual arrestment jurisdictionis fundandæ causâ. I take the fact, which is not denied, that there were effects within the premises. I know it is said that, on an investigation, it would be shown that Jones had no interest in the company effects; but, at the time the arrestments were laid on, he was a partner. Then is it a sufficient answer as to jurisdiction to aver, that, after a long litigation, I will show that there were no funds of mine to arrest? If there be primâ facie evidence of funds, the arrestment is sufficient to make him liable to our jurisdiction. Suppose arrestments laid on, and a plea of compensation is set up, it would be enough to say there were funds primâ facie, and arrested; and therefore I would rather proceed on that ground than the other, which requires more consideration.

Lord Glenlee.—I am of the same opinion. There is enough in the mean time to support the jurisdiction. By stating the plea that there is no claim by him against the company to constitute funds, he admits the jurisdiction, and therefore I hold that there is sufficient to support it in the mean time; and it is not enough to warrant us to refuse to entertain the action, that it is a possible case it may turn out there are no funds.

Lord Cringletie.—Any decree that we can pronounce, can only be effectual in this country. No doubt, he says the goods did not belong to me, though they were in my shop. He admits, however, being a partner of the company; but says he has no share, and was only to be paid for trouble. We cannot be called on to enter into that discussion now; and though it turn out that there are no funds, the only result will be, that our judgment will be of no avail. I think there is sufficient to sustain the jurisdiction.

Lord Meadowbank.—I agree; and I am also satisfied that the jurisdiction is good in respect of the lease, as an Englishman, by taking a lease, subjects himself to jurisdiction. The same observation applies to this as to arrestment, that if there are no funds, the judgment goes for nothing; and therefore I am for assuming the existence of the lease, to the effect of sustaining the jurisdiction.

The Court, "in respect that there was an arrestment jurisdictionis fundandæ causâ," adhered to the Lord Ordinary's interlocutor.

D. Brown, W. S.—J. Campbell Jun., W. S.—Agents.

No. 447.

July 1. 1831. Kermack v. Storie.

Mrs. Kermack, Petitioner.—*Sol.-Gen. Cockburn—Neaves.*
Andrew Storie, Respondent.—*Gordon.*

Aliment—Husband and Wife.—Circumstances in which the Court allowed £120 in name of aliment (exclusive of taxes, wages, &c.) to a widow, for a period of three months prior to the first term after her husband's death.

Magistrates of Dundee &c. v. Berry.

July 1. 1831.

1st Division. S.

The late Mr. Kermack was assistant Clerk of Session, and in the receipt of about £800 a year from his office. He died on the 16th of August 1830, leaving £25,638. He resided in Picardy place, in a house rented at £100 a year. His widow having repudiated a trust-settlement, which left her an annuity of £200, and the trustees having declined to act, and a judicial factor having been appointed, she presented a petition to the Court for aliment for the three months from the death of Mr. Kermack to the ensuing term of Martinmas 1830, alleging that he had, during that period, two unmarried daughters, who resided in family with him; and that Mr. Kermack's annual expenditure, for some time before his death, was £800 or £1000.

The Court, on advising answers, (in which it was stated that the annual expenditure of Mr. Kermack was overrated,) found "the petitioner entitled to £120 in name of aliment to Martinmas 1830, exclusive of the sum allowed for mournings, and for servants' wages, taxes, and other household expenses;" and allowed her the expense of the petition.

J. Wight, W. S.—A. Storie, W. S.—Agents.

No. 448.

Magistrates of Dundee and —— Hackney, Pursuers.—*D. F. Hope.*
—— Berry, Defender.—*Robertson.*

Process—Burgh.—Trial delayed in a cause in which the Magistrates of a royal burgh were parties, in respect that their election under a royal warrant required the confirmation of the Privy Council, which was to be opposed.

July 1. 1831.

2d Division. H.

Motion to delay a trial, of which notice had been given for the sittings after term, in a cause in which the Magistrates of Dundee were the principal pursuers, on the ground, that having been recently elected under a poll-warrant from the Crown, which required their election to be confirmed by the Privy Council, its validity had been questioned, and was the subject of dispute before the Council; so that if the election were found invalid, there might be no Magistrates in office when the trial came on. The Court granted the motion.

EWEN M'PHERSON and J. M'PHERSON, Pursuers.—*Skene—Keay.*
EWEN ROSS, Defender.—*D. F. Hope—A. Wood.*

No. 448.

July 1. 1831.
M'Phersons v. Ross.

Campbell v. Murray.

Process—Jury Trial.—Sufficient ground to overrule the pursuer's choice of Edinburgh as the place of trial that the witnesses were chiefly in Inverness-shire, and that the expense of bringing them to Edinburgh would be considerable.

THE pursuers in this cause (see ante, p. 797) having given notice of trial at Edinburgh for the November sittings, the defender moved that it should take place at Inverness at the ensuing Circuit, on the ground that the bringing of the witnesses (who chiefly resided in Inverness-shire) to Edinburgh, would be attended with a great additional expense. The pursuers, on the other hand, maintained that this was not a sufficient reason for interfering with their choice of the place of trial,—the more especially as they alleged that the cause created an interest in Inverness-shire, which might prevent an impartial trial. The Court attached no weight to this last allegation in regard to a private cause of this description, and agreed that the additional expense was a sufficient ground for controlling the pursuers in their choice of the place of trial; but their Lordships being of opinion that, to accommodate them, the trial should stand over till the Spring Circuit, the defender withdrew his motion, and allowed the original order to stand.

July 1. 1831.
2D DIVISION.
R.

ARCH. CAMPBELL, Complainer.—*D. F. Hope—Forsyth—Walker.*
HON. C. A. MURRAY, Respondent.—*Jardine.*

No. 449.

Freehold Qualification—Proof—Public Records.—The entry of a service in the fragment of a book which had lain in the Register House from a period beyond the memory of man, and which purported to be minutes of the proceedings of a Sheriff Court, having been recorded in Chancery, without any previous proceedings to have the authenticity of the document determined on by the Court—Held that an extract thereof was not sufficient evidence of old extent to warrant enrolment as a freeholder; and a party enrolled thereupon ordered to be struck off the roll, without allowing him to establish the authenticity.

AT the Lanarkshire Michaelmas Head Court of 1829, the respondent, the Honourable Mr. Murray, claimed to be enrolled as a Freeholder on the lands of Jervieston and Murklewood; and to instruct them to be a forty shilling land of old extent, he produced an extract from Chancery, purporting to be of the service of Alexander Baillie of Jervieston to his father, dated 29th May 1549, and having attached to it the usual certificate of the substitute of the Director of Chancery, setting forth the extract to be "vera copia principalis retornatûs super præmissis Cancellariæ S. D. N. Regis remanen." This extract had been obtained in the following manner:—There had lain in the Register Office at Edinburgh, for a period beyond the memory of man, a fragment of a book, consisting of about 50 leaves, and containing proceedings of a Sheriff Court at Hamilton in the year 1549, without any signatures or title, the first part

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of the book being wanting. Among other entries in this fragment, there was one of the service of Alexander Baillie of Jervieston, as heir to his father in the lands of Jervieston and Murklewood. Of the service so entered, Mr. Murray obtained an extract from the Keeper of the Records, certified as "extracted from the records in his Majesty's General Register House." This extract he thereupon carried to the Chancery Office, where it was copied into the Record of Special Services, from which the extract produced to the Freeholders was taken.

Mr. Murray having been enrolled, a complaint was presented by Campbell of Blythswood, on the ground that there existed no authenticated retour in Chancery, and that the extract of the unauthenticated entry copied into the Chancery books was no evidence under the 20. Geo. II., which required, as the only legal evidence of the old extent, a 'retour' prior to 1681.

The Lord Ordinary ordered Cases to the Court.

Pleaded for Mr. Murray—

The verdict of an inquest of service has always been held evidence of extent, although not retoured to Chancery at the time; and retours discovered in private charter chests are yearly added to the records of Chancery, without any previous proceedings to ascertain their authority; and extracts are given out and received as sufficient evidence of extent. There exist also in the Chancery records entries of retours, of which the originals are no longer extant; but it has never been disputed that faith must be given to them. Further, services in many cases are found in the records of Sheriff Courts, without any special authentication by signatures or otherwise; and these have been found sufficient to warrant their being engrossed in the retour books of Chancery, and extracts given out as evidence of old extent. This, in particular, was decided, in the case of Fraser v. Fraser,[1] as to an old record of the Sheriff Court of Inverness; and although the Court adopted certain proceedings to ascertain its authenticity, before they directed it to be placed in the Register House among the public records, the necessity of doing so arose from its having been found in the private repositories of an individual who had once been Sheriff Clerk. Here, however, the document founded on had, beyond memory, formed part of the public records, and required no proceedings to ascertain its authenticity, any more than a large proportion of the records in the Register House, which have no signatures, nor special marks of authentication, nor warrant for being received in the Register House, attached to them; and if any doubt can be entertained of the authenticity of the document, it is still equally competent to take steps for determining this, as it would be in regard to an old original retour now delivered into Chancery for the first time, if that were disputed to be genuine.

Pleaded for Campbell—

By the statute 16. Geo. II. c. 11, the only evidence of old extent to

[1] July 11. 1800, (F. C. and Ap. M. P. 5.)

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support a freehold qualification is a retour; and it has been decided that "an extract from the records of Chancery is not evidence of the old extent, when it is shown that the original writing recorded is not a genuine retour, nor yet an authenticated copy of a retour." [1] But here the writing recorded was a mere copy from an unauthenticated fragment, accidentally, perhaps, lying in the Register Office, as a true copy of a principal retour remaining in the King's Chancery, which had no existence. If the fragment had been examined by the Court, as in Fraser's case, and authorized to be deposited among the public records, the Chancery officers might have been warranted in giving an extract of it, as of a genuine retour; but this cannot be done now, to the effect of validating the enrolment complained of. There being no evidence of old extent, the enrolment was erroneous, and Mr. Murray's name must be expunged from the roll.

Lord Justice-Clerk.—I am of opinion that the Freeholders were not justified in enrolling Mr. Murray. In evidence of his old extent, he brings an extract bearing to be "vera copia principalis retornatûs super præmissis Cancellariæ S. D. N. Regis remanen." Now we are bound to look at the authority of this certificate. And what is the history of the document on which it rests? According to the respondent's own statement, it is within the walls of the Register House, and nothing more. It is apparently a fragment of an old book, unauthenticated in any way, and said to have been there from time immemorial. Then the Keeper gives an extract of it. But the material thing is wanting to bring this case within that of Fraser. The document there had been made part of the records by order of the Court of Session, who authorized it to be entered in the Chancery Office. Is that the case which occurs here? There is no vestige of authority to enter this fragment in the records of Chancery. The Keeper, by giving an extract, could not raise its value as proof of a retour. Then on what authority did the clerk in Chancery take it upon him to certify his extract of this as 'vera copia?' No doubt, there are certain entries in the books in Chancery without the originals, which, from the way these are kept, are received as authority. But a book, or part of a book, bearing no authentication, cannot possibly, by being carried to Chancery, warrant the officer giving a certificate that it is a copy of a principal retour. At present we cannot sustain the enrolment, whether or not we are to take the same course as was done in Gordon v. Oswald, by inquiry and investigation as to this document. If we were satisfied of its authenticity, it would be sufficient, as settled in the case of Fraser; but till that is established, we cannot hold it as sufficient evidence.

Jardine.—We are ready for investigation.

Forsyth.—It should have been done before getting on the roll.

Lord Cringletie.—I agree with the opinion delivered from the Chair.

Lord Glenlee.—I also agree. The extract from Chancery, as it stands, is not sufficient evidence. I shall not say what might have been the case, if the extract had borne to be from the records of the Sheriff Court. But

[1] Cathcart v. Gordon, March 9. 1813, (F. C.)

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nothing of the kind appears from the extract; and whether it was the records of the Sheriff Court is not said, and there was not sufficient to warrant the Director of Chancery to give forth an extract of that copy as 'vera copia' of a retour. Hoc statu, therefore, there is no evidence of the extent; and it is enough to decide this case, that the evidence laid before the Freeholders was insufficient. Let the respondent take steps to get it investigated, and then get an extract, and claim; but I do not think he is entitled to remain on the roll, or that he can be allowed to support the enrolment by showing that he might have got it done, so as that he might have had an extract.

Lord Meadowbank.—I cannot have a doubt in concurring with your Lordships. So far as at present stated, there is no ground to believe this document authentic. But it is a very important matter to consider the conduct of the Keeper of the Records, who gives an extract bearing to be from the 'records in the Register House.' I do not think he has power to give the character of a record, without the authority of the Court, to a document merely found within the walls of the Register House; consequently the certificate is given in terms imposing on those reading it, as I deny it was a record in the Register House. But the irregularity does not stop here: the clerk in the Chancery Office gives an extract as of a principal retour, while there is no such principal retour in Chancery. The Court is bound to investigate the matter, and call on the officers to answer for their conduct at the bar.

The Court sustained the complaint as to Mr. Murray, ordained his name to be expunged from the roll, and further pronounced as follows:—"Having observed the irregularities complained of in this case as to registration of documents in the public records without due authority, they ordain the printed papers for the parties to be transmitted to the Lords of the other Division, for consultation with their Lordships as to the proper course to be adopted for preventing such irregularities in future."

J. Swan, W. S.—R. Rutherford, W. S.—Agents.

Single Bills, &c.

Process—Expenses.—Intimated by the Court, that an adherence by the Inner House to an interlocutor of a Lord Ordinary, finding expenses due, should in future carry the expenses in the Inner House; but that the Clerks were to insert a finding to that effect.

July 2. 1831.

1st Division.

The Lord President intimated, that after advising with the Judges of the Second Division, the Court had resolved, in all cases where the Inner House adhered to a judgment of a Lord Ordinary which had found expenses due, that such adherence should carry with it a finding of the additional expenses under the note; and that the Clerks were in future to insert a finding to that effect in the interlocutors written out by them pursuant to such adherence.

SMITH, Pursuer.—*Ivory.*
HIS CREDITORS, Defenders.—*Deas.*

No. 450.

July 2. 1831.
1st DIVISION.

Smith v. His Creditors.

Cessio.—The pursuer of a cessio being opposed by the mother of his natural child, cessio refused hoc statu, as he declared that he had paid nothing towards its aliment, and that he would not do so.

ALEXANDER ROBERTON, Pursuer.—*Skene—J. W. Dickson.*
ANDREW ROBERTON and Others, Defenders.—*D. F. Hope—Sandford.*

No. 451.

July 2. 1831.
Roberton v. Roberton &c.

Homologation—Minor—Mandatary.—An officer in the army, nearly 19 years of age, having granted a mandate, when abroad, to uplift any sum arising to him out of a certain process; and the mandatary having done so, and granted a discharge of the process; and the officer having made repeated drafts on the sum uplifted, and, after majority, fitted an account with the mandatary, and discharged him; held not entitled to insist on reducing that discharge, and the discharge of the process, after a lapse of 15 years, on the allegation that no curator ad litem had been appointed to him during the process, or that the mandatary had exceeded his powers in discharging it.

July 2. 1831.
1st DIVISION.
Lord Newton.

ON the death of the late Alexander Roberton, his children, in 1814, raised an action of count and reckoning against his brother, the late Andrew Roberton. At this time, one of them, Alexander, the present pursuer, was in pupillarity. Decree was pronounced on the 10th of July 1818, finding a balance due to him of £347. 16s. 8d., and exonering the defender on payment of that and other sums. The pursuer at this time was 18 years old, and for some years prior he had been serving as an officer in the army, and was then in the Peninsula. In January 1814, he wrote from Bayonne to Mr. Jollie, W.S.—"As I wish whatever money may arise to me in the process or submission with my uncle Andrew Roberton, Ladyrigs, should be preserved for my use, and so as to be applied when I have occasion for it, I hereby authorize you to receive all such money, and lodge it with such bank as you may think proper, on their promissory note, for my behalf. Should any more formal writing be required, I shall grant it when I return to Britain; but neither stamps nor attorneys can be got here."

Mr. Jollie, in consequence, uplifted the above sum, and granted a discharge of the process. The pursuer became major in April 1815; and during the preceding year, and the month of June 1815, he made repeated drafts on Mr. Jollie. In July 1815, a final settlement of accounts took place between them, beginning with the sum received under the mandate, and closing with a balance of £79. 14s. 4d. in favour of the pursuer, which was then paid to him. A docquet was appended to the account, by which "the parties mutually discharge each other."

About fifteen years afterwards, the pursuer raised the present action of reduction of the decree, and of the mandate and discharge, and concluding for count and reckoning against the representatives of Andrew Roberton

No. 451. and Mr. Jollie. He set forth that he was in pupillarity or minority during the whole course of the action; that no curator ad litem had been appointed; that his interests had been grossly neglected; that his mandate to Mr. Jollie, and most of his subsequent drafts, were written in minority; and these and his subsequent acts took place while he was in utter ignorance of the fact that the decree had been informally obtained.

July 2. 1831. Roberton v. Roberton &c.

Livingston v. Murrays.

Smith v. Pyper.

The defenders answered, that the pursuer, being an officer in the army, was sui juris; and that he had, by his acts subsequent to majority, homologated the proceedings.

The Lord Ordinary assoilzied, with expenses.

Roberton reclaimed, and insisted that the discharge of the process was ultra fines mandati, and still reducible.

LORD BALGRAY.—Before Mr. Jollie interfered, the interlocutor was final, declaring that, on consignation or payment, the late Andrew Roberton should be discharged and exonered. Mr. Jollie could not have uplifted the money without granting a discharge of the process.

THE COURT unanimously adhered.

MEGGET and ROY, W. S.—J. and W. JOLLIE, W. S.—Agents.

No. 452. JOHN LIVINGSTON, Complainer.—*Robertson.*
MR. and MRS. MURRAY, Respondents.—*D. F. Hope—Robertson.*

July 2. 1831. 1ST DIVISION. D.

Summary Complaint.—On resuming consideration of this complaint, (see ante, p. 161,) along with the judicial examination of Mr. Murray, the Court dismissed it, with expenses.

H. MACQUEEN, W. S.—G. LOGAN, W. S.—Agents.

No. 453. MRS. RAE or SMITH, Pursuer.—*Henderson—W. Robertson—Carlyle.*
WILLIAM PYPER, Defender.—*D. F. Hope—Robertson.*

Parish Schoolmaster — Stat. 47. *Geo. III. c.* 85. — The heritors of a parish having elected and chosen a party 'to be schoolmaster &c., to be approven by the presbytery;' and the presbytery having thereafter found him qualified, and declared him the legal schoolmaster—Held that his appointment was of the date of the approval by the presbytery.

July 2. 1831. 1ST DIVISION. Ld. Corehouse. S.

ON the 6th of August 1807, the heritors of the parish of Annan, on a report by two clergymen as to the qualifications of William Smith, "elected and chose the said William Smith to be schoolmaster at Bridekirk village, to be approven by the presbytery," &c. On the 8th of August, the statute 47. Geo. III. c. 85. was passed; and, on the 4th of November, Smith was taken on trial by the presbytery, whose minutes bear inter alia—"Compeared William Smith, elected by the heritors of Annan schoolmaster of Bridekirk in the parish of Annan, who craved to be examined by the presbytery, in order to his instalment in the said office;

and the presbytery having accordingly taken trial of his proficiency &c., found him duly qualified; did, and hereby do, declare him legal schoolmaster in said village, and entitled to the salary and school-wages annexed to that office."

The statute was passed with a view to provide for the widows and children of burgh and parochial schoolmasters; and five rates of contribution are permitted, which run from £5 to £1 per annum; it being declared, that any contributor who does not duly make an election of his rate shall be held to have chosen the fourth rate of £2 per annum. This entitles his widow to an annuity of £10, provided that the husband have been a contributor for at least ten years, and be not in arrears to the fund. If there be a shortcoming in either particular, the one-half of the annuity to the widow is to be deducted as it falls due, until the deficient contribution be made up to the fund. The act further declares (§ 1), "that all such persons as were either burgh or parochial schoolmasters previous to the passing of this act, and whose accession to the said fund shall not be declared by a writing under their hands within the space of two years after the passing of this act, shall be for ever excluded from the benefit thereof." But it is provided (§ 3), "that every person who shall be appointed a burgh or parochial schoolmaster, and every such schoolmaster who shall be removed from one school to another, subsequent to the passing of this act, shall, in consequence of his appointment, or of such translation, be held to accede to the fund, and be obliged to contribute thereto."

Mr. Smith lived till 1824, without having contributed to the schoolmasters' fund, or intimated his accession to it. On his death, a question arose between his widow and the trustees, under the statute, whether she was entitled to the benefit of the provisions of it. This depended on whether the appointment of Smith was to be held as of the date of the election by the heritors, or the approval by the presbytery. To have this point decided, she raised an action, setting forth the statute; that, until the date of the presbytery's minute, her husband had no legal appointment; that it was therefore subsequent to the statute; and as he might have been compelled to contribute to the fund, she was entitled to insist for the allowance of £10, (that being the rate for all contributors who made no election of a special rate,) under deduction of one-half of the annuity, until the arrears due by her husband were paid up.

In defence it was pleaded, that the date of the appointment was the 6th of August, when the heritors 'elected and chose' the schoolmaster; that the subsequent proceedings of the presbytery, however necessary, were merely of a relative and accessory character; that they did not originate any appointment, but merely confirmed an appointment already made prior to the statute; and as Mr. Smith was therefore a schoolmaster before the act was passed, he could not have been compelled to contri-

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Smith v. Pyper.

bute; and as he had not intimated his accession to the fund within two years after the act was passed, his widow could have no claim under it.

The Lord Ordinary found "that William Smith, the pursuer's late husband, was a parochial schoolmaster, appointed subsequent to the passing of the act 47. Geo. III. c. 15; therefore repelled the defences," and allowed the pursuer expenses.

The defender reclaimed.

D. F. Hope for Reclaimer.—The approval of the presbytery was not requisite to complete the election by the heritors, but merely to give a legal title to the elected party to draw the emoluments of his office. By the practice of the country, a schoolmaster, on being elected by the heritors, immediately proceeds to the discharge of the functions of his office; and the period of his confirmation by the presbytery, though it ought not to be delayed, is often put off for a considerable period. In the mean time the parish must have its school and teacher, and he does all the duties, and receives all the emoluments accordingly. The period of appointment, therefore, is the date of election by those in whose gift the office lies—that is, by the heritors.

Lord Balgray.—If that be the practice of the country, it is a very loose and irregular practice, which it is the duty of a Court of Justice not to sanction, but to repress. I hold that no parish schoolmaster is entitled to open his mouth in the school until his election by the heritors is approved by the presbytery; and he cannot legally claim the emoluments of his office while his appointment is unapproved.

Lord President.—The election by the heritors, in this instance, expressly bore to be conditional. They elected and chose Smith to be schoolmaster, 'to be approven by the presbytery.' Till that was done, he was not legally appointed.

Lord Gillies.—I concur. The minute of election contained a suspensive condition, which was the approval of the presbytery. Until that approval, there was no legal appointment; and before it was given, the statute of 47. Geo. III. c. 85. had passed. I therefore adhere to the interlocutor under review.

Lord Craigie was understood to concur.

The Court then adhered.

J. Young, W. S.—J. Wotherspoon, W. S.—Agents.

JOHN BARKER, Suspender.—*D. F. Hope—More.*

NORTH BRITISH INSURANCE CO., Chargers.—*Cuninghame—Marshall.*

No. 454.

July 2. 1831.
Barker v. North British Insurance Co.

Insurance—Cautioner.—A party having borrowed money from an Insurance Company, and granted bond, along with a cautioner, for payment of that sum, and for the premium on a policy of insurance to that amount effected with the company, which he assigned to them in further security; and after the limited time for paying the premium was past, having left a bill in the hands of the company's secretary, equal in amount to the premium and interest, and died in that year—Held that the cautioner was not bound to pay the debt.

July 2. 1831.

1ST DIVISION.
Ld. Corehouse.
S.

ON the 18th of May 1825, Mr. James Lyon borrowed £2500 from the North British Insurance Co., and, of the same date, effected a policy of insurance on his life for that amount. Mr. John Barker, surgeon, granted bond, along with Lyon, as surety and full debtor for the principal sum, which was made payable at Martinmas 1825 in the usual terms. The bond set forth, that it was "part of the treaty for the present loan that I should insure my life, during its whole period, for the amount of the said loan, and should assign the policy of insurance to the said North British Insurance Co. in further security thereof; and I having, in implement of the said arrangement, effected a policy of insurance upon my life, for the remainder thereof, with the said North British Insurance Co., to the foresaid extent of £2500, conform to policy No. 26, with participation of profits, dated the 18th day of May 1825, by which policy the annual premium for the said insurance amounts to £73. 0s. 5d., and is payable upon the 4th day of May annually,—therefore I do hereby transfer, assign, convey, and make over from me, my heirs, executors, and representatives whomsoever, to and in favour of the said North British Insurance Co. and their assignees, their said policy of insurance, No. 26, &c. And in order that the security afforded to the said North British Insurance Co. and their assignees, by the said policy of insurance, under the foregoing assignation, may not be lost, we, the said James Lyon and John Barker, hereby bind and oblige ourselves, conjunctly and severally, and our respective foresaids, to pay the before-mentioned premium of £73. 0s. 5d. upon the said policy of insurance, annually, within fourteen days of the said 4th day of May, so long as the whole or any part of the said sums above contracted to be paid shall remain unpaid; and I the said James Lyon have herewith delivered up the said policy of insurance to the said North British Insurance Co., to be kept and used by them and their assignees, as their own proper writ and evident, during the non-payment of the said sums. And we both consent to the registration," &c.

The bond and policy were thereupon delivered to the Insurance Co. By one of the conditions of the policy, it was stipulated that it should be void, "if any premium remains unpaid twenty-one days after the time stipulated in the policy;" but if the defaulter, within three months, should

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pay the premium, and a fine not exceeding ten per cent., he being in good health at the time, the policy might be revived. Another stipulation was, that no receipt should be granted for any premium or deposit but those printed by the office, and signed by two directors, and by the manager or secretary. In the bond nothing was said as to these conditions.

Lyon paid the premium in May, and the interest up to Martinmas 1826. In May 1827 the premium and interest amounted to £135. 10s. 5d., but were not then paid. On the 24th of June, Lyon called at the insurance office, and left in the hands of Mr. Brash, the secretary, a bill for £140, dated the 21st of June, at fifty days, accepted by a Mr. Dickson. Mr. Lyon died suddenly in London on the 25th of September. On the 29th, an agent, who stated that he acted for Dickson, called at the insurance office, and tendered payment of Dickson's bill, which was some time past due, but this was refused by the manager and secretary, (who had just heard of Lyon's death,) unless as a payment to account of the loan of £2500. This was declined. A few days thereafter, the law agents of the company wrote Dickson's agent, "that though the bill in question was put into the hands of the secretary by Mr. Lyon, in contemplation of his afterwards applying to the directors, in terms of the laws of the company, to be permitted to have his policy of insurance revived on such conditions as they might exact, it is impossible for the directors of the company to accept of payment of it from any one as a payment of the premium of insurance on a policy which stood completely forfeited, and which cannot now be revived,—no application to that effect having been made by Mr. Lyon, and his death having now rendered this impossible."

The Insurance Company then gave Barker a charge on the bond for payment of the principal sum of £2500, with interest from Martinmas 1826. He presented a bill of suspension, which was passed without caution or consignation.[1]

Various allegations were made by the parties; but the material facts were those above stated.

The Lord Ordinary ordered Cases.

Pleaded by Barker—

1. The only obligation which exists against him is founded on the bond; and the question is, what was the contract between him and the company under that bond? On the one hand, he became bound for repayment of the £2500 and interest, and also to pay to the company a certain annual sum, to enable them, by insuring Lyon's life, to recover payment of the loan in the event of his death; while, on the other hand, the company necessarily became bound to the suspender as cautioner that this insurance should be kept up. The obligation by him

[1] Ante, May 22. 1828, VI. 831.

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to pay that annual sum, over and above the interest, except as a consideration for a correlative obligation to maintain that means of relief, in the event of Lyon's death, would otherwise be usurious. There is no question here under the terms and conditions of the policy, which was a contract between Lyon and the company alone; but the question rests entirely on the bond; and, according to it, the company, as the creditor, were bound to see that no injury was suffered by the suspender as cautioner, and consequently not to allow the security to fall. If the policy had been effected in a separate insurance office, the company would have been guilty of gross negligence in suffering it to lapse, while they had an effectual obligation against the suspender to relieve them of the premium; and the circumstance that the insurance was made in their own office, strengthens the obligation on them to keep it up.

2. The bill left with Mr. Brash was given and taken as a payment of the premium and interest then due. Lyon owed nothing else to the Insurance Company at the time. After their secretary took this payment, the suspender was entitled to rely that nothing further was required of Lyon or himself for continuing the policy in force. The company was barred from repudiating the act of their officer after Lyon's death, and must now be dealt with as if payment of the premium had been made in the ordinary form.

Pleaded for the Insurance Co.—

1. Both Lyon and the suspender were bound as principal debtors for the debt and interest, and also to provide the means of keeping up the policy. This afforded only a security of a limited and contingent nature, and it was by the acts or negligence of the suspender and Lyon that it was allowed to expire. There was no obligation, either express or implied, on the company to uphold it. This could only be done by Lyon or the suspender complying with the conditions of it; and there is no stipulation in the bond, that, in the event of its expiration, the debt was not to be exigible. Besides, the chargers had repeatedly notified to the suspender the non-payment of the premium, and the certain lapsing of the policy, if its conditions were not complied with, so as to preserve it in force. This was more than they were bound to do, and sufficiently exonerated them from all charge of neglecting his interests as a cautioner. The security was not taken for behoof of the suspender, but solely for behoof of the chargers, whose proper interest it was, for their own safety, to preserve it in force.

2. The bill was tendered to Mr. Brash on the 24th of June, after the policy had already fallen, and was merely offered on account of the interest which was past due at Whitsunday 1826. Even in reference to this limited object, Mr. Brash gave no receipt for the bill, but merely allowed it to remain in his hands, with a view to ulterior arrangement with Lyon on this subject, and the possible event of his applying to be reponed against the forfeiture of his policy. But the bill was not ten-

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dered, and could not have been received as a payment of the premium. It did not fall due until after the three months had expired, beyond which it was impossible for any party to revive the extinct policy; and even if it could have had any reference to a payment of that sum within three months, it was necessary to apply to the directors to have the policy revived on a proof of health, and paying a certain fine; but this was not done.

The Lord Ordinary having reported the cause, and the Company having averred that large sums of money were invested both in England and Scotland upon transactions similar to this, all of which would be instantly affected, if the liability of the suspender were put an end to by the Court, they were allowed to give in a condescendence as to the practice of insurance offices, but which, on being lodged, appeared to be immaterial.

The Court "sustained the reasons of suspension, suspended the letters simpliciter &c., found expenses due," &c.

THE COURT were understood to be influenced by considering that the obligation laid on Mr. Barker to pay an annual premium was the correlative of an obligation by the company to insure Lyon's life; that Barker, whose solvency was not questioned, remained bound for the premium, without qualification, so long as the loan remained unpaid; and therefore, as he remained bound for the premium which covered the year of Lyon's death, the company were not entitled, after that event, to waive all claim against him for that outstanding premium, and thereby free themselves from their counter obligation. He had no option, before Lyon's death, to free himself from the premium; and, after his death, no option could be left to the company to free themselves from the contract of insurance in a question with him, by notifying their abandonment of any claim against him for the premium in arrear. Their Lordships were also understood to rest on the reception of the bill for £140 by the company's secretary, as barring them from pleading that the policy had fallen through non-payment of the premium.

Chargers' Authorities.—Want, Feb. 11. 1810, East's Rep. XII. 183; Marshall Ins. II. 695.

CAMPBELL and MACK, W. S.—J. and C. NAIRNE, W. S.—Agents.

No. 455.

MRS. KELLY, Pursuer.—*W. Bell.*
WILLIAM KELLY, Defender.

Aliment—Husband and Wife.—Circumstances in which the Court, in absence, awarded an aliment of £50 per annum to a wife living separately from her husband.

July 2. 1831.

1ST DIVISION. H.

MRS. KELLY raised a summons of aliment, setting forth that she was a Scotchwoman, and had been married in Scotland to William Kelly, gardener; that they had emigrated to America, where his maltreatment of

her had obliged her to leave him; that, during the marriage, a moveable succession of £960 had opened to her, of which £800 was already remitted to her husband abroad, and the remaining £160 was arrested at her instance here. She craved an allowance in name of aliment. The Court, having first named a curator ad litem, allowed her £50 per annum.

T. M. Moffat, Agent.

No. 455.

July 2. 1831.

Kelly v. Kelly.

Bank of Scotland v. Smith's Trustee.

Flockhart v. Lawson.

W. Cadell (for Bank of Scotland), Petitioner.—*Skene—Walker.*
Binning Bell (Smith's Trustee), Respondent.—*Whigham.*

No. 456.

Bankrupt.—Circumstances in which a ranking and sale of the heritable estate of a party sequestrated under the Bankrupt Act having been brought, the Court awarded sequestration of the rents, and appointed a judicial factor different from the trustee in the sequestration.

The estates of Messrs. Smith being sequestrated under the Bankrupt Act, the trustee took measures for bringing their heritable property to sale. The Bank of Scotland held primary securities over it to the extent of £25,000, and the estate was valued under £26,000. There were £8000 of postponed heritable securities. A postponed creditor having brought a process of ranking and sale, the Bank applied for a sequestration of the rents of the estate, and the appointment of William Thomson jun. as judicial factor, contending that, under the circumstances, the trustee and the personal creditors had no interest in the disposal of the heritable estate. The trustee opposed the application as unnecessary, the estates being already under his judicial management; and he craved that if any factor was to be appointed, he should be named by the Court. Their Lordships granted the prayer of the Bank's petition.

July 2. 1831.

1st Division. S.

H. Davidson, W. S.—Brodies and Kennedy, W. S.—Agents.

William Flockhart, Suspender.—*More.*
Ebenezer James Lawson, Charger.—*Thomson.*

No. 457.

Proof—Bill of Exchange—Payment.—Circumstances in which proof by parole was admitted as to the res gesta at granting a bill of exchange, with a view to determine whether it had been granted in full of a disputed claim, or as a payment of interest.

Lawson having charged Flockhart, who had been his tenant, upon a Sheriff's decree for £83. 5s. for repairs, Flockhart suspended. This suspension, which commenced in 1818, was allowed to fall asleep; and in 1821 the parties met, as the suspender alleged, for the purpose of adjusting the dispute by arbitration. Lawson then drew a bill, bearing to be for value, which Flockhart accepted, along with Janet Hart and William Morrison as cautioners, for £22. 19s. 6d., payable three months after date, and it was retired by Flockhart when it became due.

Nearly ten years after the bill had been paid, and without making any demand during the interval, Lawson revived the charge against Flock-

July 2. 1831.

2d Division. Lord Medwyn. R.

No. 457.

July 2. 1831. Flockhart v. Lawson.

hart, who maintained in a suspension that the bill for £22 had been granted by him in full payment of the original claim of £83; but that he had not been assisted by any man of business at the communing, and had taken no discharge. He offered to prove this fact by the testimony of persons present at the granting of the bill. Lawson did not deny the connexion of the bill with the claim under suspension; but he averred that it was merely granted in payment of the interest on that claim.

The Lord Ordinary pronounced this interlocutor:—"Finds, under the peculiar circumstances of this case, where the claim made by the landlord having been under suspension by the tenant, and a meeting having taken place between the parties, a bill is granted for a sum alleged by the landlord to be the amount of the interest due upon the sum in the decree, while the tenant states it was a sum to be paid in discharge of the whole claim; and that it does not appear that any man of business was present to assist the tenant, and recommend him to obtain a discharge in full; but that no further step has been taken by the landlord to enforce payment for ten years;—that it is competent for the suspender to prove, by the testimony of the persons present at the communing when the bill for £22. 19s. 6d. was granted, that it was accepted in full of the claim due by him to the landlord; and appoints the cause to be again called, to determine in what manner the proof is to be taken."

In support of a reclaiming note for Lawson, it was contended that the Lord Ordinary had allowed an incompetent mode of proof, as parole could not be admitted to explain writ.

Lord Justice-Clerk.—I by no means wish to interfere with the rule of law that parole evidence is not to explain writing; but this is a very special case; and it is a material feature, that for ten years after the bill was paid, the landlord made no demand. It appears to me to be perfectly competent, according to the strictest rules of evidence, to prove that a communing took place for the purpose of settling the claim out and out. I would therefore propose to allow the suspender to prove the res gesta at the communing, and also why the cautioners were called upon. The terms of the Lord Ordinary's interlocutor may be rather broad; but why may not Mrs. Hart, for instance, be examined as to the cause of her becoming cautioner?

The other Judges concurred.

The Court accordingly pronounced this interlocutor:—"Recal the interlocutor reclaimed against, in so far as it finds it competent for the suspender to prove, by the persons present at the communing, that the bill for £22. 19s. 6d. was not granted in full of the claim due by the suspender to the landlord: Find it competent to prove by said persons, as named in the record, what was the res gesta which took place at the said communing, and on what account cautioners were required to subscribe the bill; and, quoad ultra, adhere to the interlocutor, and remit to the Lord Ordinary to proceed accordingly."

A. Gifford, S. S. C.—J. Mowbray and A. Howden, W. S.—Agents.

CAPTAIN MOSES CAMPBELL, Advocator.—*D. F. Hope.*
GEORGE MITCHELL, Respondent.—*Robertson—W. Bell.*

No. 458.

July 2. 1831.
Campbell v. Mitchell.

Process—Arbitration—Amendment of Libel.—A summons having been raised in an Inferior Court, founding on an informal decree-arbitral; and the Judge having ordered a proof—Found incompetent thus to rectify the decree-arbitral; but the libel allowed to be amended, so as to be laid on the facts of the case, independent of the decree.

July 2. 1831.

2D DIVISION.
Ld. Fullerton.
Bill-Chamber.

CAMPBELL, the advocator, entered to the farm of Achindale at Whitsunday 1829, prior to which it was possessed by Mitchell, the respondent; and the parties agreed to refer the value of Mitchell's waygoing crop, which Campbell was to take, to mutual arbiters and an oversman. Nothing was done until the year following, when an irregular meeting of the arbiters took place on board of a steam-boat, and the following award was pronounced:—"On board the Highlander Steam-boat, June 16. 1830. We three having met to fix the price of Achindale and Donie crop of 1829. As Mr. Smith of Glenevis, and Mr. Clark of Achteraw, could not agree in opinion, Captain Macdonell of Killichonate, and Clark, has agreed that Captain Campbell of Achindale is to pay to Mr. Mitchell, for the bear and oat crop, including straw, the sum of £150 sterling." Campbell complained that this award was ex parte, and altogether informal, and embraced the farm of Donie, which, he alleged, was not in the agreement as to the valuation of Mitchell's crop. Mitchell, on the other hand, followed up this award by raising an action before the Sheriff of Inverness-shire, narrating the circumstances which led to the arbitration, and concluding for £150 as the amount of the award relative to Achindale, but saying nothing about the farm of Donie. The Sheriff pronounced an interlocutor, condemning the award founded on, as "meagre, unsatisfactory, and defective," both in point of form, and upon the merits of the valuation; and therefore, before answer, appointed "the pursuer to give in a distinct and articulate condescendence of what he avers, and will undertake to prove, as to these points, with a view of obviating these defects, and supporting his libel and award, and his mean of proof for establishing the same."

Campbell, upon a reference of that point to his oath, having deponed that the crop of Donie, mentioned in the award, had not been included in the agreement, the Sheriff allowed a proof, so far as related to the crop of Achindale not including the crop of Donie. Having obtained permission from the Sheriff, Campbell presented a bill of advocation of these interlocutory judgments, in which he contended, that the action being laid solely on the award, and concluding for the precise amount found due by it,—and the award being destitute of all the legal requisites,—a proof ought not to have been allowed in an action brought for the incompetent purpose of remedying these defects.

Mitchell replied, that this was a submission inter rusticos, and that the alleged irregularities were to be overlooked; and further, that the action

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was not founded solely on the award as a document, but upon a claim for £150, supported by the fact that so much had actually been awarded; consequently, that a proof as to that claim was competent.

The Lord Ordinary reported the bill with answers.

Lord Cringletie.—By the Act of Parliament you cannot advocate an interlocutory judgment, except as to the mode of proof. Now it appears to me that this case does not come under the exceptions. It is the proof, and not the mode of proof, that the advocator here complains of. I am inclined to think that the award was informal, but the summons does not exclusively libel upon that award. It is clear that the crop must be paid for.

Lord Glenlee.—I do not see the difficulty of my brother as to the competency of this advocation. The objection to the proof allowed comes fairly under the statute, and the summons proceeds entirely upon the award. Now the Sheriff orders a proof, not in terms of the award, which includes the farm of Donie, or even of the condescendence, but "so far as relates to the crop of Achindale proper, not including the crop of Donie." This is a fundamental objection. The summons is neither more nor less than an attempt to perfect an informal award. We cannot allow a decree-arbitral to be cobbled up in this manner.

Lords Justice-Clerk and Meadowbank concurred with Lord Glenlee.

The Court remitted to the Sheriff to recal the interlocutors complained of, but with instructions to allow the respondent to amend his libel.

H. Macqueen, W. S.—J. S. Robertson, W. S.—Agents.

No. 459. William Maule, Pursuer.—*D. F. Hope—Forsyth—Robertson.*
Hon. W. R. Maule, Defender.—*Murray—Keay—Jameson.*

Res Judicata—Entail.—1.—Certain judicial procedure held not to be res judicata.—2.—Circumstances in which a decree in foro, pronounced in 1782, was held liable to reduction under a summons raised in 1826.—3.—Opinion intimated, that in a process with an heir of entail in possession, (or entitled to possession,) the decree obtained in foro, if without collusion, is good against all substitute heirs, though not parties to the process.

July 5. 1831. 1st Division. Ld. Moncreiff. D.

This was a branch of the case fully reported ante, VII. 527, (which, with the preceding reports there mentioned, see.) The questions in dispute on the merits between the parties related to their respective rights to the estates of Kelly and Ballumbie, and to certain long leases of Panmure and Brechin. The pursuer claimed right to them in respect of certain deeds of entail executed in 1730, while the defender founded on subsequent deeds fortified by prescription, and a judgment of the Court pronounced, in March 1782, between his predecessor and the pursuer's father Lieutenant Maule, and to which the pursuer, then a pupil, was called as a party. By that judgment the right of the defender's predecessor to the estates had been sustained, and the pursuer's father preferred to the leases. His right, however, to the leases was, by an ex facie decree-arbitral, given in favour of the defender's predecessor. Several

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years after his father's death, the pursuer instituted proceedings to set aside this decree, and vindicate his claim, under the deeds of 1730, to the estates and leases. After a great deal of litigation, the House of Lords found that the decree-arbitral was not binding as such; that the judgment of the Court of 1782 must receive effect, as to the estates, in favour of the defender, till it was set aside; and remitted to the Court to hear parties on the right to the leases.

The Court, under the remit, preferred the pursuer to the leases; and about the same time (1826) he raised the present action of reduction of the decree of the Court in 1782 quoad the estates, and of the titles thereto founded on by the defender, and concluding for declarator of his own right to them, for removing, count and reckoning, &c.

The defender maintained—

1. That as the pursuer had been cited both personally and by his father, who appeared as his administrator in law, and judgment had been pronounced in foro contentioso, it was res judicata as to the right to the estates, and therefore formed a good title to exclude the demand for production of the titles of the estates, and had been recognised as such by the House of Lords; and,

2. That the pursuer had, by his own conduct, and by not bringing any challenge within the quadrennium utile, excluded himself from all right to challenge the decree.

To this it was answered by the pursuer—

1. That he was a pupil at the date of the decree, and no tutor ad litem had been appointed; that the proceeding as to him was in absence, and his rights had been entirely disregarded; and,

2. That, as heir-substitute under the entails of 1730, he was entitled to have brought the decree under appeal, so far as adverse to him; but he was excluded from doing so by the collusive decreet-arbitral to which he had been improperly made a party, and which had since been set aside; that, regarding it as an agreement, it was ultra vires of his father, who, as heir of entail, and whom he did not represent to bind him a subsequent heir; that he himself had done nothing to bar his right to challenge the decree; and that the House of Lords, so far from recognising it as binding, only found, that till the proper process was instituted for setting it aside, it must in form, although not in justice, receive effect; and the present action was brought as the proper means of challenge.

The defender having refused to satisfy the production, further than by lodging the decree in process, Lord Newton found, "that, in order to satisfy the production, it is not sufficient for the defender to produce the decree of the Court of Session of 5th March 1782, as excluding, while unreduced, the pursuer's title to call for the other writs under reduction;" and he therefore repelled the preliminary defence to the production of these writs.

The defender having reclaimed, the Court altered, and "remitted to

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his Lordship to hear parties upon the reasons of reduction, and the defences arising out of the production of the decree of 5th March 1782, and to proceed further as to his Lordship shall seem proper; but sist process, in the mean time, relative to the production of the writings called for, other than the said decree already produced, and until the reduction of the same."

The cause having then come before Lord Moncreiff, a record was closed, and his Lordship ordered Cases.*

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* In reference to these Cases, the following procedure took place:—

"*Forsyth*, for the pursuer, represented, that whereas the Court remitted to the Lord Ordinary to hear parties "upon the reasons of reduction, and the defences arising out of the production of the decree of March 1782," and that his Lordship "appoints the parties to prepare Cases arguing the whole cause,"—that, in obedience to this appointment, the pursuer prepared a Case arguing the merits of the decree of 1782, as being involved with the question of res judicata; which Case having been interchanged, the pursuer has observed that in the counter Case of the defender he declines to discuss the said merits, and rests on mere pleas of form, calculated to delay a final judgment, and to multiply expensive proceedings here and elsewhere; the pursuer therefore craved the Lord Ordinary to ordain the defender to obey the remit of the Court, and the order of his Lordship, with certification that, if he fail, the defender will be held as confessed on the merits.

"The defender objected to the motion.

"The Lord Ordinary, in respect that, by the interlocutor of the Court of 31st January 1827, altering the previous interlocutor of Lord Newton, which repelled the preliminary defence founded on the decree of 1st March 1782 as res judicata, their Lordships 'sist process in the mean time relative to the production of the writings called for, other than the said decree already produced, and until the reduction of the same;' in respect that the subsequent interlocutor of the Lord Ordinary, appointing Cases to be given in on the whole cause, could only have relation to the cause as it stood under that judgment of the Court, and must be confined to the reduction of the said decree of 1782, and the validity of it as res judicata in this cause;—in respect that, by the established forms of the Court, the merits of title-deeds, or other writs called for to be reduced, cannot be discussed until the party has been required, by interlocutor of Court, to produce them in judgment, and cannot be discussed while the process stands sisted quoad the production of any such writs or titles;—in respect that the pursuer is at full liberty in insisting for the reduction of the decree in 1782, as affording no res judicata in favour of the defender to assume in argument, that if the said decree has not finally decided the points involved in it, he is able to show that it is erroneous on its merits;—in respect that the defender, in maintaining the sufficiency of the decree in 1782 as affording him a title to exclude the demand for the production of the other title-deeds called for by the summons on the head of res judicata, is not bound to discuss the merits of his own titles, or of the other titles which stand excluded by them, which several titles formed the subject of discussion in the process issuing in the said decree; and further, in respect that the Court cannot competently take cognizance of the merits of the said titles while the writs called for are not, and cannot be produced in the present state of the proceedings; refuses, in hoc statu, to make any order on the pursuer's motion, leaving it to each party, in the first instance, to plead his cause in the way which he thinks best, in relation to the question whether the said decree of 1782 ought to be reduced, or ought not to be reduced; and reserving to the Lord Ordinary or the Court, when

Thereafter his Lordship reported the cause to the Court, accompanied by the subjoined note.* No. 459.

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the Cases come to be advised, to decide on the arguments therein contained, or make such further orders as the justice of the case may require."†

* "NOTE.—It is impossible for the Lord Ordinary not to feel that a considerable proportion of the Case given in for the pursuer is occupied with matter which, in a correct view of the state of the cause, is irrelevant to the proper question at issue. The pursuer undisguisedly avows that he is discussing precisely the question whether the decree of 1782 was right upon its merits, or not. After the deliberate judgment of the Court, 31st January 1827, sisting process in regard to the validity of the title-deeds by which the defender holds the estates, the Lord Ordinary cannot think that this is a correct proceeding; for the merits of the question, as to the validity of these title-deeds are in a great measure, if not absolutely, the same with the merits of the question involved in the decree 1782; and therefore all discussion of that question seems to be excluded until the decree as res judicata shall be taken out of the way.

"The pursuer maintains, indeed, that in insisting for reduction of the decree, on the ground that it was a decree in absence, and on minority and lesion, he is entitled and bound to show that it was erroneous in itself, and that he suffered lesion by it. But there is manifest fallacy in this reasoning. The question is, whether the decree is to stand as res judicata of the matters determined by it, or not? Unless relevant grounds be made out for showing that it does not constitute res judicata, it is incompetent to discuss the question which under it is finally and irreversibly determined. But if good grounds be shown for finding that it is not res judicata, the decree may be reduced to this effect; and then, but then only, the pursuer will be entitled to try the question anew, in the same manner as if that decree had not been pronounced. It is true that a party who brings a reduction of a decree pronounced in absence may be called upon, after he has established that it is a decree in absence, against which he is entitled to be reponed, to show that the decree is erroneous on its merits, before he can obtain either absolvitor or decree in his own favour; because all that he is entitled to, is to be placed in the same situation in which he was before the decree was pronounced. But the point which the pursuer has here to prove, is the preliminary point that this decree is liable to reduction at his instance as a decree in absence. Until he establish this, any discussion of the merits of it is incompetent. If he establish it, the whole merits will be open to him, because the plea of res judicata will then be repelled. In the same manner, when the pursuer pleads minority and lesion, he is entitled to assume the lesion by the fact of his having been deprived of the estate; and though he may also assume in argument that he is deprived of it by an erroneous judgment, his opponent is not bound to discuss with him the question whether it was erroneous, or pronounced according to a just view of the law, until it be first determined that there is a competent and relevant plea of minority, which shall have the effect of preventing that decree itself from standing as a final determination of the question.

† "The Lord Ordinary has thought it right to explain thus particularly the grounds on which he refuses the pursuer's motion, because it has been distinctly stated by the pursuer that his object is to put this motion on the record, in order to found on it in some subsequent proceedings. It appears to him to be so manifestly irregular and inadmissible, as an attempt to avoid the necessary effect of the solemn judgment of the Court, that no explanation of the refusal of it could be necessary to any one acquainted with the established forms of this Court, involving, as they do on this point, the most essential rules of justice. But as the proceeding may be founded on in the House of Lords, where those forms are not so fully understood, the Lord Ordinary has thought it right to express the grounds of judgment which, in his opinion, render it impossible to make any such order as the pursuer demands."

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The Court then allowed the parties to lodge additional Cases, and to notice in them the views expressed by the Lord Ordinary.

In his additional Case the pursuer contended—

1. That the Lord Ordinary's note was erroneous, in point of fact, in assuming him to have made appearance in the conjoined processes of 1782

"The Lord Ordinary is therefore humbly of opinion that the manner in which the pursuer has treated the case in the present state of the process is very incorrect, and may very possibly produce confusion in the proceedings. But having failed in convincing him or his advisers on this point by his former interlocutor, he thinks it advisable to report the case as it stands.

"On the merits of the only question really at issue, the Lord Ordinary shall only make a few remarks.

"1. He is of opinion that the decree of 1782 cannot be considered as a decree in absence. The pursuer seems to grant that the question which was then tried might have been effectually tried in the competition with Lieutenant Thomas Maule, the immediate heir of entail alone, and that a judgment against him (laying aside the question as to the effect of the decree-arbitral) would have been effectual against the pursuer. But the question was tried in foro contentioso with Lieutenant Thomas Maule, and as to him it was no decree in absence. The pursuer was also called in the action of reduction, and it is said to be a decree in absence against him, because no tutor ad litem was appointed. But whether his being so called can alter the effect of the decree in foro with the proper party or not, (and the Lord Ordinary does not think it can alter it,) there is no doubt that appearance was made for the pursuer and his administrator in law; and as there was then at least no adverse interest between him and his father, there was no room for the appointment of a tutor ad litem; and such an appointment, it is thought, would have been altogether incompetent. A decree which was obtained on full discussion, by the first counsel at the bar appearing for both these parties, can never be a decree in absence with regard to either of them, whatever other objections it may be liable to as forming res judicata. There is no room in the present case for the principle adopted in the case of Sheuchan; and to apply it indeed to such a case would be to hold that a father can in no case act effectually as the tutor of his son.

"2. The Lord Ordinary is of opinion that the plea of minority and lesion is equally inadmissible; for, (1.) The pursuer brought no reduction within the quadrennium utile, to which the law has expressly confined the right of a minor to complain, on this ground, of acts done in his minority. But, (2.) The thing which he has to set aside is a decree of this Court on trial of a question of law; and the Lord Ordinary is not aware that such a decree in foro is liable to reduction on minority and lesion, without some other ground of objection to it than merely that the party says that he will now show that it ought to have been different, the facts and the law remaining exactly as they were, and where it is not stated that the proper allegations in fact and law were not made.—See Ersk. 1. 7. 38.

"3. The pursuer, however, has another view of the case. The judgment of the Court in 1782 was subject to appeal but no appeal, was entered. The pursuer says that his father Thomas Maule abandoned his right of appeal by a collusive compromise for a sum of money, and he infers that therefore the judgment of the Court ought not to operate as res judicata against the other heirs of entail. This plea is to the point, whether relevant or well founded, or not; but it ought not to be mixed with questions about the pursuer's personal connexion with the decree-arbitral, or its effect against him as a decree or agreement. Supposing it not to affect him in any way, the point which he has to make out is, that supposing that the judgment of the Court in foro

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by his administrator in law, and that it had overlooked his plea; that the judgment of the House of Lords in May 1826 had declared the decree of 1782 to be still open, if impeached by any competent proceeding, such as the present reduction; and,

2. That it was solely on the principle of a restitutio in integrum against the submission in 1782 that the defender had been allowed to discuss his right to the leases, which must otherwise have been held foreclosed by the decree in 1782; and as that decree had been held open to him as to the leases, it must be held open to the pursuer as to the estates.

Their Lordships having ordered the opinions of the whole Court "upon the points at issue betwixt the parties, stated in the revised Cases, either collectively or individually, as to their Lordships shall seem most proper," the following opinions were delivered:—

LORDS MEADOWBANK, MACKENZIE, MEDWYN, and NEWTON concurred with LORD COREHOUSE in this opinion: — In 1782, certain actions relative to the succession of Earl Panmure depended in this Court, in which the late Thomas Maule, the pursuer's father, on the one side, and the defender, and the Earl of Dalhousie, as his administrator in law, on the other side, were parties. These actions related to the estates of Kelly and Ballumbie, to a bond for £9000, and to two long leases of parts of the estates of Brechin and Panmure, all of which Thomas Maule claimed as heir of entail and provision, under certain destinations executed in 1730 by Harry Maule, father of Lord Panmure, and others. It seems unnecessary at present to specify the nature of those actions, further than to mention that in some of them Thomas Maule appeared for his own behoof, as the heir entitled to possession of the subject, and in others, not only for his own behoof, but also as administrator in law for the pursuer, and his other children, then in infancy, the nearest substitutes.

All those actions were conjoined, and, on the 5th of March 1782, the Court of Session pronounced an interlocutor, by which they decided in favour of the defender as to the estates of Kelly and Ballumbie and the bond for £9000, and

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would have been res judicata, if Lieutenant Maule had simply acquiesced in it without appealing, the effect of it in this respect is destroyed by the compromise of the suit; and it will be necessary for him to satisfy the Court, both that it prevented the judgment from becoming final at the time, and that he is not barred from now complaining of it by not having taken his remedy in due time; for the point stated by the defender is certainly material, that the pursuer brought no action for reducing the decree, not only till many years after he was of age, but long after he raised his action for reducing the decree-arbitral, and even more than five years after that decree was finally reduced.

"This part of the case appears to involve considerations of very great importance to the law. The Lord Ordinary doubts whether, from the very singular course which the pleadings have taken in these papers, the arguments of the parties sufficiently meet one another with regard to it. But perhaps it may appear to the Court that there is enough for the decision of the question. The Ordinary has thought it his duty to frame these notes merely in order to show where, in his humble opinion, the merits of the case hinge. The Court will have, at the same time, to consider the effect of the judgment of the House of Lords, of 26th May 1826, in regard to this question of res judicata."

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in favour of Thomas Maule as to the leases. Before that interlocutor became final, the defender and his administrator in law entered an appeal to the House of Lords in so far as regarded the leases; and it appears that the counsel for Thomas Maule were preparing to enter a cross appeal as to the estates of Kelly and Ballumbie and the bond. In these circumstances, an agreement was concluded between the defender and his administrator in law on the one part, and Thomas Maule, acting for himself, for the pursuer, and the remaining substitutes, on the other part—by which Thomas Maule, for the sum of £3500, surrendered his and their right to the leases, part of which sum was to be paid to himself, and the remainder vested in trustees for behoof of himself and the substitutes in their order. Further, it was stipulated that the defender's appeal should be withdrawn, that Thomas Maule should not enter a cross appeal, and that the interlocutor of 1782, so far as concerned Kelly and Ballumbie and the bond, should be allowed to become final. As the parties entertained doubts whether this agreement was legal and effectual, it was made to assume the form of a decree-arbitral pronounced on a pretended deed of submission; and, in virtue of that decree, the defender was afterwards served heir of entail and provision to the estates and the bond.

The pursuer having survived his father, and attained the age of majority, received for several years the interest of the trust-funds, in the belief that the submission was regular, and the decree-arbitral effectual. But having come to the knowledge of the previous agreement, he brought an action concluding for reduction of the decree-arbitral, for declaring his right to the leases, and for removing the defender from the subjects held under them.

The Court of Session assoilzied the defender. The House of Lords, on appeal, remitted for reconsideration, with a finding, that the submission and decree-arbitral were not valid as such, being only a form which the agreement had been made to assume. The Court of Session again assoilzied; but, on a second appeal, the House of Lords reversed the judgment in part, reduced the decree-arbitral, found that the interlocutor 1782 was not final against the defender with respect to the leases, and affirmed as to the declaratory conclusions of the pursuer's action, reserving any question between the parties in any other action touching the property contained in the deeds of tailzie.

The cause came back to the Court of Session, and the pursuer raised a new action, in which he claimed not only the leases, but also the estates of Kelly and Ballumbie and the bond. It was pleaded in defence, 1. That although the transaction in 1782 had been reduced as a decree-arbitral, it was valid, notwithstanding, as an agreement. 2. That as the interlocutor of the Court of Session in 1782, not having been brought under review either by reclaiming petition or appeal, had become final, and as it never had been challenged by reduction, it formed a res judicata against the pursuer as to the estates and the bond. Both these pleas were sustained, as appears from the report of the case, June 1. 1824; and the defender was again assoilzied.

A third appeal was entered, and it is material to consider the effect of the judgment pronounced upon it. 1. The interlocutor of the Court of Session was affirmed as to the estates and the bond, on the ground that it was not competent to impeach the interlocutor of 1782 under the summons of reduction and declarator then before the House. 2. It was found that all questions relative to the leases were open to both parties, and in express terms that the pursuer had a title to insist in his claim for them, which necessarily inferred that the transaction in

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1782 was ineffectual, not only as a decree-arbitral, but as an agreement or compromise. 3. The judgment reserved all questions between the parties respecting the property, exclusive of the leases, to be discussed in a competent manner; or, what was the same thing, it found that the reservation in the preceding judgment of the House of Lords had that effect, the intent and meaning of which previous judgment it declared and affirmed; and, lastly, it remitted to the Court of Session to try the rights of the parties as to the leases.

The pursuer raised a new action, concluding, for the first time, for reduction of the decree of the Court in 1782, by virtue of the reservation; and also for reduction of the deeds executed by Lord Panmure, relative to the estates and the bond, which had been the subject of the former reduction raised in 1821. The Lord Ordinary appointed the production to be satisfied as to both; but the Court recalled that interlocutor, and limited the production to the extracted decree 1782. The only question, therefore, at present is, whether that interlocutor can be set aside, to the effect of allowing parties to try the merits of the question as to the validity of the entails? or whether, on the contrary, it forms a res judicata between the parties, unimpeachable on any of the grounds stated in the pleadings?

We agree with the Lord Ordinary that a great deal of matter, irrelevant at this stage of the cause, has been introduced into the pursuer's argument, as it relates not to the effect of the interlocutor 1782, but to that of the deeds executed by Lord Panmure.

1. The first point which properly falls under consideration is, whether the interlocutor ought to be held as pronounced in absence, because the pursuer, though cited in one or more of the conjoined actions, was in pupillarity, and no tutor ad litem was appointed to him. We are of opinion that this reason of reduction is ill founded. There was no need of such appointment, as the pursuer's father was his administrator in law, and acted for him expressly in that capacity. If there had been an opposition of interest between his father and himself, the case might have been different; but there was no such opposition while the action depended in the Court of Session. Nay, if the pursuer had not been cited at all, we conceive that the decree obtained against his father, as the heir of entail entitled to possession, would have been effectual against him; for whenever the interests of the heir and the substitutes coincide, he represents them in every lawsuit respecting the subjects of the entail; and a decree pronounced against him causâ cognitâ, and without collusion, is effectual against them. If this were not the law, whenever the rights of third parties are implicated with those of heirs and substitutes of entail, the matter might become inextricable, and every judicial proceeding regarding them be rendered insecure.

2. Before the interlocutor of 1782 became final, the defender had appealed against it to the House of Lords, and the pursuer's father was preparing a cross appeal. But the pursuer's father entered into a transaction with the defender, which was ultra vires, if not fraudulent; and, in terms of that transaction, all legal proceedings were departed from, the appeal was withdrawn, the cross appeal was not entered, and the interlocutor became final, subject to the alteration made upon it by the decree-arbitral. But the whole transaction has been reduced, both as an agreement and a decree-arbitral; and the next point is, what is the effect of that reduction, first in law, and then in equity? It is evident in law, that, by the

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reduction, the surrender of the leases in reference to the pursuer became ineffectual; the interlocutor 1782, in so far as they were concerned, not having been reclaimed against, and the appeal being withdrawn, took effect and stood as a final interlocutor; and the pursuer, therefore, was entitled to extract it as a decree, and by virtue of it to obtain possession of the subjects; but, in equity, other considerations are let in. If the agreement had been held altogether fraudulent, and the defender as participant of that fraud, it does not appear how he could have obtained redress. But as it might have been entered into bonâ fide, though not valid against substitute heirs, whose interest was opposed to that of Thomas Maule, and compromised by his act; and, even if fraudulent, as the defender was a pupil at the time, it seems fair and reasonable that, instead of holding the interlocutor a res judicata against him, he should be reponed against it, and be allowed to try the question anew. In point of form, that could not be done in the shape of a reclaiming petition, the reclaiming days being elapsed; indeed that mode of procedure had been abolished by the Judicature Act, before the point was stirred, in 1826. Neither could it be reviewed by appeal; for the original appeal had been withdrawn, and the time for appealing again had long before expired. The most correct form of proceeding, it is thought, would have been by an action of reduction at the instance of the defender, on the ground that the interlocutor had become final in consequence of the misconduct of his administrator in law, and concluding that he should be restored in integrum, to the effect of re-trying his right to the leases. But that form was dispensed with by the House of Lords, and parties sent back to try the right to the leases de plano in the pursuer's declarator. The reason of this may have been, that the defender was in possession of the leases, and the pursuer in petitorio, although that scarcely appears a satisfactory reason—a res judicata being no less effectual as a ground of pursuit than it is as a ground of defence. But the point is immaterial, since in equity it was thought right to let parties into the question, to which of them the leases belonged. That question, accordingly, has been tried under the pursuer's declarator and removing, and the result has been that the interlocutor of 1782 was altered in part, and in part affirmed, the pursuer being found entitled to the lease of Panmure, and the defender to the lease of Brechin.

On the other hand, it is equally manifest, that though the transaction 1782 was reduced, both as a decree-arbitral and an agreement, the interlocutor of the Court remained a res judicata against the pursuer as to the entails and the bond. The time for reclaiming (had reclaiming petitions been still in use) was expired, and for the same reason an appeal was incompetent. But in equity, on the same principle that the defender, having a final interlocutor standing against him, was allowed to re-try the question as to the leases, the pursuer, in the like predicament, was entitled to re-try the question as to the entails and the bond. Perhaps it ought rather to be said, that the pursuer's right to be reponed against the interlocutor was still more unquestionable. If there were a fraud in the transaction between Thomas Maule and the defender, it was a fraud for his behoof, while it was a fraud to the prejudice of the pursuer. Further, the defender's administrator in law had no personal interest in the matter, opposed to that of his pupil; while Thomas Maule compromised his son's interest, with a view to promote his own. There would have been no inconsistency, therefore, in holding that the pursuer was entitled to a restitutio in integrum, while the defender was not; but it would

plainly be iniquitous to bestow that privilege on the defender, if it was withheld from the pursuer. No. 459.

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For these reasons, we are of opinion that the right of restitution against the interlocutor of the Court in 1782 is mutual; and as it formed no res judicata in favour of the pursuer, neither can it form a res judicata against him.

It remains to be considered whether this opinion is in conformity with the judgments of the House of Lords already pronounced, and obligatory upon the parties. And here it is manifest that the judgment pronounced in 1819, when Lord Eldon presided, proceeds on the principle of mutual restitution. While it affirms the interlocutor appealed from as to the leases, it contains an express reservation of "any question between the parties, in any other action, touching any property comprised in the deeds of tailzie in the pleadings mentioned;" and his Lordship observed on that occasion, as appears from an excerpt from his speech, "that the opening of the interlocutor 1782, considering it as not res judicata, must be considered as opening it altogether."

The judgment pronounced in 1826, when Lord Gifford presided, is equally decisive. It is true that the House of Lords, on the motion of his Lordship, affirmed the interlocutor of the Court below as to the estates and the bond in the action then before him, on the ground that the decree 1782 could not be impeached in that action, in which it had not been brought under reduction, and that it had not been impeached by reclaiming petition, appeal, or any other competent proceeding; but the affirmance is expressly qualified with a declaration that the effect of the preceding judgment in 1819 was to leave open all questions, not only as to the leases, but as to the other property comprehended in the tailzie —that is, the estates and the bond—to be discussed in such manner as the same might be properly discussed in any future proceeding raised for that purpose. Now, since reclaiming petition and appeal are incompetent, the only proceeding in which the question as to the estates and bond can be properly discussed is a reduction—the action which accordingly has been brought.

It is said that the pursuer is barred from insisting in this action by his delay, as he challenged the decree-arbitral in the year 1810, and allowed seventeen years to elapse afterwards before the present summons was executed. We do not think that the pursuer is to blame for this delay, and far less that it can operate as a bar to his action. On the same ground that the defender was allowed, without a reduction, to discuss his right to the leases, notwithstanding the interlocutor of 1782 in point of form was final, the pursuer had reason to believe that he would be allowed, without a reduction, to discuss his right to the estates and the bond,—the same interlocutor 1782 having been declared to have been equally open as to both parties, and in reference to all the property contained in the entails. It was not until the date of the judgment 1826 that he learned that this form, dispensed with in the case of the defender, was deemed requisite in his case; and however well founded the distinction may be, it certainly was not so obvious that the fault of overlooking it should be visited with a penalty so severe.

The last point for consideration is the plea of minority and lesion on which the interlocutor 1782 is challenged. It is possible that both that interlocutor and the decree-arbitral or agreement, might at one time have been brought under reduction on that ground; but the quadriennium utile having long since elapsed, minority and lesion per se can no longer be competently pleaded to that effect, either against the one or the other. The only plausible way of putting the argument is,

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that the pursuer, being deceived by the collusive decree-arbitral, refrained from bringing his reduction ex capite minorennitatis, and that the defender, being participant in the fraud, is barred by a personal exception from pleading the lapse of the tempus utile. But we think the argument, even in that shape, untenable; for the decree-arbitral was at least as hurtful to the pursuer as the judgment of the Court which preceded it, and the one was just as liable to reduction on this ground as the other. No reason can be assigned why the decree-arbitral, whether fair or fraudulent, should have prevented the pursuer from having recourse to this remedy, if he had suffered lesion in the proceedings. But, in truth, the consideration of the question is superseded by the reduction of the decree-arbitral, which at once opens the way for re-trying the question whether the pursuer was lesed or not; and, in the circumstances of this case, a restitutio in integrum is a much more effectual remedy than an action of reduction ex capite minorennitatis.

It is said that a distinction exists between the case of the defender and the pursuer in reference to the interlocutor 1782, because the defender had actually entered his appeal against it, while Thomas Maule had not entered a cross appeal, either on his own part or on that of his son, that it is not presumable he would have done so; and if he had not, the interlocutor would have been final, independently of the agreement. We think it a sufficient answer to this remark, that Thomas Maule, having the power to appeal, became bound by the agreement not to appeal. In hoc statu, there is just as much reason to presume that the defender would have withdrawn his appeal after it was entered, as that Thomas Maule would have refrained from entering a cross appeal, because, at this stage of the proceedings, we have no means of forming an opinion whether the interlocutor 1782 was better founded with regard to the estates and the bond than it was with regard to the leases. The same equity which interposed to restore the defender against a final interlocutor, because his appeal had been withdrawn in consequence of an invalid agreement, must confer the like privilege on the pursuer, who was tied up by it from entering a cross appeal.

We come to the conclusion, therefore, that the interlocutor 1782 ought not to be held as a res judicata against the pursuer; and there being, therefore, no title to exclude, the defender should be ordained to satisfy the whole production, with a view to the merits being discussed.

Lord Fullerton. — The determination of the question now before the Court depends in a great measure on the legal effect and import of the procedure which has taken place, and the judgments which have been pronounced in the former actions between the parties. But those actions have been so complicated, and those judgments, both in this Court and in the House of Lords, have been so various, that it is a matter of some difficulty to ascertain separately what points were fixed by each successive judgment, and of still greater to seize their combined effect; so that it is with some diffidence I give this opinion, founded as it is on a view of the previous procedure, in taking which, it is not impossible that particulars materially affecting the result may have escaped my attention.

The decree now sought to be reduced formed part of a judgment pronounced by the Court of Session, on the 5th of March 1782, in certain conjoined actions depending between Lieutenant Maule, the father of the pursuer, and the defender and his administrator-in-law, Lord Dalhousie. The only one of these actions in which there is any pretence for considering the present pursuer as directly a

party, was that originally raised by Lord Panmure, and afterwards insisted in by the present defender and his administrator-in-law, for reducing the entails of the lands of Kelly and Ballumbie, of the bond for £9000, and of the leases of Brechin and Panmure, founded on by Lieutenant Maule. But it may be observed, in the first place, that though that summons seems to have been served personally on the present pursuer, it does not contain his name. It calls merely Lieutenant Maule for himself, and as administrator for his children; and, secondly, I understand that in none of the conjoined actions was there any appearance by Lieutenant Maule, as administrator for his children. By the judgment pronounced in these conjoined actions, the Court sustained Lieutenant Maule's claim to the leases of Brechin and Panmure, but rejected his claim for Kelly and Ballumbie, and the bond for £9000.

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While it was competent for either party to reclaim against that judgment, and certainly while it was competent for either party to appeal, the litigation was closed by an agreement between Lieutenant Maule, and the defender and his administrator in law, afterwards embodied in the form of a submission and decree-arbitral, to which the defender, then a pupil, was made nominatim a party. By that transaction it was determined, 1. That the judgment of the Court in Lieutenant Maule's favour respecting the leases should be held to be reversed, and the defender's claim to the leases sustained. 2. That the appeal entered by the defender against that judgment should be withdrawn. 3. That the judgment of the Court, unfavourable to Lieutenant Maule should be adhered to, and "the cross appeal competent to have been entered by him" against it departed from. And, lastly, that a certain sum of money should be paid by the defender, part of it instantly to Lieutenant Maule himself, and the remainder, by instalments at particular periods, to Lieutenant Maule, or the substitutes who might, in the event of his death, happen to be in his right under the entails at those periods.

This transaction stood unchallenged till the year 1810, when the pursuer, having discovered that the transaction, though apparently a submission and decree-arbitral, was substantially an agreement between the defender and his father Lieutenant Maule, raised an action for setting aside that submission and decree-arbitral, and the service which he had obtained under it, while he was in ignorance of the true nature of the transaction. That summons called merely for production of those documents, in order that they might be reduced; and upon that reduction founded the conclusion that the defender should remove from the houses and parks of Brechin and Panmure, being the subjects contained in the entailed leases. It contained no conclusion whatever concerning the estates of Kellie and Ballumbie, and the £9000 bond. And it is easy to see, from the nature of the discussion which afterwards took place, why it was so limited. It was evidently founded on the assumption, that, by the reduction of the decree-arbitral, the decree of the Court of the 5th of March 1782 revived as a res judicata, and accordingly the summons founded the demand of removing exclusively on the reduction. In the discussion under that summons, various points of great difficulty and importance were raised, which it is unnecessary here to mention. But, with regard to the assumption forming the foundation of the summons, two questions arose—1. Whether on the decree-arbitral being set aside, the defender was entitled to be heard on the merits of his claim to the leases, notwithstanding the decree of Court 1782? 2. Whether he was entitled to be so heard without bringing a reduction of that decree? And it is important to observe, that this

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second question, though apparently one of form, was substantially decisive of the pursuer's demand of the houses and parks of Brechin and Panmure, under the only summons then in Court; for it involved the inquiry whether the decree of 1782, in regard to the leases, was a standing decree, available to the pursuer until reduced; and the decision of that point against him necessarily led to the result, that in the summons then in Court, founding merely on the reduction of the decree-arbitral, and assuming by implication that on that reduction the decree of Court revived, he had laid no ground whatever for his conclusion for removing.

Now it appears to me that this last was the only point which was truly settled by the final judgment of the House of Lords in this action in the year 1819. In the first appeal in 1816, the House of Lords had found "that the submission and decree-arbitral ought not to be considered as being, or having in law the effect of such, but as a form adopted, in which an agreement previously made between Thomas Maule, the appellant's father, and George Earl of Dalhousie, parties to the said submission, was concluded;" and with that finding remitted the case to the Court of Session. The Court, on the 2d of December 1817, sustained the defences in general, and assoilzied the defender. There was then a second appeal by the pursuer, in the discussion of which the respondent, the defender, was materially interested in excluding the effect of the decree 1782 as to the leases, as a judgment necessarily reviving in favour of the pursuer, and requiring a reduction to impeach it; and it is of importance to look at the grounds on which that was maintained—grounds which, considered along with the judgment afterwards pronounced by the House of Lords, are quite irreconcilable with the notion that the pursuer was properly and directly a party to the proceedings in 1782. The respondent, in his appeal case on that occasion (page 10) states that "in 1781, Lieutenant Maule, the appellant's father, laid claim to the leases in question, in virtue of the entails now founded on by the appellant. Lieutenant Maule himself was the only pursuer in that process, the present appellant being no party in it." Again, after mentioning that Lieutenant Maule obtained one interlocutor in his favour on the 5th of March 1782, and afterwards closed the proceedings by the transaction of the 2d of April, he proceeds (page 11)—"But the interlocutor was not final, and it never did become final as a judgment in favour of the appellant, or even of Lieutenant Maule. Lieutenant Maule, who alone had obtained it, renounced the benefit of it within the reclaiming days, and it was set aside and given up by a very solemn transaction. And again, "But the finding never was a judgment in favour of this appellant. It was an interlocutor in favour of Lieutenant Maule, and not of the appellant; and surely a judgment not final, and solemnly discharged by the party for a valuable consideration, can never afterwards be raised up as a res judicata."

This view, it will be observed, was indispensable to support the respondent's case on that occasion; for if the pursuer had been properly and distinctly a party in the combined actions in which the judgment respecting the leases was pronounced, the agreement of Lieutenant Maule to renounce the decree would have left it still a good decree available to the pursuer, who, according to the preceding judgment of the House of Lords, was not affected by the submission. On the other hand, if Lieutenant Maule was the only proper party, the reduction of the agreement by the pursuer could not rear up the decree; because, on that supposition, it was a decree passed from by the only party in the suit. It appears to me that this last was the view taken by the House of Lords. They reversed

the interlocutor of the Court " in so far as it is inconsistent with the former order of the House of the 10th of May 1816." They further order and adjudge, " that the instrument of the 2d of April 1782 ought to be reduced as a decree-arbitral affecting any rights of the appellant." Next it is declared, " that under the circumstances of this case, the interlocutor of the 1st of March 1782 is not to be considered as final and conclusive against the respondent with respect to the leases in question; and therefore, as to so much of the appellant's action of reduction and declarator as seeks a declaration of the rights of the appellant to such leases, it is further ordered and adjudged that the said interlocutor of the 2d of December 1817 be, and the same is hereby affirmed, but without prejudice as to any question between the parties in any other action touching any property comprised in the deeds of tailzie in the pleadings mentioned." Here the part of the judgment rejecting the pursuer's claim to the leases, erroneously termed a declarator of right instead of a removing, is preceded by the word ' therefore,' and is thus made to depend on the previous finding that the interlocutor of the 1st of March 1782 was not to be considered conclusive against the respondent with respect to the leases—a deduction which appears to me to be strictly correct; because, upon the supposition of the decree 1782 not being a decree conclusive against the defender, there was truly no ground for the conclusion of removing laid in the then existing summons, which rested that conclusion on nothing but the reduction of the decree-arbitral. Accordingly the judgment contained an express reservation " of any questions between the parties in any other action" touching the rights contained in the various entails.

After this the pursuer raised his action in 1821, in which he, for the first time, advanced his claims not only to the leases, but to the estates of Kelly and Ballumbie, and the £9000 bond; and considering the view hitherto taken by him, this delay is not to be wondered at. His claim hitherto advanced was limited to the leases, because it was bottomed on the assumption that, by the reduction of the decree-arbitral, the decree 1782 was restored to operation—a supposition which, of course, prevented him from claiming the estates, to which his father's claim had been rejected by that very decree. Finding, then, that the decree 1782 was to be held open to challenge at the instance of the defender, he assumed that it was equally open to challenge in so far as it was adverse to himself; and adopting a particular, and as it has turned out, erroneous construction of the judgment of the House of Lords, he assumed not only that it was substantially open to challenge, but that it was open to challenge by way of exception, and without the necessity of any procedure for impeaching it. So far he has been found in the wrong by the final judgment of the House of Lords in 1826, which found that the judgment of the Court of Session of the 5th of March 1782 was res judicata in respect to the estates and bond, in as much as it appears to their Lordships " that it was not competent to the appellant, by the summons of reduction and declarator in the said interlocutors mentioned, to impeach such decree of the 5th of March 1782, so far as the same respected such estates and bond; and such decreet has not been impeached by reclaiming petition or appeal, or any other proceeding competent to impeach the same." I cannot hold that, in this judgment, the term res judicata was used as denoting a judgment which it was incompetent in any way to impeach. Independently of the expressions employed by the noble Lord who moved the judgment, the judgment itself seems to be sufficiently explicit. The decreet is held res judicata, in as much as it was not

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competent to impeach it by the summons of reduction then in dependence, and such decreet had not been impeached in any other competent form, the evident meaning of the House of Lords being, that the judgment must be held as res judicata under that summons, calling merely for the reduction of the defender's titles, and, unless impeached by some substantive procedure competent for that purpose, but without determining whether some other procedure for that purpose, might or might not be competently adopted. And I may be permitted to observe, that this judgment does not appear to me to involve any inconsistency with that of 1819 on the effect of the decreet 1782 in relation to the lessee. Holding Lieutenant Maule to be the only party in the conjoined actions of 1782, the transaction, though reduced as to the pursuer, truly remained effectually binding on Lieutenant Maule, and consequently an effectual waiver in favour of the defender of the decreet 1782. In so far as the decree was favourable to Lieutenant Maule, it was, on the supposition just made, passed from by the only party at whose instance it was obtained. But, on the other hand, the decree, in so far as it was against Lieutenant Maule, remained in force. Instead of being passed from by the party who had obtained it, the right to challenge it had been passed from by the party against whom it had been obtained. The decree in this last particular, therefore, remained a decree of Court in favour of the present defender, which the House of Lords seem to have held good until it was effectually challenged.

In the present action, then, the pursuer has attempted that challenge. In the summons he concludes for the reduction of the decree 1782, as touching the lands and the £9000 bond, as well as of the various titles of the lands founded on by the defender.

Considering the limitation contained in the interlocutor of Court of 31st January 1827, I am of opinion that by far the greater part of the discussion in the pursuer's pleadings are beyond the limits contemplated in that interlocutor. In one sense, no doubt, it may be said that the reduction of a decree involves the merits of that decree, as those merits truly constitute the interest of the party seeking to reduce it. But the interlocutor of the Court, by limiting the production to the decree itself, and sisting process as to the writings "until reduction of the said decree," seems to me to have intended to confine the discussion to the point whether the decree itself formed a title to exclude; in other words, whether or not, under all the circumstances of the case, the pursuer was entitled competently to impeach the decree, so as to reach the merits of the case, of which the discussion was necessarily postponed by sisting the process in regard to the writings involving those merits.

Considering this to be the only point on which I am called upon to give, and have the means of giving an opinion, that opinion is, that the pursuer is entitled to reduce the decree 1782 in regard to the lands of Kelly and Ballumbie, and the £9000 bond, to the effect of being heard on his claims to those subjects.

In forming this opinion, I do not consider it necessary to inquire into the effect of the expiry of the quadriennium utile, or of those circumstances by which that effect may be supposed to have been suspended or excluded. There might have been room for some such inquiry, if the decree 1782 had been directly and expressly against the pursuer called nominatim, and appearing in

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the combined actions. But it does not appear to me that he either was properly called, or did appear. The whole of the actions were actions depending with Lieut. Maule, his father. Even in the one action in which Lieut. Maule was called as administrator for his children, the summons is blank in regard to the children, and no appearance was ever made by Lieutenant Maule, except in his individual character. Accordingly, in the discussion under the original summons raised by the pursuer in 1810, the defender, as has been seen, pleaded, and pleaded with effect, that the proceedings in 1782 were proceedings to which the pursuer was not a party; and the judgments pronounced in which, Lieutenant Maule, as the only party, had a right to abandon.

In these circumstances, it is impossible to hold the decree 1782 as a decree directly and nominatim against the pursuer. Its operation as a res judicata must rest upon a different ground—namely, that though not a decree directly against him, it was a decree effectual against him and the other heirs of entail, in as much as it was a decree respecting the validity of entailed rights, pronounced in actions maintained by Lieutenant Maule, the party fully vested at the time with those rights. That a decree so pronounced will, in the general case, be held an unchallengeable res judicata, there seems no reason to doubt; but I think that this special case does not admit of the application of that principle.

In the first place, I conceive it to be completely excluded by the option which has been already exercised on the part of the defender in construing the effect of the proceedings in 1782, in so far as they terminated in favour of the heirs of entail. Had the defender, in the discussion on the reduction of the decree-arbitral and action of removing, confined himself to the defence of the decree-arbitral, and had judgment gone against him in the removing, as necessarily following from the decree 1782, in regard to the leases reviving on the reduction of the decreet-arbitral, it would have been perfectly consistent to plead now, that in virtue of that self-same decree 1782, his right to the lands and bond was finally ascertained. But he did not adopt the option of standing by the decree 1782 that was held out to him by the defender. On the contrary, he maintained, as he was no doubt entitled to do, that on the reduction of the decree-arbitral, the decree in regard to the leases was not only not conclusive, but was not an available decree at all requiring to be reduced, in as much as it had been abandoned by Lieutenant Maule, the only party who had obtained it.

Now, though the decree, in so far as it was against Lieutenant Maule, has been found to stand in a different situation in this particular, that it requires to be directly impeached by some substantive procedure, it does appear to me necessarily to follow from the construction put upon the procedure in those combined actions by the defender himself, that the pursuer must be entitled to impeach the decree, so as to be heard upon the merits of the case. The only ground upon which that could be denied, is that the decree was obtained in an action regarding entailed rights against Lieutenant Maule, the heir in whom those rights vested at the time. But that ground is necessarily excluded by the course of pleading adopted, and successfully adopted by the defender, who obtained a re-hearing in the case of the leases, in respect that the decree on that point was truly a decree in favour of Lieutenant Maule, and

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not in favour of the heirs of entail, and had been passed from by the party who had obtained it. In other words, the defender maintained, and successfully maintained in regard to the leases, that the decree was obtained by Lieutenant Maule in his individual character, and not in that of representative of those interested in the entailed rights. But it seems to be impossible for a party to plead that the same decree pronounced in conjoined actions can receive a directly different construction in regard to its mode of operation, and to maintain that, in so far as it was in favour of Lieutenant Maule, it was a decree in his favour as an individual, of which the heirs of entail could take no benefit; but that, in so far as it was against him, it affected him in his representative character, and consequently through him the whole other heirs of entail. These pleas are absolutely inconsistent; and therefore the opening up of the decree in regard to the estates and bond seems to me the necessary consequence of the option exercised by the defender in refusing to stand by the decree on the subject of the leases; and I cannot help thinking that this was the meaning of the expression employed by the noble Lord who moved the judgment in 1819, "that the opening the interlocutor of 1782, considering it as not res judicata, must be considered as opening it altogether." Although, therefore, it has been found that the decree in question obtained against Lieutenant Maule, and in favour of the defender, is res judicata, available to the defender until impeached, I think that the pursuer is entitled to impeach it, and that the present reduction is competent for that purpose.

But, secondly, and independently of the ground above mentioned, I am rather inclined to think that the pursuer, an heir of entail, would not have been bound by the legal procedure in question, closed as it was by a transaction with Lieutenant Maule, which has been finally determined not to be effectual against the pursuer. It is true that a judgment obtained respecting entailed rights against the party vested with them at the time, is good against the other heirs of entail. But this, of course, involves the assumption that the question has been bonâ fide litigated by the heir in possession, according to a sound discretion, and upon a fair exercise of those privileges to which, by the rules of litigation, he is entitled. There seems, therefore, no reason to doubt that if the litigant, in the exercise of that sound discretion, declines, upon judgment being pronounced against him, to bring the case under review by a reclaiming petition, or by appeal, the judgment of a Lord Ordinary is not impaired in effect by the failure to bring it under review of the Court; still less is the judgment of the Court invalidated by the circumstance of the unsuccessful declining to appeal. But it is a very different case indeed when the heir of entail in possession, litigating in his representative as well as individual character, does, during the dependence of his right to reclaim, or of his right to appeal, make those rights the subject of a transaction with the opposite party, and surrender them for a consideration personal to himself. I should consider it alike dangerous in practice, and contrary to principle, to hold that a judgment, of which the review was bought off by the opposite party, stood, in a question with the heirs of entail, in the same situation as a judgment allowed to become final in the fair exercise of a sound discretion, contemplating the legal probabilities of continuing the litigation. There is a manifest distinction between the two cases; and I rather think that in the former case the heirs of

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entail would, upon showing that they were not bound by the transaction, be entitled to impeach the decree, which had not been bonâ fide acquiesced in by the original litigant, but of which the right of review, recognised as a subject of value, had been surrendered for considerations in which they had no interest. But this seems to be the case which exists here. At the time when the compromise was entered into, Lieutenant Maule had a right to reclaim, and certainly had a right to appeal; and accordingly the abandonment of the cross appeal is expressly set forth in the submission and decree-arbitral as one of the considerations of the transaction.

I am of opinion, then, upon both of these grounds, that the pursuer is entitled to be let into the merits of the case. I have only further to add, that they appear to me to be proper grounds of reduction; and that the competency of the present procedure, therefore, cannot be affected by the lapse of the period allowed for appeal. In truth, upon the principle adopted in the House of Lords in the judgment 1819, the surrender of the right to appeal by Lieut. Maule, the only party to the suit, would have been an effectual bar to any other party attempting that mode of review. The true grounds of challenge here are, that the judgment 1782, though obtained against a party who happened to be vested with the entailed rights at the time, was obtained, or allowed to become final, under circumstances which exposed it to challenge, in so far as it might be construed to affect the other heirs of entail—grounds which appear to me to form the apt and competent subject of an action of reduction like the present.

Lords Justice-Clerk, Glenlee, Cringletie, and Moncreiff, delivered this opinion:—The pursuer, by his summons raised on the August 1826, insists for reduction of a decree of this Court pronounced, upon full discussion of the merits of the cause, between the parties proper for trying the questions at issue, on the 1st of March 1782; and he further demands reduction of the titles by which the defender and his father have possessed the estates mentioned in the summons, before and since the date of that decree, and which were thereby found and determined to be valid rights.

The present question is, Whether the decree thus challenged does or does not constitute res judicata, to the effect of excluding all consideration of the questions which were decided by it? or whether any relevant grounds have been shown for reducing it after so long a period, so as to lay open the whole merits of those questions regarding the validity of the defender's title-deeds.

We are clearly of opinion, that in this state of the question, it is altogether incompetent to enter at all into the merits of the judgment pronounced by the Court in 1782; and that the question, whether the decree is res judicata or not, is a preliminary question, which must depend on other matters of fact and law. For unless relevant grounds have been shown for setting aside that decree as a decree legally pronounced, or for opening it up as not final, it must be considered as having irreversibly adjudged and determined the questions involved in it.

The facts on which the question, whether this decree constitutes res judicata or not, depends, are not very numerous, and are not involved in any perplexity.

The pursuer founds his title in the present action on certain deeds of entail executed in 1730, under which he says his father, Lieutenant Thomas Maule, was the immediate heir in the estates of Kelly and Ballumbie on the death of the Earl of Panmure in 1781. Some proceedings had been taken before the death of Lord

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Panmure; and, in particular, Lord Panmure had brought a declarator against Lieutenant Thomas Maule, to have it found that he had an unlimited right to the estates, and that the entails were not binding on him; and, separately, a reduction for setting aside those deeds, in which the present pursuer, as well as his father, was called as a party. After Lord Panmure's death, the question as to the rights to these estates was further raised, 1. By a reduction at Lieutenant Maule's instance against Lord Dalhousie and the present defender; and, 2. By a competition of brieves between Lieutenant Maule, on the one part, and Lord Dalhousie, as the defender's administrator in law, on the other. These various processes having been conjoined, appearance was made for all the parties under them; and there is no doubt that the entire question as to the validity and subsistance of the entails, and as to the validity of the defender's titles as opposed to them, was fully discussed by the first counsel then at the Bar, and was in all respects aptly and legally brought to issue, and decided by the Court in favour of the defender.

The same interlocutor found, that Lieutenant Maule had right to certain leases of the parks of Panmure and Brechin, in virtue of separate entails applicable to them; and against this judgment Lord Dalhousie entered an appeal to the House of Lords.

A transaction was then entered into in the form of a submission and decree-arbitral, by which Lieutenant Maule, for himself and his son, surrendered his right by this judgment as to the leases, and became bound not to enter a cross appeal against the judgment regarding the estates; and Lord Dalhousie for himself and the defender, became bound to pay a sum of £3500, to be settled in a particular way. That money was paid or invested as agreed upon.

The pursuer was served heir to his father, came of full age, and, for many years after that event, received the interest of the money invested, without challenging the decree-arbitral, or raising any doubt concerning the conclusiveness of the decree in 1782 as to the estates.

In 1810, he brought a reduction of the decree-arbitral on various grounds, to which it is unnecessary to advert. As far as we have seen, the single ground on which the House of Lords ultimately proceeded was, that from the terms of the deed itself it appeared that it was not a decree-arbitral, but merely a form by which Lord Dalhousie and Lieutenant Maule made an agreement between themselves. This first action concluding for reduction of the decree-arbitral related to the leases alone; and the summons contained further conclusions to have it found that the pursuer had right to these leases, and for removing against the defender.

The Court, by a majority, assoilzied the defender. But it is believed, that even those who differed from that judgment were then of opinion, that, though the decreet-arbitral were set aside at his instance, the effect could only be to place the defender in the same situation in which he stood before it was pronounced.

On appeal, the House of Lords found that the submission and decree-arbitral was only a form adopted, by which an agreement between Thomas Maule and Lord Dalhousie was concluded, and remitted the cause.

The Court afterwards pronounced a judgment in general terms sustaining the defences; though there is no doubt that the whole merits of the cause had been pleaded, and were intended to be decided on the footing of the previous judgment of the House of Lords.

On a second appeal, the House of Lords reversed the interlocutor, so far as it was thought inconsistent with that judgment, and sustained the defences generally;

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and ordered that the decree-arbitral should be reduced "as a decree-arbitral affecting any rights of the appellant." It declared, that the judgment of the 1st of March 1782 was not to be considered as final and conclusive against the respondent with respect to the leases; and therefore, as to so much of the pursuer's action as sought a declaration of his rights to the leases, affirmed the judgment, without prejudice to any question between the parties in any other action as to any other property comprised in the deeds of tailzie mentioned.

The pursuer holds this judgment to have been a decree reducing the transaction called a decree-arbitral to all intents and purposes, so far as "affecting any rights of him the appellant." It probably was so intended; and we think it may now be assumed to have this effect. But it is to be observed that, up to this time, the pursuer had brought no regular action, either for claiming the estates of Kelly and Ballumbie, or for setting aside the decree of the Court in 1782 regarding them, though he had unsuccessfully attempted to repeat a summons as to these estates in the action regarding the leases; but it is very evident to us, that, if the views now maintained by him had at all occurred at an earlier period, he must have laid claim to the estates in his very first proceeding.

But, apparently in consequence of the finding of the House of Lords, that the decree 1782 was not conclusive against the defender as to the leases, the pursuer now took up the idea that it could not be conclusive as to him with regard to the estates. We are of opinion that there is no correct analogy between the two things. But, if there were a correct analogy, the pursuer does not appear to have availed himself of it in a competent manner.

He did not attempt to enter any appeal to the House of Lords at this time against the judgment in 1782. Neither did he bring any reduction of it. But he brought before the First Division of the Court, simply an action founding on the old entails, and demanding reduction of those title-deeds which had been solemnly adjudged to be valid by that decree. The defence stated was res judicata, which was sustained by the Court.

On a third appeal, the House of Lords pronounced the important judgment of 26th May 1826, ordering that the interlocutors be "affirmed with respect to the estates of Kelly and Ballumbie, and the bond for £9000 in the said interlocutors mentioned, so far as said interlocutors find that all right and interest in the said estates and bond, which the appellant claimed under the summons of reduction and declarator in the said interlocutors mentioned, were totally excluded, and the subject-matter of the action then before the Court, as to such estates and bond, was res judicata by the judgment contained in the decreet of the Court of Session of the 5th of March 1782, in the said interlocutors mentioned, in as much as it appears to their Lordships that it was not competent to the appellant, by the summons of reduction and declarator in the said interlocutors mentioned, to impeach such decreet of 5th March 1782, so far as the same respected such estates and bond; and such decreet has not been impeached by reclaiming petition or appeal, or any other proceeding competent to impeach the same.

This appears to us to have been a conclusive judgment on the case as it stood before the House of Lords. Neither do we find any reservation in it It seems just to determine the point thus: That the pursuer not having taken any competent form of impeaching the decree 1782, the House then held that decree to be res judicata, to exclude the claim made by him in the action to the estates of Kelly and Ballumbie.

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The pursuer, however, now raised the present action for reducing the decree 1782, at the distance of 44 years from its date. The nature of the action, and the proceedings in it, are fully detailed in the papers of the parties.

In this state of the case, we are humbly of opinion, that the decree 1782 does constitute res judicata against the pursuer in the present action.

It is evident that the decree 1782 must be considered as res judicata, unless the pursuer has shown legal grounds for impeaching it as such. It was pronounced in a regular process, competent for the decision of the question, fairly conducted, upon full argument, and by the competent tribunal. It was not impeached by reclaiming petition nor by appeal; and 44 years went over it before this reduction was brought. All these points are clear. But the pursuer maintains various grounds of reduction.

1. He says that it was a decree in absence as to him. We are of opinion that it was not a decree in absence; and that, though it had been so, the plea is irrelevant. The pursuer was a party to the suit by his administrator in law, having been called in one of the actions, which was conjoined with the rest; the merits of the case were fully pleaded in his behalf, the interest of his father and himself precisely coinciding; and we are of opinion that, in such circumstances, there was no necessity for the appointment of a tutor ad litem, and there would have been no competency in such a measure. But, at any rate, we are clearly of opinion, that the plea is irrelevant. The question was, whether the entails were subsisting? Thomas Maule was the immediate heir of entail: He undoubtedly discussed the question in foro contentioso; and we are of opinion that such a judgment pronounced causa cognita against the immediate heir of entail, who would have been the verus dominus if the entail subsisted, does constitute res judicata against all other heirs claiming under the same entail.

2. He pleads minority and lesion. We are of opinion that this plea is not well-founded. The privilege of a minor to bring such a reduction must be exercised within the quadriennium utile, which has not been done in this case. Even if this rule could be changed by the pursuer's allegation of his ignorance of the nature of the decree-arbitral, (of which, however, we have seen no evidence,) he must at least have been bound to bring the action as soon as he knew the facts. But neither was this done. We further entertain great doubt, whether this ground of reduction could be applied to the effect of reducing a decree of this Court in foro contentioso, even if the pursuer had been the primary or the only party to it. But we think it very clear that it is altogether inadmissible, as a ground for reducing a decree which was competently pronounced against another party, who was the first heir of entail fully in titulo to try the question with effect, and who was of full age.

3. The pursuer maintains, that Thomas Maule having by the decree-arbitral bound himself and the pursuer not to enter a cross appeal to the House of Lords against the judgment regarding the estates, the effect of this must be to take away the operation of the judgment as res judicata, and to entitle him even now to reduce it.

This is the only point in which we think that there is any difficulty in the case. But we are of opinion that the plea is not solid.

The decree-arbitral has been found to have been merely the form of an agreement, and it has been reduced as a decree-arbitral affecting the rights of the pursuer. Under this decision he claimed the leases. But the Court and the House of Lords held, on the plainest principles of law and justice, that the effect of his

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challenging the decree-arbitral successfully in that point could only be to oblige the defender to take the place as to these leases, which he would have held if no such transaction had been made—that is, with an appeal actually entered against the judgment; or, in other words, to discuss the merits of the judgment as still open. It appears to us that the law and equity of this proceeding are manifest. What did the pursuer complain of? Of nothing, but that by the decree-arbitral Thomas Maule had compromised the pursuer's right as an heir of entail to the leases, which had been found by the interlocutor to belong to Thomas Maule and the heirs of entail in their order. But if he was reponed against this effect of the decree-arbitral, there could be neither law nor equity for holding that the defender should not be also reponed against the abandonment of his appeal by Lord Dalhousie on the faith of the compromise. We think that it was the inevitable consequence; and so the House of Lords conclusively determined by the judgment of 1819.

But the position of the parties, with regard to the estates, was and is totally different. As to them the defender held the judgment of the Court. If Thomas Maule chose to acquiesce in the judgment, he had a right to do so—if he had appealed, and abandoned the appeal, he had a right to do so. Neither could he have challenged any agreement for himself, engaging not to appeal; and indeed the decree-arbitral has not been reduced so far as it affected his rights, the judgment of 1819 being expressly applied to it only as "affecting any rights of the appellant." Now the defender never challenged the decree-arbitral. He is asking nothing of the pursuer. He is not impeaching any part of the agreement which was made for him. It is impossible therefore to apply to him the ground of equity, which the House of Lords sustained against the pursuer in the case of the leases. The pursuer was challenging the decree-arbitral, and yet holding the defender bound by the judgment of the Court, which stood appealed at the time, and only became final by the force of the same decree-arbitral. The defender is in no such position. He was and is willing to stand by the decree-arbitral in all points; and the plea of the pursuer seems really to be, that because he himself has reduced the decree-arbitral, with a different view, the defender must lose the benefit of the judgment of this Court which he previously held.

This view of the dissimilarity of the two cases is not removed by the circumstance, that by the decree arbitral, Thomas Maule renounced for himself and the pursuer the right to enter a cross appeal. If this had been thought to make the cases parallel, the pursuer must have been admitted at once to impeach the original merits of the decree in 1782. But, beyond all doubt, the House of Lords have expressly decided the reverse; and as that House has definitively determined that the cases are not parallel, we humbly think that it is now incompetent for the pursuer to maintain, and would be incompetent for us to hold, that the decree of 1782 is not res judicata, on any supposition that they are alike, or that the House of Lords should have determined otherwise than they have done. We think, however, that the difference is still very plain in principle. The defender is not challenging the decree; and though the pursuer, who challenges it as heir of entail, may overcome that which was incompetently done by his ancestor in the surrender of the leases, it does by no means follow, in our apprehension, that the defender is to be compelled to open up the lawful decree which he holds in his favour, merely because the party in the immediate right at the time had consented to let it stand without an appeal.

In the case of Porterfield, lately before the Court, the question was fully tried

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by the late Sir Michael Shaw Stewart; and after several judgments had been pronounced, and the case was final in this Court, he intimated in writing to his opponent, Mr. Corbet Porterfield, that he was satisfied with the trial of the case, and did not intend to appeal, and gave up the benefit of an agreement by which the expenses of both parties were to be paid from the rents till a final judgment in the House of Lords. This did not interfere with the right of any other heir of entail to appeal, and the next heir has done so. But if no appeal had been entered within the period of five years, there can be no doubt, we apprehend, that the judgment of this Court would have been res judicata against all parties whatever.

The question here is, whether the case is made different by the circumstance of the pursuer having been made a party to the submission. And we can very well see, that if the pursuer had proposed to appeal the case in due time, and had been met by the clause in the decree-arbitral as a bar to such a proceeding, he must have been reponed against that, as soon as the decreet-arbitral was found not binding on him. But laying aside that case, it is not easy to see that, in the actual circumstances of his proceedings, he was placed in any worse situation than he would have been, if he had not been a party either to the actions or to the decreet-arbitral. He says, indeed, that for a long time he thought himself bound by the decreet-arbitral, and it has been suggested that thereby he was prevented from appealing in proper time. We are much afraid that this view receives very little support from the facts of the case, more especially as the idea of either appealing against the judgment, or attempting to reduce it, or even claiming the estates at all, did not occur to him for so very many years after he brought his reduction of the decreet-arbitral as to the leases. But giving the utmost weight to the consideration, and granting also the principle, however doubtful, that in equity he might still be permitted to challenge the judgment, final though it was against Thomas Maule, we can see no ground for holding that this right could be altogether without limits, and that, after he knew all that he yet knows, he should still be allowed to let the decree stand unchallenged, and at last bring his reduction after 16 years of further acquiescence. His first action was brought in 1810. He did not even claim the estates till 1821; and he did not bring the reduction of the decree 1782 till 1826. It would be a very great stretch of equity, but surely it would be the utmost latitude which could be given to it, on the ground of his thinking himself bound by the decree-arbitral, that he should be allowed still five years more to challenge the judgment, after he saw cause to object to the validity of the decree-arbitral. But granting even this, he lost the opportunity.

The pursuer, however, says further, that he waited till the decree-arbitral should be reduced. It may well be doubted whether any party can be entitled to allege such a thing as an excuse for not exercising a right claimed as matter of equity, as soon as he himself believed that no legal obstacle could stand against him. But supposing even this to be overcome, the decree-arbitral was reduced in 1819. Still there was no attempt to challenge the judgment of 1782. The pursuer, indeed, brought an action claiming the estates. He was met by the plea of res judicata, which gave him fair warning. The Court found it to be res judicata, which should still more have put him upon his guard. The House of Lords, in 1826, affirmed the judgment; and it was only after this that the present action was raised.

By that judgment the decree 1782 stands clearly found to be res judicata, excluding the pursuer's claim to these estates. On what ground, then, is it to be over-

come in regard particularly to the last period from 1819 to 1826? The pursuer has nothing to state but this, that he acted under the impression, that because, when he challenged the decree-arbitral as to the leases, the pursuer was admitted to defend his titles by trying the merits of the judgment regarding them without bringing any reduction, the pursuer should be equally entitled to challenge the judgment as to the estates without a reduction; and that he only discovered his mistake when the judgment of 1826 was pronounced. We do not think that this can be received even as a matter of fact, considering that this Court had sustained the plea of res judicata. But supposing it were true, is it relevant? Supposing it granted that even in 1819 the pursuer might have challenged the decree 1782, if he did so immediately, or even within five years, what does the plea for the delay amount to, but that the pursuer took a false view of the law, and has, even in this last stage of a forty years delay to impeach the judgment of this Court, lost his opportunity by an error in law? We apprehend that the pursuer had no good ground to make the assumption which he says he did. He was told by the interlocutor of the Court that he had not. But if he chose to act upon his own advice, or any other, we apprehend that that can furnish no reason for now relieving him of the consequence of his not having taken his appeal, or brought his reduction, in due time.

The case of the pursuer, therefore, against the plea of res judicata, appears to us to consist in a series of excuses for not having done that which he was bound by law to do, in order to preserve his right to complain of the judgment. The case is no doubt special. But we cannot avoid looking at the very long period which has elapsed between the date of the decree and the action for reducing it. We know of no similar case in which a decree solemnly pronounced in foro has been allowed to be opened up at so great a distance of time. And as it certainly cannot be held that, under any of the peculiar features of this case, the pursuer's right to challenge became absolutely indefinite as to time, we are humbly of opinion, that after the utmost possible effect is given to each of his successive apologies for the delay, he must be considered as at last foreclosed by the course of proceeding which he chose, with his eyes open, to adopt.

Lord Balgray.—I concur completely in the opinion given by Lord Corehouse. I need not enter into any detailed explanation of my views, as that would be merely a recapitulation of what has been already expressed by his Lordship; but I would observe, that the judgment of the House of Lords of May 1826 appears to preclude the defender from pleading res judicata; and after we held the decree of 1782 to be no res judicata against him in regard to the leases, I think it due to the pursuer, ex debito justitiæ, that we should hold the same decree to be no res judicata against him on its other branches.

Lord Craigie.—My opinion is the same with that expressed by Lord Balgray, and I think it unnecessary to add any thing further in this case, in which my views are already so fully expressed by Lord Corehouse.

Lord President.—I am of a different opinion, and concur with the Lord Justice-Clerk, and the minority of the consulted Judges. I do not think the question now open to us, which the pursuer wishes to discuss. The House of Lords, in 1819, found that the decree of this Court in 1782 was not final against the defender as to the leases, and therefore affirmed the judgment of this Court, assoilzieing the defender from a reduction and declarator as to these leases, "but without prejudice to any question between the parties in any other action, touch-

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ing any property comprised in the deeds of tailzie in the pleadings mentioned." This was a reservation only of a special nature. The judgment of the House of Lords in 1826 orders that the interlocutor of absolvitor pronounced by this Court in the action then pending shall be affirmed as to Kelly, Ballumbie, and the bond for £9000, "so far as the said interlocutors find that all right and interest in the said estates and bond, which the appellant claimed under the summons of reduction and declarator in the said interlocutors mentioned, are totally excluded, and the subject-matter of the action then before the Court as to such estates and bond was res judicata by the judgment contained in the decreet of the Court of Session, of the 5th of March 1782, in the said interlocutors mentioned, inasmuch as it appears to their Lordships that it was not competent to the appellant, by the summons of reduction and declarator in the said interlocutors mentioned, to impeach such decreet of the 5th of March 1782, so as the same respected such estates and bond, and such decreet has not been impeached by reclaiming petition or appeal, or any other proceeding competent to impeach the same." These are words which I cannot construe as leaving the present question open. The pursuer maintains their meaning to be, that the decree of 1782 was only a res judicata as to the particular reduction and declarator then pending. Had it been the object of the judgment merely to find this, I cannot think the words I have read would have been employed. The finding, as contended for by the pursuer, simply amounts to this—that it was incompetent, by means of the process then pending, to open up the decree of 1782, whether that decree constituted res judicata or not. But if that had been the finding of the House of Lords, I humbly consider that it would have been directly so expressed, and that there would have been no finding which expressly recognised the judgment of 1782 as being, to any effect, a res judicata between the parties as to the estates of Kelly and Ballumbie and the bond. And the consequences of the pursuer's plea seem to me to be of a very singular kind. He says he sustained prejudice by the agreement in 1782, as it cut off his right of presenting a cross-appeal. But after he gets entirely free of all trammels arising from this agreement, he contends that he is entitled not merely to have the five years which are allowed to any party to seek redress by appeal, but a whole course of forty years, in any part of which he may reduce the decree, on the ground that his right of cross-appeal was sacrificed. This does appear to me to be a very singular plea, and yet it is substantially what the pursuer insists in. On the whole, I completely concur in the views expressed by the minority of the consulted Judges.

Lord Gillies.—I concur with your Lordship in this case, which is one of great difficulty; and I may add, that I am not a little struck with the view last thrown out by your Lordship. It would be a very odd result, if a party, by being improperly restrained from a right of appeal which prescribedin five years, should, in lieu of it, acquire not only a new course of five years to bring his challenge, but a right of reduction which should subsist for forty years.

The Court "having advised the cause, with the opinions of the consulted Judges &c., repelled the defence of res judicata, and decerned; and remitted to the Lord Ordinary to ordain the defender to satisfy the production in common form,"—reserving, at the request of parties, the question of expenses.

D. Fisher, S. S. C.—Fotheringham and Lindsay, W. S.—Agents.

EARL of ELGIN Suspender.—*Bell.*
MARQUIS of TWEEDDALE, Charger.—*Maxwell.*

No. 460.

July 7. 1831.
E. of Elgin v. M. of Tweeddale.

Removing—Landlord and Tenant.—Formal warning not necessary to remove a tenant of port customs.

July 7. 1831.

2D DIVISION.
Bill-Chamber.
Ld. Moncreiff.
F.

THE Marquis of Tweeddale is proprietor of certain customs leviable at the harbour of Limekilns, which belongs to the Earl of Elgin. The Earl had drawn the customs as tenant since 1799, but without any written title; and in the beginning of March 1831, the Marquis' agents wrote to the Earl's agents that the Marquis intended to take the collection of the customs into his own hands at Whitsunday, unless a new agreement should be made. Some correspondence took place on this; but no offer being made by the Earl, the Marquis, on the 13th of May, appointed one Spowart to collect the customs and dues belonging to his Lordship from and after Whitsunday. Lord Elgin then presented a bill of suspension and interdict, on the ground that he had not been warned to remove, and that Spowart was taking down buildings on the harbour belonging to him, and erecting others. No answers were given in for Spowart; but the Marquis of Tweeddale answered the bill in so far as regarded the customs, and contended that he was not bound to give regular warning, and that the letter of 4th March was sufficient intimation.

The Lord Ordinary refused the bill, adding this note:—"The respondent's title is clear and admitted; and as to warning, see the case of a lease of feu-duties, which is stronger than this, Earl of Darnley v. Campbell, Jan. 28. 1742, (Kilk.)

Lord Elgin reclaimed, but the Court adhered, except as to Spowart's alleged proceedings, as to which they passed the bill, and granted interdict.

A. ROLLAND jun. W. S.—GIBSON-CRAIGS, WARDLAW, and DALZIELL, W. S.—Agents.

Single Bills.

AINSLIE, Pursuer.—*Lothian.*
HIS CREDITORS, Defenders.—*Patton.*

Cessio Bonorum—Citation.—Objection to the execution of a summons of cessio bonorum, that it bore companies to have been cited by leaving service copies with their wives.

July 7. 1831.

2D DIVISION.

No. 461.

July 7. 1831. Balfour &c. v. Laing.

W. Balfour, W. S., and J. Hamilton, W. S.—*Ivory*
W. Ewing.—*More.*
Lady Strathmore's Trustees.—*Jameson.*
W. Laing.—*Brown.*
Competing.

July 7. 1831.

2d Division. Ld. Mackenzie. T.

Expenses.—Question as to the expenses of the case mentioned ante, p. 291. The Lord Ordinary found Balfour and Hamilton, Lady Strathmore's Trustees, and Ewing, respectively liable to Laing in the proportion of expenses occasioned by their opposition to his claim. The Court adhered.

A. Forsyth, S. S. C.—Wotherspoon and Mack, W. S.—A. Clason, W. S.—W., A. G., and R. Ellis, W. S.—Agents.

No. 462.

July 7. 1831. Cuninghame &c. v. Learmonth &c.

Mrs. Cuningham and Others, Advocators and Pursuers.—*Skene—Stark.*
J. Learmonth and J. Walker, Respondents and Defenders.—*Sol.-Gen. Hope—More.*

July 7. 1831.

2d Division. T.

Special case, in which the Court assoilzied from a reduction of the defenders' title to a piece of ground at the west end of Prince's street, and affirmed a judgment of the Sheriff of Edinburgh, refusing the pursuer the benefit of a possessory judgment.

J. Gray, W. S.—Macritchie, Bayley, and Henderson, W. S.—Agents.

No. 463.

July 8. 1831. Melrose v. Hunter.

Mrs. Melrose or Dickson, Petitioner.—*Patton.*
James Hunter, Respondent.—*Lothian.*

Appeal—Process—Stat. 48. *Geo. III. c.* 151.—Circumstances in which the Court, after having granted interim execution pending an appeal, to the extent of £250, without caution, entertained a second petition, and granted execution to the further extent of £50 without caution.

July 8. 1831.

1st Division. H.

This was a second petition for interim execution pending appeal of the case reported ante, VIII. 1054, (which see.) The petitioner stated that she was in necessitous circumstances, that the sum formerly awarded was exhausted, and that she would be prevented from adequately defending herself in the House of Lords, unless a further sum were awarded. She therefore craved further interim execution to the extent of £150. The petition was opposed, both as incompetent, and because caution should at least be found. The petitioner answered, that if caution were required, that would be equivalent to a refusal of the petition, as she was unable to find it. The Court granted the prayer, "to the effect of giving the petitioner decree for £50" without caution.

No. 463.

July 8. 1831. Melrose v. Hunter.

Act of Sederunt.

LORD PRESIDENT.—The competency of repeating an application for interim execution, where one petition has already been granted, depends on the circumstances of the case. In a case of aliment, for example, it may be not only competent, but necessary. In the present instance, I am inclined to grant the petition, on a due regard to all the circumstances of the parties.

The other Judges concurred.

Respondent's Authority.—Brown &c., Dec. 20. 1822, (ante, II. 104.)

G. RITCHIE, W. S.—J. H. LOTHIAN, W. S.—Agents.

ACT OF SEDERUNT

To amend the style of the Wills of Summonses, Suspensions, and Advocations; also to regulate the time and mode of executing the same, and to fix the period for executing Summonses whereon Arrestments have been used.

July 8. 1831.

THE Lords of Council and Session, and the Lord Chief Commissioner of the Jury Court, taking into consideration that in the wills of summonses, letters of suspension, and letters of advocation, it is not necessary to specify any precise day of compearance, and that the leaving of blanks for filling up such days of compearance, as well as the erroneous filling up of the same, have been frequent sources of litigation; and considering that in certain cases the executing of letters of suspension and advocation is unnecessary; and further considering that it is expedient to fix the time allowed to pursuers who shall arrest on unexecuted summonses for executing the same against defenders, and that it is proper to determine what proceedings should be adopted in the Bill-Chamber when a bill of suspension or advocation has been allowed to lie over for more than year and day; do therefore hereby enact and declare, that from and after the eleventh day of November next 1831, the following regulations shall take effect:—

1. The wills of summonses shall specify the inducie legales, according to the nature of the summons and residence of the defender, without mentioning any particular day of compearance, or leaving blanks for filling up days of compearance; and shall direct the messenger to cite the defender to appear in Court on the last day of the legal inducie applicable to the case—the inducie in all cases running from the date of citation; and (excepting summonses or complaints under the small debt statutes) these rules shall apply also to all summonses, precepts, wills, and warrants for service in all Inferior Courts; all conform to the examples of wills hereto subjoined, as nearly as circumstances will permit; and the executions by messengers, sheriff officers, and others, shall be framed accordingly, conform to the example also subjoined.

2. The Clerks to the Bills shall cease to fill up in the deliverance upon a passed bill of suspension, or advocation either a day of compearance or a day of continuation; but they shall specify therein whether or not appearance has been made for the charger or respondent in the Bill-Chamber; and in expeding the letters, it shall be sufficient to specify in the will the inducie legales only, or number of days at the expiration of which the charger or respondent

Act of Sederunt July 8. 1831.

is to compear in Court, which, in ordinary cases, shall be six days; and in cases where the respondent or charger resides in Orkney or Shetland, thirty days; and when he is furth of Scotland, sixty days.

3. If the last day of the legal inducise of any summons, suspension, advocation, or other writ, shall not be a sederunt day, then the day of compearance shall be held to be the first sederunt day thereafter; and the instance in the case of summonses shall fall, unless the summons shall be executed within year and day of its signeting, and be called within year and day of the day of compearance: As also, that all letters of suspension or of advocation not executed within year and day of the date of signeting, or, though duly executed within that period, if not called within year and day of the day of compear ance, shall, as heretofore, be held to fall asleep: Providing always, that, in citations upon the passive titles, the summons shall not be called in Court till after the expiration of the annus deliberandi, unless the defender, by putting up protestation, shall waive objection to the citation.

4. In all cases of suspension where the respondent has made appearance in the Bill-Chamber, or where the intimation of the application or sist in the Bill-Chamber has been made to the respondent by a notary or messenger at arms, and a regular certificate or execution returned,—and in all cases of advocation, whether the defender or pursuer be the advocator, where the respondent shall have made appearance in the Bill-Chamber, or where intimation of the presenting or passing of the bill of advocation shall have been made to the respondent or his agent in the Inferior Court, the suspender or advocator shall be entitled, at the expiration of ten days after the date of passing the bill, to call and insist in the letters of suspension or advocation, without executing the same; and the respondent or charger shall in all cases be entitled, at the expiration of six days after the elapse of the period allowed to the suspender or advocator to expede his letters, to put up a protestation at the minute-book to force on the discussion of the expede letters, whether the same shall have been executed or not, and shall also be entitled to obtain a certificate at the Signet Office, in case of not duly expeding and signeting the letters, in terms of the Act of Sederunt July 11. 1828, § 17.

5. When proceedings in a bill of suspension or of advocation shall have lain over for more than year and day, the same shall be held as asleep; but it shall be competent for either party to revive the proceedings (without a summons of wakening) by a written note to the Lord Ordinary on the Bills, duly intimated to the opposite party, or his known agent, by a notary public or messenger at arms, before witnesses, fifteen days at least previous to laying the note before the Lord Ordinary—the execution or certificate of which intimation shall be produced along with the note.

6. If a pursuer, whether in the Court of Session or in an Inferior Court, shall use arrestment on an unexecuted summons, he shall, in order to preserve such arrestment in force, be bound to execute the summons against the defender within forty days next after the date of executing any such arrestment; and failing thereof, all such arrestments dated more than forty days prior to the execution of the summons shall fall and be void; and it shall be competent to the defender to apply to the Lord Ordinary on the Bills for letters of loosing arrestment, which shall be granted without caution or consignation—such appli-

cation, with an order for answers within such time as the Lord Ordinary on the Bills may judge proper, being previously intimated to the pursuer or his known agent; and the Lord Ordinary shall at the same time award such expenses against the pursuer as may seem reasonable; and the Lord Ordinary's judgment shall not be subject to review. Act of Sederunt July 8. 1831.

FORMS BEFORE REFERRED TO.

I. WILL OF AN ORDINARY PETITORY SUMMONS IN THE COURT OF SESSION.

"Our will is herefore, and we charge you, that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge the said defender, personally or at his dwelling-place, to compear before the said Lords of our Council and Session at Edinburgh, or where it may happen them to be for the time, the twenty-seventh day next after the date of your citation, in the hour of cause, with continuation of days, to answer at the instance of the pursuer in the matter above libelled," &c. &c.

II. WILL OF LETTERS OF ADVOCATION OF AN INTERLOCUTORY JUDGMENT.

"Our will is herefore, and we charge you, that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge the said Sheriff and his Substitute," (or other Judge,) "and his Clerk of Court, and the said B. party, personally or at their dwelling-places, to compear before the Lords of our Council and Session at Edinburgh, or where they may happen to be for the time, the sixth day" (or thirtieth day, if in Zetland and Orkney) "next after the date of your citation, in the hour of cause, with continuation of days, bringing with them the foresaid process, whole steps and procedure had therein, and grounds and warrants thereof,—to be seen and considered by the said Lords, and to hear and see the same advocated from the said Sheriff and his Substitute,—and them, and all other inferior Judges, discharged from further proceeding and determining therein in time coming, for the reasons and causes (if against an interlocutory judgment, say above mentioned, and others) to be proponed at discussing hereof: And further, we, and the said Lords of our Council and Session, have advocated, and do hereby advocate, the foresaid action and cause from the said Sheriff and his Substitute, and all other inferior Judges, discharging them hereby from all further proceeding or determining therein in time coming, till the verity be known. According to Justice." "Because Lord A., Ordinary, has passed the bill, appearance having been made for respondent in the Bill-Chamber, and D. has become cautioner for the complainer for payment of the expenses to be incurred in the Court of Session," (or otherwise, as the fact shall be stated in the fiat or deliverance on the passed bill,) &c.

III. WILL OF LETTERS OF SUSPENSION.

"Our will is herefore, and we charge you, that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge the said B., personally or at his dwelling-place, to compear before the said Lords of our Council and Session at Edinburgh, or where they may happen to be for the time, the sixth day" (or thirtieth day, if in Zetland and Orkney) "next after the date of your citation, in the hour of cause, with continuation of days,

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bringing with him the foresaid decree, (or bill, &c. as the case may be,) and charge thereon, and the grounds and warrants on which the same proceeded,—to be seen and considered by the said Lords, and to hear and see the same, whole effect and execution thereof, and all that has followed or may follow thereon, simpliciter suspended for the reasons and causes foresaid, and for other reasons to be proponed at discussing hereof: Moreover, we, and the said Lords of our Council and Session, have suspended, and hereby suspend, the foresaid decree (or bills &c.) and charge thereon, whole effect and execution thereof, and ground and warrants whereon the same proceeded, with all that has followed or may follow thereon,—discharging hereby all messengers at arms, and other officers of the law, from putting the said charge to further execution in the mean time, till the verity be known. According to Justice." "Because, appearance having been made for the charger in the Bill-Chamber, the bill was passed upon answers," (or 'of consent upon caution,' or 'without answers,' or as the fact may be specified in the fiat or deliverance on the bill,) "and F. has become cautioner for the complainer," &c.

IV. WILL OF A SHERIFF SUMMONS.

"Herefore I command you, that on sight hereof ye pass, and lawfully summon, warn, and charge the said defenders, personally or at their respective dwelling-places, to compear before me or my Substitutes, in the ordinary Court place at E.," (or as the case may be,) "upon the seventh day" (or such other day as the case may require) "next after the date of your citation, in the hour of cause, with continuation of days, to answer at the instance of the said pursuer in the matter libelled;—that is to say, to hear and see the premises verified and proved, and sentence and decreet given and pronounced therein, ut supra; or else to allege a reasonable cause to the contrary; with certification," &c.

IF MEANT TO CONTAIN A WARRANT TO ARREST ON THE DEPENDENCE, ADD—

"Attour that in the mean time ye lawfully fence and arrest the said defender's whole goods and gear, debts and effects, sums of money, and all others whatsoever, within my jurisdiction, in whose hands soever the same may be—all therein to remain under sure fence and arrestment at the pursuer's instance, ay and until sufficient caution and surety be found acted in my Court books, that the same shall be made forthcoming to the pursuer, as accords of the law. According to Justice," &c. "Given at ——," &c.

V. FORM OF A COPY OF CITATION ON A SUMMONS BEFORE THE COURT OF SESSION UPON THE ORDINARY INDUCIÆ.

"I messenger at arms, by virtue of a libelled summons of which the above and preceding pages are a full double to the will, dated and signeted the , raised at the instance of the before-designed , in his Majesty's name and authority lawfully, summon, warn, and charge you, the also before-designed , to compear before the Lords of Council and Session at Edinburgh, upon the twenty-seventh day next after the

date of this citation, in the hour of cause, with continuation of days, to answer at the instance of the said pursuer in the matter libelled in the said summons, with certification, conform to the principal summons. This I do upon the day of one thousand eight hundred and years, before these witnesses, K, M, and F, all residenters in ."

Act of Sederunt July 8. 1831. Gilmour &c. v. Finnie &c.

N. B.—The execution will of course be made to correspond with the citation; and if upon a separate sheet of paper, the parties must be fully designed.

And the Lords appoint this act to be engrossed in the sederunt-book, and printed and published in the usual manner.

C. HOPE, *I. P. D.*

WILLIAM GILMOUR and Others, Suspenders.—*Marshall.*
WILLIAM FINNIE and BENJAMIN GREIG, Chargers.—*More.*

No. 464.

Process—Suspension—Cautioner—Assignation.—1.—Competent to pass a bill of suspension, on caution, of a charge under a bond, which provided that no such bill should pass, but on consignation only.—2.—Where a bond granted by six co-obligants was retired by a third party, who offered a discharge to each co-obligant on payment of his proportion, but refused to assign the bond to three of the co-obligants who tendered full payment—Held that these co-obligants were bound to pay their proportion, under deduction of a sum alleged to have been paid by them to the original holder of the bond.

July 8. 1831.

1ST DIVISION. Ld. Moncreiff. Bill-Chamber. H.

WILLIAM GILMOUR, James Lindsay Ewing, James Reid, Thomas Lawrie, Andrew Reid, and Archibald Graham, signed a bond for a cash-account of £10,000 to the Glasgow Branch of the Bank of Scotland. The bond provided that no suspension of a charge on it "should pass, but on consignation only." On the 27th of August 1830, a balance of £9042, with £250 of interest, remained due, when a charge was given by the Bank. The chargers, Finnie and Greig, (who were not obligants under the bond,) paid the amount, and got an assignation from the Bank. They then gave a charge to the six co-obligants; but it was alleged that their true object was to prejudice the interests of Gilmour, Ewing, and James Reid, who stated that they had, in July 1830, paid to the Bank £1500 to account of the bond, and for which they were entitled to relief pro rata from the other three parties. Gilmour, Ewing, and James Reid then offered to pay the whole sum advanced by the chargers, on getting an assignation to the bond. This assignation they at first proposed should be in their own favour, and afterwards in favour of a third party to be named by them. The chargers declined this, and intimated, that on each co-obligant paying an equal share of the sums charged for, they would give a discharge of the bond

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to such co-obligant, reserving to themselves a right of further execution against him, in the event of the others not paying their proportions.

Gilmour, Ewing, and James Reid then presented a bill of suspension on caution, stating that they had paid to the Bank the above sum of £1500; that they were ready to pay to the chargers their whole advance; and that the object of the chargers in declining to grant the assignation was to prevent the suspenders from making effectual their relief of the proportional part of the £1500 due by the other obligants.

The Lord Ordinary passed the bill, and issued the subjoined note.*

The chargers reclaimed, insisting that the bill should be refused, but that, at all events, consignation was necessary. The Court disregarded the latter of these pleas; but being of opinion, that as the suspenders had not paid to the Bank a sum equal to their proportion of the bond, (for which they must ultimately be liable,) the bill should be refused to that extent; and accordingly, after a minute had been lodged, specifying the sum, they "recalled the interlocutor of the Lord Ordinary, and re-

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* "The Lord Ordinary finds it difficult to see into the truth and justice of this case. The chargers, in the end of the answers, plead as third parties who know nothing of the transactions of the parties obligants. If it were so, they would have no interest to refuse full payment, and grant an unqualified assignation. But in the beginning of the answers they state, that they took up the bond as the friends of Messrs. Lawrie, Reid, and Grahame, and that they have no interest in the matter but to force what they (as friends of these parties) hold to be the fair apportionment of the burden. Yet the charge is for the whole debt against the complainers. But if a friend of Messrs. Lawrie, Reid, and Grahame, by taking an assignation from the Bank, tries to force a settlement on their terms, it is not evident why Messrs. Gilmour, Ewing, and Reid may not equally employ a friend, and require an assignation to him from the chargers, as in place of the Bank, on offering full payment of the debt; and as the chargers distinctly refused this when payment was repeatedly offered in writing, they are not now entitled to object, on the ground that money was not actually tendered.

"The Lord Ordinary sees very well that the parties will never come to a fair settlement in this way of proceeding. They must meet in their proper persons; for this course of interposing a friend as a third party may be repeated ad infinitum. The Lord Ordinary is not satisfied that if the chargers have granted an absolute discharge to Lawrie, Reid, and Grahame, the relief of the complainers may not be thereby impaired. There is probably some unfairness on the one side or the other; but the Lord Ordinary is unable at present to determine with any certainty on which side it lies. The Bank may have had reasons for the form of their charge, of a nature not unfavourable to the case of the complainers, though perhaps they only looked to their own convenience.

"As to the demand for consignation on the clause in the bond, the Lord Ordinary considers it to be a settled point that that clause is not effectual—Forrester v. Walker &c. June 27. 1815; and Bell, I. 364. But at any rate he would hold in this case, that if the chargers have refused an assignation, on an offer of payment, when they were bound to grant it, they could not found on that clause; and therefore, on the whole, caution being found for the large sum charged for, he thinks it his duty to pass the bill, that the case may be investigated."

mitted to his Lordship to refuse the bill to the extent of £4050, with interest thereof from the 21st of December 1830, and, quoad ultra, to pass the bill."

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Governors of Gordon's Hospital v. Ministers of Aberdeen.

Suspenders' Authorities.—Sinclair, Dec. 3. 1662, (Supp. II. 297); Leslie, Jan. 10. 1665, (2111); Rigg, Nov. 7. 1676, (3353); Erskine, Jan. 14. 1780, (1386); Rannie, March 7. 1822, (ante, I. 422); M'Gilvray, June 10. 1826, (ante, IV. 697.)

Chargers' Authorities.—3. Ersk. 3. 68; Grant, Dec. 9. 1779, (1384); Home, July 10. 1666, (3347); Cameron, Feb. 2. 1830, (ante, VIII. 430); Scott, Feb. 12. 1712, (3360); Wood, Dec. 12. 1695, (3355.)

J. Patison, W. S.—C. J. F. Orr, W. S.—Agents.

GOVERNORS of GORDON'S HOSPITAL, Pursuers.—*Lumsden.*
MINISTERS of ABERDEEN, Defenders.—*Sol.-Gen. Cockburn—Dunbar.*

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Clause—Trust—Will.—The founder of an hospital having named as patrons the Magistracy, Town Council, and "the four Ministers, commonly called the Town's four Ministers, of the old and new churches, and their successors in their respective offices;" and there being only two collegiate churches and four ministers at the time; and the burgh being afterwards divided into six parishes, having each a single clergyman—Held that only four of these ministers could be patrons, two of them being always the ministers of the churches referred to in the deed of foundation, and the other two being chosen according to the seniority of their appointment as town ministers; or if coeval in that respect, then by their seniority as licensed clergymen.

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1st Division.
Ld. Corehouse.
H.

IN 1729, Mr. Robert Gordon of Aberdeen mortified £10,000 to found an hospital there, on the narrative of his zeal for "the glory and honour of God, and that the true principles of our holy and Christian religion may be the more effectually propagated in young ones; and that the knowledge of letters, and of lawful employments and callings, may flourish and be advanced in all succeeding generations." The sum was mortified "to and in favour of the Provost, Bailies, and the remanent members of the Town Council of the burgh of Aberdeen, and the four Ministers of the Gospel in the said burgh of Aberdeen, commonly called the Town's Four Ministers of the old and new churches, who exercise the pastoral charge there, and to their successors in their respective offices, Provost, Bailies, Town Council, and four Ministers of the said burgh of Aberdeen, in trust," &c. It was declared that the purpose of the endowment was to entertain and educate indigent sons and grandsons of decayed merchants and guild-brethren of Aberdeen; "but the revenues of the said hospital shall be always in and remain with the said Provost, Bailies, Town Council, and four Ministers of the burgh of Aberdeen, and their successors in their respective offices, in trust, perpetually," &c. Each of the Patrons and Governors was to have a separate vote; eleven were to be a quorum, and the Town Council and the four Ministers were constituted a board, being then composed of twenty-three persons. It was further declared, as an unalterable statute of the hospital, "that the same is for the relief, maintenance, and for the instruction in the prin-

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ciples of our holy Christian Protestant religion, and education in letters, writing, arithmetic, and book-keeping, of boys," &c.

At the date of this deed, the burgh of Aberdeen formed a parish called the parish of St. Nicholas of Aberdeen, containing two contiguous churches, termed the Old and New. These were collegiate charges, in which the four Ministers of the burgh officiated.

Soon after Mr. Gordon's death, the old church was taken down, and another, after an interval of some years, was built, partly on the same site. The two clergymen officiating in the newly-built church acted as governors of the hospital without opposition. In 1772, the "provost, bailies, town-councillors, and four ministers of the city of Aberdeen, and their successors in these offices respectively for the time," were erected into a corporation.

By the successful management of the mortified fund, there is now an hospital built, at which eighty-four boys are educated; the revenue exceeds £3000 per annum; and there is a prospect of the establishment continuing to increase. Owing to the augmented population of Aberdeen, the Teind Court, in 1828, pronounced decree, declaring "that it is necessary that new and additional churches be planted and erected;" and therefore disjoined the parish of St. Nicholas or Aberdeen, and erected it into six parishes—the east, the west, the north, and the south parishes, and Greyfriars' and St. Clement's parishes, and uncollegiated "the east and west churches, or the new and old churches." The decreet declared that the six parishes should be considered as one parish, so far as respected assessments for the poor, mortified funds, and collections within the burgh, &c.

In these circumstances a question arose, whether Mr. Gordon's nomination of clerical patrons applied only to the ministers officiating in the uncollegiated churches called the 'Old and New, or East and West,' in which case there must eventually be only two clerical patrons remaining; or whether the number of clerical patrons was fixed to four; and if so, which of the clergymen in the newly-erected parishes should be chosen as patrons, in addition to the ministers of the old and new churches; or whether the ministers of the six parishes were not all entitled to act as clerical patrons, according to the true intent of the founder. The Magistrates raised a declarator for the purpose of having one of these alternatives fixed as the rule for governing the future administration of the hospital.

The Court, on the report of the Lord Ordinary, pronounced this judgment:—"Find that only four of the defenders are entitled to act as governors of Robert Gordon's Hospital in Aberdeen;—that the Rev. Dr. George Glennie, minister of the west parish, and the Rev. James Foote, minister of the east parish, and their successors in office, ministers of the said parishes respectively, are entitled to be governors of the said hospital in all time coming;—that the Rev. John Murray, minister

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of the north parish, and the Rev. John Bryce, minister of the south parish, are entitled to be governors of the said hospital during their respective incumbencies;—that on the death or removal from the office of governor of either or both of the said John Murray and John Bryce, the vacancy or vacancies that may thereby arise in the government of the said hospital shall be supplied by the minister or ministers for the time of the north parish, south parish, Greyfriars' parish, and St. Clement's parish, all of Aberdeen, who shall have enjoyed his or their cures for the longest period; or if no distinction can be drawn in that respect, then the said vacancy or vacancies shall be supplied by the minister or ministers of the said four last-mentioned parishes who have been licensed for the longest period, and so on in all time coming; so that, in addition to the ministers of the east and west parishes, two of the ministers of the said other four parishes, to be selected in manner above mentioned, shall be governors of the said hospital in all time coming; and find, decern, and declare accordingly; find no expenses due," &c.

LORD PRESIDENT.—There is no necessity for an alteration in the number of clergymen on whom the founder of the hospital conferred the patronage. Four of the ministers must therefore remain patrons, as we can neither increase nor diminish that number at our discretion.

The other Judges assented.

Pursuers' Authorities.—Roberts on Wills, I. 356; Roper on Legacies, II. 401.

W. DUTHIE, W.S.—J. ROSS, S.S.C.—Agents.

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SIR J. COLQUHOUN, Pursuer and Suspender.—*D. F. Hope—Forsyth.*
R. G. COLQUHOUN, Charger.—*Jameson—Sandford.*

Entail—Service.—1.—A party infeft in fee-simple having executed an entail, and not having disponed in favour of himself, but reserved a power of revocation; and having died, leaving the deed unrevoked and undelivered—Held that a general service as heir-substitute of entail to the entailer was inept to take up the procuratory or precept granted by him.—2.—Opinion by a majority of the whole Judges—(1.)—That where the institute in such deed of entail predeceases the granter, no right has vested in him; and the surviving party next called to the succession is a conditional institute, who should make up a title by a declarator that the first institute had failed, and that he, as conditional institute, was entitled to take up the precept and procuratory.—(2.)—That where such surviving party died without making up a title, the next substitute should raise a declarator to prove who was the conditional institute wo survived the granter, and then expede a general service to such party.

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1ST DIVISION. D.

BY an entail in 1774, Mr. Robert Colquhoun of Camstraddan conveyed that estate to his eldest son James and his issue; whom failing, to his second son Walter and his issue; whom failing, to other substitutes. The deed contained procuratory and precept; it reserved ample power of revocation, and remained undelivered during the entailer's lifetime.

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After Mr. Colquhoun's death, his trustees, in 1788, under a subsequent and temporary trust-deed, put the entail on record. James Colquhoun predeceased the entailer without issue. Walter survived the entailer, but made up no titles. On his death, his son Robert Colquhoun junior, on the 21st of August 1806, expede a general service as heir of tailzie and provision to his grandfather the entailer, and took infeftment under the precept in the deed of entail. Being afterwards advised that his titles were inept, he got a precept of clare constat, and was infeft as heir of line to his grandfather. He then, as a proprietor in fee-simple, sold the estate to Sir James Colquhoun, who, in order to ascertain the validity of the title, brought a suspension as of a threatened charge for the price. Sir James also raised a reduction of the service and infeftment of Robert, as heir of entail, in 1806, and a declarator of his right of property in fee-simple; and Robert further raised a reduction of the same service and infeftment. These processes were advised together on the 16th of December 1828, when the Court, in the suspension, found the letters orderly proceeded, and, in the declarator and reduction, decerned in terms of the libel.[1] The decree in the reductions was allowed to become final beyond the power of appeal; but Sir James Colquhoun took the judgment in the suspension to appeal. The charger died while the cause was under appeal; and his son, Mr. R. G. Colquhoun, sisted himself. The House of Lords, on the 17th of February 1831, remitted "to review generally the interlocutor complained of, &c.; and it is further ordered that the Court to which this remit is made do require the opinion of the other Division, and of the Lords Ordinary, in writing, in regard to the law and to the practice of conveyancers in Scotland in the services of heirs; and whether, according to such law and practice, the service, in this case, of the 21st of August 1806, by Robert Colquhoun of Camstraddan, as heir of tailzie and provision to his grandfather Robert Colquhoun, the maker of the entail of 1774, was a valid service? Or whether such service should have been to James Colquhoun, the institute in the said entail, who predeceased his father, the granter thereof, or to any other and what person?"

The Court thereupon ordered Cases upon the points remitted.

Pleaded by Sir James.—As the deed of entail was not delivered, and nothing equivalent to delivery took place in the lifetime of James the institute,—and as it contained the most ample power of revocation during the granter's lifetime,—and as the institute predeceased him,—every right conferred by the deed remained suspended, and consequently the granter died the undivested and absolute fiar of the estate. Such being the case, and no right being vested in the institute, a service to him could not take up any right under the deed. Again, as Walter never

[1] Ante, VII. 200.

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expede a service, nor accepted the conveyance in his favour, and was not the institute,—it was impossible for any remoter substitute to take any thing by serving to him. It only remained, therefore, for Robert Colquhoun to serve to his grandfather, unless it was to be maintained that he needed no service whatever, in which case his simply using the precept of sasine was enough to feudalize the entail, which had been put on record in 1788, and was thus effectual against purchasers.

Pleaded by R. G. Colquhoun.—Although it is true that the granter of the deed remained absolute fiar of the estate till his death, yet as he had executed a conveyance de præsenti, containing procuratory and precept, that deed took effect immediately on his death, which necessarily destroyed the power of revocation. This deed, therefore, regulated the succession to the estate; and if any one, called under it, had served to the granter in fee-simple, he could have been compelled by an heir-substitute to make up titles under the entail, which could only be done by service as heir of entail to James the institute. Though James predeceased his father, he was alive at the date of the deed of entail; which conveyed to and vested in him, as of its date, the personal right to the procuratory and precept, subject to the power of revocation. Delivery of the deed to James would unquestionably have vested the right in him; yet it would not have made the grant to him irrevocable, or impaired the absolute right of fee in the granter. The personal right, therefore, being vested in James, it necessarily on his death remained in his hæreditas jacens; and consequently, so soon as the granter died, leaving the deed unrevoked, it was necessary for an heir-substitute taking under that deed to expede a general service to James, and so take out of his hæreditas jacens the personal right to the precept and procuratory. No right under the deed of entail could be taken up by service to the granter, because he was not a disponee. The service of 1806 being bad, it was indifferent to the purchaser to inquire what else should have been done; but if there were room for the question, it was clear on principle and authority that the service should be to the institute.*

Lords Justice-Clerk, Glenlee, Cringletie, Meadowbank, Mackenzie, Corehouse, Medwyn, Newton, Fullerton, and Moncreiff, returned the following opinion:—Robert Colquhoun, by a disposition and settlement executed in 1774, conveyed his estate of Camstraddan, under the fetters of a strict entail, to his eldest son James Colquhoun, and the heirs whomsoever of his body; whom failing, to his second son Walter Colquhoun, and the heirs whomsoever of his body; whom failing, to a series of substitutes. The disposition contained procuratory of resignation and precept of sasine.

* It was further pleaded that the appeal in the suspension was uncalled for, because the decrees of reduction of the service in 1806 being final beyond the power of appeal, there was no ground of suspension left.

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James died before his father, without heirs of his body. Walter survived his father, but died without making up a title to the estate, leaving a son (Robert.) Robert the younger attempted to make up a title by a general service as heir of tailzie and provision to his grandfather under the disposition 1774, in virtue of which he was infeft on the precept it contained. We are clearly of opinion, that by the law of Scotland, and according to the practice of the best conveyancers, the service of Robert was not a valid service.

By the law of Scotland there are two modes in which rights of this nature may be transmitted—namely, by inheritance on the one hand, and by grant or conveyance on the other. When rights are inherited, a title is completed to them by service—a form equivalent to the aditio hæreditatis of the Roman law; and without service or certain proceedings, which in some cases may be substituted for it, the right does not pass to the heir, or vest in his person. When rights are conveyed, the conveyance itself constitutes the title, and vests the subject, except in so far as it requires to be feudalized, (a point not now under consideration); and there is no room for service on the part of the grantee, because he inherits nothing from the granter.

In the present case, Robert, the entailer, might have disponed the estate to himself; whom failing, to his son James, and the other members of the destination—a form of conveyance extremely common. If he had done so, he himself would have been the institute or immediate grantee; and, on his death, the substitute entitled to succeed must have taken up the right by service to him. But, instead of instituting himself, he disponed to his eldest son James, as the institute, who, if he had survived, could not have served heir to his father; but being, by virtue of the conveyance, in full right as grantee, he could have proceeded at once to execute the procuratory, or take infeftment on the precept contained in it. On the same principle that a service by James to Robert would have been inept, so a service by any other member of the destination to Robert must be inept also, there being nothing in his hæreditas jacens to which it could apply.

The opinion now given is confirmed by the express authority of Mr. Erskine, iii. 8. 73—by the decision in the case of Mercer, to which he refers, and by the recent case of Dennistoun, Feb. 5. 1824.

It is true that Robert, the entailer, reserved his own liferent, with power to revoke the entail, and sell the estate. But neither these reservations, nor any other that can be imagined, could make him the institute in the entail, or render effectual a general service to him by his grandson Robert, or any one else, as heir of provision under that settlement. The feudal fee of the estate remained in him, notwithstanding the execution of the entail with the benefit of all those reservations; but that fee could be taken up only by a special service expede by the heir of line, or by infeftment in his favour on a precept of clare constat; and the person so completing a title would have been proprietor in fee-simple, though he might afterwards have been compelled, by an action at the instance of those having interest, to bring the estate under the fetters of the entail.

Accordingly the general service of Robert Colquhoun, and the infeftments

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which followed upon it, were reduced, and we think rightly reduced, in the actions brought for that purpose at the instance of the suspender.

But if the service of Robert Colquhoun was invalid, the whole question between the parties in this suspension is exhausted, and it follows that the interlocutor under appeal is well founded.

But we are required by the remit to say, not only whether the service of Robert Colquhoun to his grandfather was a valid service, but "whether such service should have been to James Colquhoun, the institute in the said entail, who predeceased his father, the granter thereof, or to any other and what person." As to this point, it appears to us, that if there was an actual delivery of the disposition and settlement 1774 to James the institute, or to any person for his behoof, or if there was any thing which the law holds as equivalent to delivery, so that a right vested in James during the lifetime of his father, (an inquiry in law and in fact not fully entered into in the pleadings, and into which it was unnecessary to enter, not being relevant to the merits,) then the right so vested in James was a right of inheritance in respect of the remaining substitutes, and it would have been necessary for Robert to expede a general service as heir of provision to James. But if, on the contrary, there was neither delivery to James, nor any thing equivalent to delivery, we are of opinion that no right vested in James, and that a service to him by Robert the younger would have been as invalid and inept as the service was which Robert expede to his grandfather.

To explain the mode in which a title ought to have been made up by Robert, and assuming that no right vested in James by delivery, it will be remembered that Walter was instituted conditionally on the failure of James and the heirs of his body. If Walter himself, therefore, who survived the entailer, had intended to complete a feudal title in his person to the estate, he ought to have proceeded, not by service, but by an action of declarator in the Court of Session against all having interest, concluding to have it found that he was conditional institute in the entail—that the condition was purified by the death of his brother James without issue, and therefore that he was entitled to take infeftment in that character. The decree of the Court in that action would have been a warrant authorizing the notary to give sasine upon the precept, without which, in consequence of the act 1693, c. 35, relative to the deduction of titles, the notary might not have been in safety to expede the infeftment. The decree, it is obvious, would not have vested the right to the precept in Walter, for it had been previously vested by the grant itself; but the decree would have furnished the notary with evidence of the fact, which it was incumbent on him to state in the instrument of sasine. On Walter's death, without completing a title, his son Robert in like manner ought to have obtained decree, that the right had vested in his father by his survivance of the entailer, and the failure of James and his issue; and he ought then to have expede a general service as heir of provision to Walter, which would have put him in right of the procuratory and precept contained in the entail. Other modes of making up a title might have been followed, but what has been stated we consider to be the most correct.

If the subject appears to be attended with any difficulty, it arises from the following circumstances:—A practice, not very correct, but sometimes conve-

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nient, has prevailed, of using a service, not as the form of transmitting a right from the dead to the living, its primary and proper purpose, but as a substitute for a declaratory action to ascertain facts relative to the succession by the cognition of an inquest, instead of the decree of a Court. It is to this that Lord Kilkerran alludes in reporting the case of Gordon of Carlton. The destination was to the male issue of James Gordon, the entailer; whom failing, to John Gordon and his heirs-male; whom failing, to Nathaniel Gordon;—and John Gordon, the conditional institute, having predeceased the entailer, who left no male issue, it was held that a service to him by Nathaniel Gordon, the next conditional institute who survived the entailer, was inept; for, as the reporter rightly observes, there was plainly no right in John which could be carried by service. But Nathaniel served to the entailer, and that was held sufficient — not certainly because the service transmitted any right from the entailer to Nathaniel, but because it afforded evidence that both the entailer and John Gordon had died without male issue, and consequently that the conditional institution in favour of Nathaniel had taken effect. On the same footing, if Walter Colquhoun, in the present case, being the second son of the entailer, had served to his father, it might have been considered as equivalent to a decree, that his elder brother James and his issue had failed before the entailer, and therefore that he was in titulo. But Walter having died without any proceeding of this kind, it was incompetent for his son Robert to serve to the entailer, because it was incumbent on him first to establish by decree that the right had vested in Walter,—and, secondly, to take it out of Walter's hæreditas jacens by service to him.

This subject has also been perplexed by a doctrine maintained in the Case for the respondent, and which at one time received some countenance in practice—namely, that a disposition not delivered to the grantee, or for his behoof, vested a right in him, even in the granter's lifetime, which required to be taken up by service, though he predeceased the granter. We think that this doctrine is not consistent with legal principle, and that it would lead to anomalous and mischievous consequences. It assumes a right to be vested, which the grantee has not accepted, and which he has the power to repudiate—of which he may be absolutely ignorant, which may infer burdens he would never consent to undertake, and which confessedly can neither be alienated by himself, nor attached by his creditors. Neither the case of Lord Strathnaver, nor that of Campbell, which the respondent quotes, can be held as precedents in point; for in both, the argument that the service to the predeceasing institute was valid, was maintained with this alternative, that, assuming it to be otherwise, the right of the next member of tailzie as conditional institute (or creditor as it was termed) vested without a service at all; and the judgment of the Court in neither case distinguishes on which ground it proceeds. In Lord Strathnaver's case, Kilkerran, a counsel in the cause, mentions in his argument that the service was held to have been properly expede; but Kames, in reporting the decision, represents it as a case of conditional institution. On the other hand, in Campbell's case, from the terms of the disposition, the service, which was in the character of heir-male, and not of heir of provision, was clearly equivalent to decree of declarator that the condition of the institution had been purified, and as such it is expressly relied upon by the party.

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But although those two decisions, which are ambiguous, had been directly in point, they never could have outweighed the mass of precedent and authority on the other side, part of which is quoted in the argument in M'Kenzie v. M'Kenzie, Nov. 24. 1818, and much more could easily be adduced.

But it is proper to repeat, that our opinion with regard to the validity of a service by Robert Colquhoun to his uncle James is given only in consequence of the terms of the remit by the House of Lords. It cannot in any way affect the question at issue between the parties in this cause.

When this opinion was returned, the cause was again advised by the First Division, and

Lord Balgray delivered the unanimous opinion of that Division:—The question remitted for us to consider is, "Whether, according to our law and practice, the service of the 21st of August 1806 by Robert Colquhoun of Camstraddan, as heir of tailzie and provision to his grandfather Robert Colquhoun, was a valid service; or whether such service should have been to James Colquhoun, the institute in the said entail, who predeceased his father, the granter thereof, or to any other and what person?" In the law of conveyancing, this is a most important question; and if it be meant to regulate the making up of titles to heritable property in future times, it would require a most extensive and accurate inquiry into practice. In the present case, its determination is of little importance, as the judgment of the Court is now irrevocable,* and a res judicata; and, of course, whatever may be the opinion of the Court on the question, it can only be a hypothetical opinion, declaring, somewhat anomalously, what should be the law and practice. If such be so meant, then I humbly think that the service of 21st August 1806 was not a valid service, and that the service should have been to James Colquhoun, the institute in the entail, although he predeceased his father, the granter thereof, and that it should not have been to any other person.

Before assigning the reasons for such an opinion, it is proper to premise, that if there existed no peculiarities in the conveyance of heritable property according to the feudal form, and if the transmission of such from the dead to the living were open to the regulation of the principles of general law, the question would assume a very different aspect. If our feudal conveyances were permitted by the law to assume the nature of testamentary deeds, then predeceasing disponees would be held as non-existing persons, and so opening the way to those who followed them, and existing as conditional institutes. But this is not the form of our feudal conveyances. All such grants must be executed in words de præsenti, and are understood to be complete the day they are dated. It is that consideration which induces me to think that the service should have been to the institute. 1. Although Robert Colquhoun, the grandfather, died last vest as of fee in the feudal estate, it never was vested in him on this entail. 2. Although, in this entail, this Robert Colquhoun, the granter of it, reserved his own liferent of this feudal estate, and power to sell &c., yet, by the dispositive and governing clause of this deed, he disponed

* In the relative action of reduction.

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the estate, per verba de præsenti, to James Colquhoun nominatim, with procuratory of resignation and precept of sasine for vesting this feudal estate directly in this James Colquhoun, nominatim disponee. 3. Every disposition of feudal estate a habente potestatem to a nominatim disponee, per verba de præsenti, does in law convey to that disponee a legal estate, which may lawfully be vested in such disponee by immediate infeftment, if the disposition be delivered. Although the disposition be not delivered during the life of the granter, he is nevertheless presumed in law to have intended and done what he declares himself, by his own complete and uncancelled deed, to have done; and this a fortiori, if in that deed he has dispensed with the delivery of the same. 4. The nominatim disponee, James Colquhoun, being alive at the date of the deed, did thereby immediately acquire a legal estate, which might have been legally inherited by the heirs of his body, if he had died on the morrow, leaving an heir of his body; and such heir might have been legally and effectually served heir of tailzie and provision to this his immediate ancestor James Colquhoun, and thereby would have been entitled to the legal estate disponed to James by this deed, and to the therein contained procuratory and precept, and thereon he might have been lawfully infeft. (See 1693, c. 35.) 5. To say that the fee remained in Robert Colquhoun, the tailzier, is merely to say that his infeftment of fee remained the last infeftment, because none had yet followed on his procuratory or precept, and he remained in the dominion of the estate by not delivering his dispositive deed. But all this is nothing to the purpose in the question of making up the feudal title, under this dispositive deed, after his death. The quality of his right is not at all in question. 6. Any service to Walter Colquhoun, or to any other substitute as heir of tailzie and provision, would have been inept and useless. Such a service would not have constituted legal certainty that the institute James Colquhoun, and the heirs whatsoever of his body, had failed. The only legal certainty that this James, and the heirs whatsoever of his body, had failed, was by service as heir of tailzie and provision to this James. A service as heir of tailzie and provision to Robert Colquhoun, the tailzier, never could be a title to the unexecuted procuratory and precept in this tailzier's own deed. He had not disponed to himself, nor had he granted any procuratory or precept for infefting himself. Either this his deed was of some legal effect, or of none. If of none, there is an end of the whole case on both sides, and the fee-simple title made up must be good. But if this deed of the tailzier was of any legal effect, it was a disposition, procuratory, and precept for infefting James Colquhoun, the nominatim disponee alive at the date of this deed, and, failing him, the heirs of his body.

Suppose that this James had left an only child, or eldest son, therefore the heir of this James's body, could this status, or quality of relation of this child to this James, ever be proved, or be of legal certainty, by service of this child as heir of tailzie and provision to Robert Colquhoun, the tailzier? Most assuredly not. Conveyancers never heard of a declarator of a nominatim disponee or institute having failed. Such a practice never has existed; and such new form of procedure ought never to be resorted to, and is dangerous, as it would tend to perplex and unsettle land-rights. The legal answer to such procedure would be, "The party must produce the legal certainty that the

predecessor died at the faith and peace of the king; and this can only be done by the verdict and service as a brieve in due form of law. For aught that appears, the nominatim disponee may have died attainted of high treason, or he may be still alive." In short, the law believes a service, and believes nothing else in such cases; and the law bestows peculiar privileges on it. It will not do to say, that, in the proof to the inquest on the service of the substitute as heir to the tailzier, the substitute may bring proof that the institute is dead. Any such proof, supposing it admissible, would not appear on the retour, or, if it did, it would only be obiter or incidental. Still the service would not be to the institute or nominatim disponee, but to the tailzier or disponer, and never could be a mid-couple to take up the open procuratory and precept according to the act 1693, c. 35, nor to take up any title or right whatsoever.

The process of declarator is a most useful proceeding in the law of Scotland, particularly for ascertaining the right of parties under complicated settlements and manifold titles; but that process never has been used, nor ought to be used, nor can be used, as a substitute for a service, where such service is the legal mode of transferring the right. The general service was hitherto used and resorted to for that end, and was useful in a declaratory way, without the least intention of taking up or transmitting any thing. In this point of view, the judgment in the case of Ramsay v. Sir Alexander Cochrane is to be lamented. It is the more to be regretted, as there is no record of general services; and at this time, since that judgment, no conveyancer, however accurate, or however careful, can tell whether he has made up a correct title for his client.

This is a feudal question, not one of mere general law, and it relates to the transmission of heritable property according to the peculiarities of the law of Scotland, and ought to be considered with the greatest attention. In such matters, whatever tends to unhinge long-established form and usage, is constantly attended with dangerous consequences. The case of Lord Strathnaver I consider of great authority; and I look upon the law, as laid down by Lord Arniston in his paper, as correct.*

The doubt which has arisen in another place seems to have been, "whether any legal estate could be constituted or conveyed to the institute by the deed in question, he having predeceased the granter, the tailzier; and consequently, whether there could be any legal estate to be taken by service as heir to the institute." But, with great deference, there was constituted and conveyed to the institute by his deed the legal estate of fee, legally capable of being feudally vested by infeftment, although qualified with the reservation of the granter's liferent, and of power to sell, &c. And the legal estate, thus constituted and conveyed to this institute, might be taken up by service as heir to the institute; and such service was the only legal certainty that the institute had failed—that is, had died; and that thus the open procuratory and precept had become transmissible according to the act 1693, c. 35.

In this question, it is no less to be borne in mind that all dispositions, or deeds conveying heritable rights, must be conceived in words de præsenti, and

* One of the cases quoted by the suspender, along with a pleading by Mr. R. Dundas, afterwards Lord Arniston.

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are full and complete deeds from the date of execution, whatever qualities or conditions they may contain. Again, by the practice of our law, it should also be remembered, that where various persons have various and different rights, the one having the principal or catholic right is understood, and justly so, to be custodier for the whole. A liferenter, particularly one by reservation, as the entailer remained after executing the deed of entail, keeps the whole for the fiar. As it stands, the question is merely hypothetical, and can be intended merely as a declarator of the law in future. But as it may have a great influence, prospectively, on Scottish conveyancing, it is important that our opinions should be promulgated.

His Lordship further stated that he expressly dissented from some of the principles laid down by the consulted Judges.

Jameson for Suspender.—I understand that no point is intended to be decided, except that the general service as heir of entail, which Robert Colquhoun junior expede in 1806 to his grandfather the entailer, was a bad service; and that the proposed judgment does not involve the question whether the service as heir of entail ought to have been to the institute James.

Lord President.—Certainly not. In compliance with the remit from the House of Lords, the Court have taken the opinions of the other Judges on the questions there set forth. We have also delivered our own opinion on these points; and in further compliance with the same remit, which directs us thereafter to proceed as may be just, we adhere to our former judgment, and refrain from deciding a separate question, which, in the opinion of the whole Judges, is unnecessary to the final and complete disposal of this cause.

The Court then pronounced this interlocutor:—"Having advised the Cases &c., with the opinions of the consulted Judges &c., of new repel the reasons of suspension, find the letters orderly proceeded, and decern; find no expenses due to either party under the remit from the House of Lords."

Suspender's Authorities.—See ante, VII. 200.

Charger's Authorities.—See ibid.; Lord Strathnaver, Feb. 2. 1728, (15373), and printed papers in the cause; Gordon, Nov. 14. 1749, (15384); Campbells, Nov. 23. 1770, (14949); Bailley, Feb. 23. 1809, (F. C.); Dyke, July 3. 1813, (F. C.); Russell and Others, Jan. 31. 1792, (10300); Douglas, Feb. 22. 1765, (15616.)

D. Fisher, S. S. C.—A. Scot, W. S.—Agents.

No. 466.

William Young and Co., Raisers.—*D. F. Hope—Baillie.*

P. and A. Thomson and Others, Claimants.—*Skene—J. W. Hay.*

Tutor and Curator—Foreign—Discharge.—An English guardian cannot discharge a Scotch heritable bond of minors domiciled in England.

July 8. 1831.

2d Division. Lord Medwyn. T.

Young and Co. became the purchasers of part of the sequestrated estate of Stuart of Dunearn, over which there was an heritable bond for £3800, on which infeftment had passed, granted by Stuart "to Mr. Robert Thomson, and Mrs. Charlotte Macsparran Thomson his wife, in joint fee and liferent use only, and to Paget Thomson and Alexander

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Thomson, the second and third sons of the said Robert Thomson and Mrs. Charlotte Macsparran Thomson, equally between them, and to their heirs and assignees whomsoever in fee." Thomson and his family thereafter went to reside in England, where he died, having appointed Mrs. Thomson guardian to their children, who were minors. Young and Co., with a view to obtain an effectual discharge, raised a multiplepoinding as to the price, in which a claim was lodged for Paget and Alexander Thomson, along with Mrs. Thomson, for the amount of the heritable bond; and they offered a discharge to be executed by Mrs. Thomson for her own liferent interest, and as guardian to her sons. The sufficiency of this discharge being questioned, a remit to Mr. Cranstoun, W. S., was followed by a report from that gentleman, that "in respect of the points of English law and practice which are held to enter into this case," he was unable to decide.

Thereafter a joint Case was prepared for the opinion of English counsel on the following queries:—1. "Whether, according to the law and practice of England, Mrs. Thomson, the guardian, has power to grant a legal and effectual discharge for the money lent in the name and for behoof of the minors,—that money being secured in lands in Scotland, in virtue of an heritable bond and disposition completed according to all the solemnities required by the law of that country for the acquisition and transference of heritable or real estate? 2. Whether the minors, or either of them, ought to concur in and subscribe the discharge along with their guardian?

The Lord Ordinary remitted to Mr. John Campbell, who gave this opinion:—"1. I am of opinion, that according to the law and practice of England, Mrs. Thomson has no authority, as guardian, to grant the required discharge. By the common law of England, where minors are mortgagees, no effectual discharge can be given during their minority. To remedy this inconvenience, several statutes have passed; the most recent of which is 2. Geo. IV. and 1. Wm. IV. c. 60, by which the mortgager may pay the money into the Court of Chancery, and the minors may reconvey the estate, and give a discharge under the directions of the Lord Chancellor. 2. The act of the minors, in subscribing the discharge without the authority of any statute, would in England be treated as a mere nullity. With the most profound and sincere respect for the learned Judge by whose order I have the honour to be consulted upon this occasion, it seems to me that the discharge must depend entirely upon the law of Scotland—the lex loci rei sitæ."

The Lord Ordinary, on considering this opinion, pronounced the following interlocutor, adding the subjoined note:*—"Finds that Mrs. Thom-

* "NOTE.—The Lord Ordinary wishes that the difficulty which had occurred as to the discharge by the heritable creditor had been stated to him, as it seems to him that some expense and delay might have been thereby saved. But both the remits to Mr.

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son being duly appointed guardian to her sons Paget and Alexander by a deed valid according to the law of the domicile of her husband, her discharge, along with her son Paget, as taking burden upon her for her said son, and also for Alexander, who is still in pupillarity, as well as for her own interest as liferentrix, will be a valid discharge of the bond and infeftment in question; and, on such discharge being delivered executed, ordains payment to be made of the sum due under the said bond out of the fund in medio."

On advising a reclaiming note for Young and Co., the Court expressed a doubt as to whether the appointment of a guardian in England inferred powers equivalent to these of tutors and curators in Scotland, and ordered Cases.

Thomson maintained that the appointment of an English guardian conferred powers sufficiently analogous to the curatorial office in Scotland to enable Mrs. Thomson to grant a valid discharge.

Young and Co. contended that there was no such analogy; that even the nomination of a curator in Scotland did not ipso facto constitute the powers; that the party must, under the act 1672, make up inventories—an obligation which Mrs. Thomson did not pretend to fulfil; and, without that being done, the purchasers were not in safety to pay to her.

Before these Cases were advised, the parties came to an agreement as to the appointment of a factor loco tutoris to the children; but the Court

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Cranstoun and to Mr. Campbell were made upon a statement from the Bar that such was the proper course to follow, without much if any discussion; for it appears to the Lord Ordinary that our own law must determine what is the proper discharge of an heritable bond and infeftment, and that in this case it was necessary or proper to resort to the law of England, only to say whether, by the deed of settlement of 5th November 1828, Mrs. Thomson was duly constituted guardian of her two sons Paget and Alexander, the fiars of the bond. It seems nothing to the purpose that, as would appear from Mr. Campbell's opinion, a guardian cannot in England grant a discharge of a mortgage, if a tutor in Scotland may validly receive payment, and grant a discharge of an heritable debt which the debtor wishes to pay up. That such a discharge would be good to the debtor, it is presumed, will not be disputed; and it is quite possible that a contract valid according to the lex loci may have different effects, sometimes greater and sometimes less, if sued on in this country, than it would have had in the country where it was entered into. Upon this principle the celebrated marriage cases were decided. See also Lang v. Weir, Dec. 6. 1821, and other cases, such as those to which a foreign prescription applies, or where, by the removal of the defender to another country to which the prescription of the locus contractus does not extend, it is held not to apply. See also Erak. 3. 2. 40. and 41. Hence, as I presume there is no dispute that Mrs. Thomson, by her husband's settlement, has been duly appointed guardian to her two sons, it seems to me that she has all the powers she would have had, if the settlement had been executed when the parties were domiciled in this country, and had nominated her tutrix and curatrix; and that she can grant a valid discharge, in concurrence with her son Paget, who is above pupillarity, for his interest in the bond, and in her own name alone for her son Alexander, who is still in pupillarity; and that such discharge will be effectual to the debtor."

recalled the Lord Ordinary's interlocutor, as they were of opinion that the discharge by the English guardian would not be sufficient. No. 466. July 8. 1831. Young and Co. v. Thomsons.

D. Fisher, S. S. C.—J. Wotherspoon, W. S.—Agents.

William Miller, Petitioner.—*Cuninghame.*
Ann M'Lean, Respondent.—*J. Anderson.*

No. 467. July 9. 1831. Miller v. M'Lean.

Arrestment.—Circumstances in which arrestments used on the dependence of an action concluding for £500 of damages, and £200 of expenses, were loosed on caution for £200.

Ann M'Lean raised an action of damages against William Miller, alleging that he had made an assault upon her, with intent to perpetrate a rape. She concluded for £500 of damages, and £200 of expenses. She had formerly complained to the procurator-fiscal, who raised a criminal libel against Miller, and the latter had forfeited his bail-bond, but had since returned to the country. He petitioned for letters of loosing arrestment, alleging the action to be unfounded and malicious. July 9. 1831. 1st Division. Ld. Moncreiff. Bill-Chamber.

The Lord Ordinary passed the bill on caution for £500, which the Court reduced to £200.

Lord President.—We must keep in view that not only damages, but expenses also, may be allowed under this summons. We cannot make the caution less than £200, but I think it should not exceed that sum.

A. P. Henderson,—J. M'Gill,—Agents.

Alexander Buie, Pursuer.—*H. J. Robertson.*
Lady Gordon, Defender.—*D. F. Hope—Sandford.*
Sir James Gordon, Defender.—*More.*

No. 468. July 9. 1831. Buie v. Lady Gordon &c.

Husband and Wife.—1.—Held that, after a husband had prohibited a vintner from making furnishings to his wife, he could not be liable for articles not necessary for the maintenance of herself and family according to his fortune.—2.—Question how far the separate peculium of the lady of a Baronet in embarrassed circumstances could be subjected for chaise-hires, wines, &c. furnished by a vintner to her order.

This was the sequel of the case reported ante, V. 464, (which see.) The Court had then found Sir James Gordon liable for such furnishings, subsequent to the 1st of February 1824, as were necessary for the maintenance of Lady Gordon and her family according to her husband's rank and fortune, and remitted to the Lord Ordinary to hear parties as to what furnishings should be laid on the separate peculium of Lady Gordon according to this principle. The account of the pursuer, a vintner, consisted chiefly of chaise-hires, dinners, wines, and spirits. July 9. 1831. 1st Division. Lord Newton. D.

The Lord Ordinary found "that Sir James Gordon has failed to show that the articles of the pursuer's account, contracted subsequent to the 1st of February 1824, were not necessary for the maintenance of Lady Gordon and his family, considering his rank and fortune, and therefore

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found him liable in payment of the same, under deduction of the sum of ten pounds, as an overcharge on the price of wine not used in the inn, but carried to Letterfourrie; but found her entitled to no expenses."*

Sir James Gordon reclaimed on the merits,—Lady Gordon on the point of expenses; and the pursuer Buie reclaimed, so as to keep his claim open against Lady Gordon, if the Court should assoilzie her husband.

Lord President.—The husband of Lady Gordon is in very embarrassed circumstances. For her accommodation he gave up the use of Letterfourie house, and there her Ladyship is continually incurring fresh expense for chaise-hires; and a considerable consumption of claret and other wines takes place, conform to orders made by her. The Lord Ordinary thinks that her rank and station in society prevent him from adjudging these expenses to be unnecessary. But her husband's fortune must also be taken into account, and it was so by the terms of our former remit. Now Sir James appears to possess only about £80 per annum of free income, and her Ladyship has above £200 of pin-money; therefore I think the Lord Ordinary has gone too far in allowing this account against the husband; and instead of going over the items of the account here, I would propose that a new remit should be made to his Lordship, informing him generally of the view taken by the Court, and requiring him to remodel his interlocutor accordingly. I would observe, at the same time, that when I consider the relative incomes of the parties, I incline to hold her Ladyship's separate annuity as liable for her own individual maintenance.

The Court then "altered the interlocutor so far, and found that certain of the articles in the account libelled appear not necessary for the maintenance of Lady Gordon and her family according to her husband's fortune, and that for such unnecessary articles Sir James Gordon cannot be held liable; remitted to the Lord Ordinary to ascertain the ex-

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* "Note.—The Lord Ordinary has felt no small difficulty in this case, from the matter at issue being in a great measure discretionary. It is not alleged that Lady Gordon was supplied with money for the maintenance of the family; but it is averred that she had fruit and vegetables from the garden, butcher meat, poultry from the farm, and access to a well-stocked cellar, of which she made liberal use. She denies all this; but the two first articles seem immaterial in the present question, as there are no charges in the account for fruit or vegetables, and the butcher meat for provisions, sent to the house by the pursuer, amounts to but a trifle. As to the cellar, it is not credible, that if Lady Gordon had had free access to wine there, she would have ordered it to be sent from an inn. There is, no doubt, a large sum charged for chaise-hires; but as Lady Gordon appears to have had no carriage kept for her, and no means of visiting or travelling but in post-chaises, the Lord Ordinary cannot pronounce it unnecessary, considering her rank and station in society. The expense of entertainment at the inn seems also very large; but this seems to have been occasioned, not so much by Lady Gordon, as by other members of the family, for whom she cannot be held liable. The family might probably—and considering Sir James's embarrassments, perhaps, should—have been conducted with more economy; at same time the Lord Ordinary does not see sufficient ground either for throwing a part of the expense on her Ladyship, or for refusing the pursuer's claim for payment of it."

tent of the articles of this description, and to proceed further in this cause as to his Lordship shall seem just,—reserving all question of expenses."

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MACKENZIE and INNES, W. S.—J. MORISON, W. S.—D. FISHER, S. S. C.—Agents.

MRS. READ, Suspender.—*H. J. Robertson.*
ANDREW STORIE (RUSSELL'S TRUSTEE), Charger.—*Clephane.*

No. 469.

July 9. 1731.
Anderson v. Storrie.

Sale—Warrandice.—The private trustee of a party who was rendered bankrupt within 60 days of the trust-conveyance, having made a bona fide sale of trust-heritage which was free of burden; but it being alleged that all the creditors did not concur in the trust—Held that the purchaser, being offered warrandice against the truster absolutely, against the trustee from fact and deed, and against the creditors to the extent of the portions of the price drawn by them respectively, was entitled to no other warrandice.

June 19. 1831.

1ST DIVISION.
Bill-Chamber.
Ld. Moncreiff.

MR. RUSSELL stood infeft in a house in Ainslie place, on which there was a real burden of £1500. He became insolvent, and executed a private trust-deed for behoof of his creditors. Within sixty days thereafter, he was rendered legally bankrupt. The trustee took infeftment in the house, and paid off the debt affecting it, after a renunciation of the security was recorded. Having sold the house, at a price of £2600, to Mrs. Read, she presented a bill of suspension as of a threatened charge for the price, contending that she was entitled to receive warrandice from the trustee against his own fact and deed, and absolute warrandice from the creditors who concurred in the trust, (some creditors, she alleged, not having concurred); that such warrandice was the more necessary, because £1500 of the price would be applied to relieve the trustee for paying the heritable debts; and as that debt had been discharged, instead of being assigned to her, the warrandice of the personal creditors would only cover a small sum, if it was limited to the balance of the price as received by them. The trustee objected, that he could only bind the creditors to the extent of the respective sums of the price drawn by them, and himself in warrandice from fact and deed, and the truster in absolute warrandice; all which he was ready to do. He alleged that the whole creditors had concurred. In these circumstances, as the house was free of all burdens, and sold by him for a fair price instantly paid, the title to it, as acquired by the purchaser, was unchallengeable.

The Lord Ordinary, at the request of the parties, ordered Cases to the Court.*

LORD PRESIDENT.—There are no grounds of suspension here. The trans-

* "NOTE.—It appears to the Lord Ordinary that the warrandice offered is all that the complainer has a right to demand, and that she really incurs no hazard in accepting of it; but as the parties are desirous of obtaining an immediate judgment of the Court, he reports the cause at their mutual request."

No. 469. July 9. 1831. Anderson v. Storrie. M'Dougall v. His Creditors. Hamilton v. Cuthill &c.

action is a bonâ fide sale, in which the heritable subject is disponed for a price instantly paid. That is good beyond the power of reduction by any creditor.

The other Judges concurred.

THE COURT "refused the bill, and found the complainer liable in expenses."

Suspender's Authority.—1. Bell, 346, note 3.
Charger's Authority.—Forbes's Trustees, June 15. 1822, (ante, I. 535.)

PEARSON, WILKIE, and ROBERTSON, W. S.—J. KEMMACK, W. S.—Agents.

No. 470. July 9. 1831. 1st Division.

LIEUTENANT M'DOUGALL, Pursuer.—*M'Neill.*
HIS CREDITORS, Defenders.—*Robertson.*

Cessio.—A Lieutenant whose half-pay amounted to £82 per annum, whose debts were £482, and who had one child to support, having brought a process of cessio, the Court found him entitled to the benefit of it, on assigning £30 per annum in favour of his creditors.

A. M'NEILL, W. S.—J. STUART, S. S. C.—Agents.

No. 471. July 9. 1831. 2d Division. Ld. Moncreiff. Bill-Chamber. T.

ROBERT HAMILTON, Suspender.—*J. Anderson.*
MRS. CUTHILL and TRUSTEES, Chargers.—*Thomson.*

Landlord and Tenant—Retention—Inhibition.—A tenant having used inhibition upon an action of damages against his landlord; and the inhibition being recalled on caution for a limited sum in addition to certain rents retained by the tenant; but the landlord not having availed himself of this recal—Held, in an action of removing, under A. S. 1756, founded on the tenant being more than one year's rent in arrear, that the rents retained by him might be taken into consideration, so as to bring the case under the A. S.

HAMILTON, tenant in a farm belonging to Mrs. Cuthill, raised, in 1829, an action of damages against her and her trustees, concluding for £4000, and he used inhibition upon the dependence thereof. Cuthill's trustees then presented a petition for recal of this inhibition, in which they pointed out, as part of the security held by him, a considerable amount of arrears of rent which he was retaining against them. Upon this petition, the Court recalled the inhibition on caution for £200, "in addition to the sums retained by him." The trustees did nothing under this interlocutor, the inhibition remained undischarged, and Hamilton allowed his action of damages to sleep.

In March 1830, the trustees raised a process before the Sheriff of Lanarkshire under the A. S. 1756 against Hamilton, setting forth that he was more than a year's rent in arrear, and concluding that he should be ordained to find caution, or to remove,—and concluding also for removal, on the ground that he had no written lease. This last matter was already the subject of discussion in an action depending before Lord Medwyn; and as to the other ground of removal, Hamilton pleaded, that as the arrear of a full year's rent was only made out by taking into consideration part of

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the arrears allowed to be retained by the interlocutor recalling the inhibition, there were no termini habiles for founding an application on the A. S. To this it was answered, that having the security of the inhibition, (which had not been scored,) he could not insist on the arrears being struck out of view in estimating the amount due by him. The Sheriff having ordained him to find caution, and on his failure decerned in the removing, he presented a bill of suspension, which the Lord Ordinary passed, adding the subjoined note.*

On a reclaiming note, however, the Court altered, and refused the bill.

Lord Glenlee.—At first I thought that the interlocutor was unexceptionable; but then I supposed the recal of the inhibition to have been acted upon, that caution had been found, and the inhibition scored, in terms of that interlocutor; but that has not been done, and I think the tenant's plea of retention cannot be listened to. We never could find him entitled to wait the result of his action of damages keeping up his rent all the time. The A. S. would not sanction such a plea.

Lord Cringletie.—I agree. Suppose this tenant followed out his action, and got no damages after all, is the landlord to have no security for his rent? Even upon the supposition that the inhibition were recalled, I was inclined to think the landlord entitled to security, in case damages should not be found due.

Lord Justice-Clerk.—I am of the same opinion. It appears to me that the Lord Ordinary proceeded upon the view that the inhibition was discharged.

John M'Gill, S. S. C.—J. Mowbray and A. Howden, W. S.—Agents.

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* "The chargers insist for decree of removing on two grounds:—1. That the complainer has no lease; but the very question, whether he has a lease or not is sub judice in the declarator before Lord Medwyn. 2. That he was more than a year's rent in arrear at the date of the summons of removing; but in March 1830 there was not a year's rent in arrear, unless the large arrear which he was retaining at the date of the judgment recalling the interlocutor, or some part of that arrear, were taken into account. The Lord Ordinary cannot see, therefore, how the chargers could expect that he could refuse this bill consistently with his former judgment. No doubt the complainer is not entitled both to retain the arrears, and to continue to possess the farm without paying rent; and if the complainers (chargers) had not brought their action till a year's rent was due, over and above what he was retaining at the date of the interlocutor of the Court, their argument would have been invincible; but as the case stands, he can give no weight to it until he shall be informed by the Court that they put a different construction on their own judgment from that which he is obliged to adopt."

No. 472.

July 9. 1831. Orr v. Heritors and Kirk-session of Glassford.

ROBERT ORR, Advocator.—*Miller—A. Dunlop.*
HERITORS and KIRK-SESSION of GLASSFORD, Respondents.—*R. Bell.*

Poor—Jurisdiction—Process.—1.—The Sheriff has jurisdiction to entertain an application by a third party, in whose hands a child has been left destitute by its parents, to have the Heritors and Kirk-session ordained to take it off his hands, or, failing their doing so, to pay a sufficient aliment.—2.—Circumstances in which the Heritors and Kirk-session were held bound to have instantly taken a child so left;—and,—3.—Action having been raised against the minister and certain heritors of a parish, as representing the Heritors and Kirk-session, and the Heritors and Kirk-session having appeared as parties, and litigated the cause—Held that they were not afterwards entitled to object that they had not been properly called.

July 9. 1831.

2D DIVISION. Ld. Mackenzie. F.

IN the year 1824, an infant child, named Robert Torrance, was placed by his father James Torrance to board with the advocator Orr, a weaver in Westquarter of Glassford. Shortly after this, James Torrance died; and his wife, the mother of the child, having previously deserted him, the child was left destitute with Orr, who thereupon applied to the Heritors and Kirk-session of the parish of Glassford to have it taken off his hands, or an allowance made for its support. The Heritors and Kirk-session having paid no attention to his application, he, in October 1824, presented a petition to the Sheriff of Lanarkshire, narrating the circumstances, and setting forth that the child was born in the parish of Glassford; and also that James Torrance, the father, was a native of, and residenter in the parish; and praying the Sheriff to grant warrant of service on two residing heritors, the minister, an elder, and the session-clerk and collector, "as representing the Heritors and Kirk-session," and thereafter to ordain them "to take the said child off the petitioner's hands, and thereby relieve him of its support; and failing their doing so, find them liable to the petitioner in such a sum of aliment for said child, as to your Lordship may appear proper;" or, alternatively, to ordain the Heritors and Kirk-session "to meet to take the above case, and the petition which has been presented to them relative thereto, under their consideration." Answers were given in to this petition, in which no objection was made to the Heritors and Kirk-session not being called as a body, and in which the individuals called took burden on them for the other heritors and members of session.

In the pleadings which followed in the Inferior Court, the Heritors and Kirk-session did not deny that the child had been born in the parish, nor did they dispute that the father had resided more than three years in the parish, though they alleged that his residence had not been industrial, so as to gain for him a settlement; but they chiefly defended themselves on the plea that the Sheriff had no jurisdiction in the subject-matter of the petition, which they maintained was, in the first instance, exclusively under the cognizance of the Heritors and Kirk-session, whose judgment could only be reviewed by the Supreme Court. The Sheriff, on the 7th of January 1825, pronounced the following interlocutor:—"In respect that the respondents do not deny that the infant mentioned in the

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pleadings was born in the parish of Glassford, and is unprovided for, and that the mother absconded from that parish after his birth, before further answer, allows the petitioner to prove three years industrial residence of the father there immediately previous to his decease, exclusive of the period he was resident in America, and of the time he was on his passage to that country, and from thence to Scotland, and that he died within three years of the commencement of this process."

Orr reclaimed against this interlocutor in so far as it limited the proof of James Torrance's residence to the three years 'immediately' preceding his decease, on the ground that a settlement acquired by three years residence at any former period would subsist till another settlement had been acquired, notwithstanding an intervening lapse of time; while the Heritors and Kirk-session reclaimed, on the ground that their plea as to want of jurisdiction had not been sustained, but without objecting to that part of the interlocutor setting forth that they did not deny that the child had been born in the parish of Glassford. The Sheriff having refused the reclaiming petitions of both parties, the Heritors and Kirk-session brought an advocation on the point of jurisdiction. The letters of advocation bore to be at the instance of the individuals called in the original petition for themselves, and the other heritors and members of session; and these and the other papers subsequently given in were titled as for "the Heritors and Kirk-session of the parish of Glassford." In this process the Lord Ordinary remitted simpliciter,—"in respect that the petition in this case to the Sheriff was not at the instance of the pauper himself, but at the instance of the respondent, who, it is admitted on all hands, was not bound to aliment him, and was brought against the parish of Glassford for relief of the burden of maintaining the child; and that the jurisdiction of the Sheriff has always been sustained in such cases of relief, and was acknowledged by the Court in the case of the Abbey Parish of Paisley,—and also in respect that the Sheriff has jurisdiction to order the kirk-session to meet to consider whether a pauper is entitled to aliment or not, and consequently may take such steps as will enable him to judge whether he should order, or not, the kirk-session to meet for that purpose,—and in respect that in this instance the Sheriff has done no more than to take such measures when the advocation was brought."

The Heritors and Kirk-session then reclaimed; and the Court being equally divided as to the first of the rationes decidendi contained in the Lord Ordinary's interlocutor, recalled it as unnecessary, and adhered to the interlocutor "in so far as it remits the cause simpliciter to the Sheriff, in respect that the Sheriff has jurisdiction to order the kirk-session to meet to consider whether a pauper is entitled to aliment or not."[1]

On the cause returning to the Sheriff, he renewed his order of proof contained in the above interlocutor of 7th January 1825. Orr then

[1] See ante, V. 921.

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proceeded to adduce witnesses; but on his attempting to prove the settlement of James Torrance, the father of the child, by residence during a period antecedent to the three years 'immediately' preceding his death, this was disallowed by the Sheriff. Orr then declined leading further proof, as he could not establish continuous residence during these three particular years; and the Sheriff thereupon assoilzied the Heritors and Kirk-session, with expenses. Orr then brought an advocation, in which a record was made up,—no record having been prepared in the Inferior Court, owing to the cause having commenced prior to the passing of the Judicature Act. In this record the Heritors and Kirk-session denied, for the first time, that the child had been born in the parish of Glassford, without, however, specifying any other parish where they alleged it to have been born; and they also disputed generally that the father had a settlement in Glassford, but without specifically denying the statement of facts made by Orr as to the periods he had resided in that parish, (which, if correct, would have inferred a settlement,) or averring that he had a settlement in any other parish. They, however, alleged that the mother of the child was now resident in a neighbouring county, and that the son of James Torrance by a former marriage was in such circumstances as to enable him to support the child; and they further produced minutes of a meeting of Heritors and Kirk-session held subsequent to the Sheriff's judgment, at which they had authorized five shillings per month to be paid to Orr for the support of the boy in future, on condition of his withdrawing the present action.

The Heritors and Kirk-session then pleaded—

1. The original petition having been directed only against the minister, an elder, and two of the heritors individually, no judgment can pass under it against the body of Heritors and Kirk-session, who were the proper parties to have been called.

2. The determining on the claims of paupers has been by statute exclusively vested in the Heritors and Kirk-session, and the Sheriff can neither review their decision, nor exercise the powers committed to them as to this matter;[1] and the former judgment of the Court in this case must be considered as res judicata, fixing that his jurisdiction merely extended to the power of ordering the Heritors and Kirk-session to meet and consider the case. They, however, have done so, and awarded an allowance which they deemed sufficient; and if Orr was dissatisfied with their decision, his proper and only remedy was by an advocation of their judgment to the Supreme Court.

3. The Sheriff was perfectly justified in refusing to allow a proof beyond the limits of the final interlocutor of 7th January 1825; and

[1] Paton v. Adamson, Nov. 20. 1772, (7669 and 11154); Abbey Parish of Paisley v. Richmond, Nov. 29. 1821, (ante, I. 189.)

Orr having failed to establish the settlement of the child's father in Glassford, no claim for its support can lie against that parish; and,

4. Orr was bound, in the first instance, to have proceeded against the mother and brother of the child, before making any claim upon the parish.[1]

Orr, on the other hand, contended—

1. The Minister and resident Heritors having been called in the original petition as representing the Heritors and Kirk-session, and they having given in pleadings, taking burden on them for the Heritors and Kirk-session, who further appeared in the former advocation, no objection can now be validly stated to the form of the petition, as not having called the general body.

2. Although the Heritors and Kirk-session have alone the power of determining in the first instance on claims for support submitted to them by paupers, the present does not fall under that class of cases. It is not a claim by a pauper to be put on the roll, but a claim by a third party who has maintained a child utterly destitute, and, without dispute, a proper object of parochial support, which he was under no obligation to support, to have this child taken off his hands by the parish, bound to maintain it, or to have an adequate remuneration made to him. Claims of this description are clearly competent to the Judge Ordinary, and have long been in use to be entertained by him, whether at the instance of other parishes, or of individuals.[2] The former judgment of the Court left this point undecided, and it is still open. Then as to the allowance offered by the Heritors and Kirk-session, it was totally inadequate to remunerate Orr for the expense of maintaining the child, even if it had extended to former years, which it did not; but although the Heritors and Kirk-session may, if they can, support the child for five shillings a month when they take it off his hands, they cannot compel him, who is under no obligation whatever with reference to the child, to keep it at a rate which he considers inadequate; and he is not under any necessity of advocating from their determination, since, quoad him, that is merely the offer of a party, not the judgment of a Court having power to decide on his claims against them.

3. The child having been left destitute in the parish of Glassford afforded, per se, sufficient ground for ordaining the Heritors and Kirk-session at once to take it off the hands of a party in no respect liable to support it; and, besides, the allegation that the child was born in the parish was not disputed in the Inferior Court, and the denial now made for the first time cannot be admitted; and this necessarily established

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[1] Ettrick, Feb. 14. 1824, (ante, II. 715.) [2] Various Cases in the Dictionary, 10573, et seq.; Howie v. Blyth &c., Jan. 25. 1800, (App. v. Poor, 1); Dict. of L. J. C. Boyle in Abbey, Parish of Paisley v. Richmond, (App. to Dunlop's Parochial Law, No. 7.)

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the child's settlement, unless the Heritors and Kirk-session could have shown, what they did not attempt, that its father had a settlement elsewhere. Further—The averments as to the facts inferring a settlement on the part of the father also are not specifically denied; and at all events, if the circumstances of the child's birth, or its being left destitute in the parish, be not held sufficient to lay the burden of its support on the parish of Glassford, Orr is still entitled to be allowed a proof of settlement, unfettered by the limitations of the interlocutor of 7th January 1825, which is erroneous in limiting the proof to the three years 'immediately' preceding Torrance's death, and which, besides, was pronounced before answer; and,

4. If there are relations of the child against whom a claim of relief lies, and able to support it, which is not admitted, the Heritors and Kirk-session may make it good; but they cannot throw the burden of doing this on Orr, who is under no sort of obligation to keep the child, but was entitled to throw it over on the parish immediately on its father's death.

The Lord Ordinary pronounced this interlocutor: — "Finds that, in the circumstances of this case as appearing from the record, it was the duty of the Kirk-session of Glassford to have immediately taken the child libelled off the hands of the advocator;—that, on their refusal to do so, it was not incompetent for the advocator to apply to the Sheriff to ordain them to do this, and to pay suitable aliment to the advocator during the time they delayed to do it;—therefore advocates the cause, ordains the respondents forthwith to take the said child off the hands of the advocator, and decerns;—finds the advocator entitled to aliment for the said child, at the rate of six pounds sterling per annum, from and since the 6th day of October 1824, the date of the application to the Sheriff, payable quarterly per advance, and ay and until the child shall be taken off his hands, and decerns in the relief, and against the respondents, the Heritors and Kirk-session of Glassford, for payment of said aliment to the advocator accordingly;—finds the respondents liable to the advocator in expenses of process."

The Heritors and Kirk-session reclaimed, but the Court adhered.

R. Booc, S. S. C.—G. Mill, S. S. C.—Agents.

LORD FORBES and Others, Pursuers.—*D. F. Hope—Skene—Anderson.*
LEYS, MASSON, and Co., Defenders.—*Sol.-Gen. Cockburn—Lumsden.*

No. 473.
July 9. 1831.

Lord Forbes v. Leys, Masson, and Co.

Fishing—River—Title to Pursue.—Proprietors of salmon-fishings in a river entitled to pursue an action for removing one of several dam-dikes across the river, as an obstruction to the passage of the fish, without previously, or at the same time, challenging the others, which would still prevent the passage of the fish, although that under challenge were removed.

July 9. 1831.*

2D DIVISION. Jury Court. T.

LORD FORBES, and other proprietors of salmon-fishings in the river Don, raised an action against Leys, Masson, and Co., proprietors of certain works on that river, for the removal of a dam-dike by which they supplied their works with water, on the ground that it was injurious to their fishings by obstructing the passage of the fish up the river. Leys, Masson, and Co. pleaded in limine that the pursuers had no sufficient interest, and that they were barred by acquiescence from attempting to remove the dam-dike. The objection of want of interest was in part founded on the allegation that there were other dam-dikes on the river, which presented equal or greater obstacles to the fish than that of the defenders; but the Lord Ordinary found that the pursuers had sufficient interest to entitle them to pursue the action, and the Court adhered to his Lordship's interlocutor.

After some further procedure, the Court remitted the cause to the Jury Court, to have the following issues tried, viz. "It being admitted that in the years 1792 and 1793, the defenders, Leys, Masson, and Co., cut a canal on the north side of the river Don for the purpose of conveying water from the said river to Grandholme Haugh, where the bleachfield and manufactory of the defenders are situated, and that in the year 1805 the defenders formed a dam-dike across the said river, for the purpose of conveying water into the said canal:

"1. Whether the said canal, cut as aforesaid, is to the injury and damage of the pursuers, or of any and which of them, as proprietors of salmon-fishings in the said river?

"2. Whether the said dam-dike, formed as aforesaid, is to the injury and damage of the pursuers, or of any and which of them, as proprietors of salmon-fishings in the said river? Or,

"3. Whether the whole, or any, or which of the pursuers, or their predecessors or authors, or their commissioners, trustees, or agents duly authorized, acquiesced in the formation or continuance of the said canal? And,

"4. Whether the whole, or any, and which of the pursuers, or their predecessors or authors, or their commissioners, trustees, or agents duly authorized, acquiesced in the erection or continuance of the said dam-dike?"

* This case was accidentally omitted in its proper place, the decision having been pronounced on the 11th of March 1831.

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July 9. 1831. Lord Forbes v. Leys, Masson, and Co.

At the trial, which took place before Lord Gillies, the defenders led evidence to prove, inter alia, that lower down the river than their dam there was a cruive-dike, and further up another dam-dike, both of which were of a higher level than theirs, and would equally obstruct the passage of the fish, even if theirs were removed. With reference to this evidence, Lord Gillies charged the Jury, " that the question put in issue, and the only question they had to consider, was this—Is the dike injurious to the pursuers' fishings in the actual condition of the river and of other dikes; and not whether it would be injurious to them, if other dikes were demolished or properly regulated?"

The Jury having returned a verdict for the defenders on the first two issues, the pursuers tendered a Bill of Exceptions, in which they maintained that the Judge had erroneously directed the Jury, and that he should have directed them " that the Court of Session having already decided, by a final judgment, that the said pursuers were not bound to raise actions for removing or regulating the other obstructions in the river Don, before challenging the canal and dam-dike formed by the said defenders, the point meant to be tried by the first and second issues, and the question which the Jury had to consider under them, was, whether the said canal and dam-dike of the said defenders were injurious to the fishings of the said pursuers, without reference to the injury occasioned by the other obstructions on the river? And further, that as the cruive-dikes might be regulated at all times in terms of law, and that as the other dikes, in so far as they were encroachments injurious to the fishings of the said pursuers, might be removed or properly regulated,—and as the trial between the parties aforesaid did not depend on the objections or defences in regard to any other obstructions,—the evidence led with regard to the effects of the other obstructions on the river was irrelevant; and that the injury occasioned by them, in their present state, to the fishings of the said pursuers, ought not to be taken into the consideration of the said Jury on returning this verdict on the said issues."

On this bill being argued before the Court, their Lordships unanimously allowed the exceptions, and ordered a new trial.*

Cranstoun and Anderson, W. S.—P. Crooks, W. S.—D. Fisher, S. S. C.—Agents.

* Affirmed Sept. 7. 1831.

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12. (1.) Law-agents, in preparing an heritable security, having omitted to search the records, and the security being thereby eventually ineffectual—Held liable in reparation, notwithstanding the loan was effected among relations and co-trustees, and with every reason to confide that the lands of the borrower were not encumbered.

(2.) Where the agent's liability in reparation arises from an omission to search the records, and a search, if made, would have prevented the loan from being effected, he is only bound to replace the principal sum, with bank interest from the date when the loan was made.

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1. The House of Lords, in reversing a judgment, having remitted with instructions to allow a trial by Jury, and ordered the Jury Court "to examine the parties vivâ voce before them," the Court delayed to apply the

APPEAL (Continued).
judgment until its terms should be submitted to the House of Lords, with the view of obtaining explanation and further instruction. Stewart and Co.'s Trustee v. Stewart, Nov. 16. 1830, p. 17.

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See *Process, VII.* 2. 3. 6.—*IX.* 2.

——— EXECUTION PENDING.

1. Creditors having unsuccessfully opposed the approval of a composition-contract under a sequestration, and been found liable in expenses to the trustee and bankrupts, and in the expense of a petition and complaint against the trustee and one of the bankrupts; and the creditors having appealed—Interim execution granted, although the creditors stated that their appeal was to be speedily heard, and that they, as creditors ranked, had considerable funds in the hands of the trustee, so as to afford a security for expenses, if ultimately found due. Alexander &c. v. Robertson &c., Dec. 1. 1830, p. 97.
2. The Court refused to allow an appeal from an interlocutory judgment, finding a married woman, living separately from her husband, entitled to pursue an action of damages along with a curator ad litem. Ewing v. M'Kenzie or Cullen, Jan. 19. 1831, p. 289.
3. Decree against a tenant for rents having been appealed against, and interim execution granted — Held that the landlord was entitled to recover the rent by means of sequestration, on finding caution in terms of the judgment awarding execution. Pentland v. Booth, Feb. 25. 1831, p. 510.
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ARBITRATION.

1. Arbiters having issued notes of their opinions as to some of the points in a submission, and which they entitled "joint report and interim decree," but without pronouncing any regular decree; and having in their report devolved points of difference upon the oversman, who pronounced a decree limited to those points—Found,

(1.) That the interim decree or report was not valid as a decree-arbitral.

(2.) That the decree pronounced by the oversman, deciding only part of the matter referred, could not stand by itself. Runciman v. Craigie, May 24. 1831, p. 629.

2. Where a wife who had a claim of legitim, and her husband for his interest, entered into a submission of all questions, disputes, &c.; and the arbiters

ARBITRATION (Continued).
assoilzied, and ordained the wife and her husband to sign a discharge of the claims; and the husband did so, but the wife refused till after an imprisonment of thirty days—Held,
(1.) That the arbiters had power to order a discharge to be executed; but,
(2.) That, under the circumstances, the wife was entitled to reduce the discharge executed by her.
3. In a reduction of a decreet-arbitral, on the ground that the arbiter had decided without hearing parties, not necessary to aver corruption on his part. M'Phersons v. Ross, June 23. 1831, p. 797.
4.—(1.) Parties having submitted a cause depending in the Jury Court, and prepared for trial, as a "concluded cause"—Held that the arbiter was entitled to allow a proof.
(2.) An arbiter has power to award expenses, without any special clause to that effect in the submission. Berry and Sanderson v. Watsons, Jan. 26. 1831, p. 337.*
5. Where two executors were appointed by a settlement exempting each from liability, except for his own actual intromissions; and a count and reckoning was raised against them, concluding for exhibition of "an account of their intromissions," and for decerniture "to invest or consign the sum which shall be ascertained to be in their hands," failing which, "to make payment of £200, less or more," &c.; but not concluding to have it found that by their irregularities they had incurred a joint and several liability; and "the whole cause" having been submitted to an arbiter, who not only ascertained the balance, but decerned against the executors, as having by irregularity incurred a joint and several liability,—a bill of suspension of a charge on his decree, on the ground that the finding of joint and several liability was ultra vires, passed. Carruthers v. Hall &c., Nov. 25. 1830, p. 66.
6. Where a submission and decree-arbitral involved questions of private feeling and character, besides pecuniary claims, and contained a consent and an order for registration, and were delivered to the party assoilzied, who declined to register them—Held that the other party (who did not allege that his character was affected by the contents of the deeds, and who was offered inspection of the deeds by himself or his counsel) was not entitled to insist for registration, unless he could qualify a substantial interest to put the deeds on record. Dickson &c. v. Shirreff, Dec. 1. 1830, p. 100.
See *Contract*, 2.—*Process*, *XVI.* 13.

ARRESTMENT.
1. Circumstances in which arrestments of a minister's stipend (which was under £150) for a debt of £130 were recalled on his granting a disposition omnium bonorum, and assignation of his stipend to a trustee, to pay £30 per annum to his creditors, and the balance to himself. Brown v. Hunter, March 11. 1831, p. 578.
2.—(1.) Arrestments in the hands of debtors of a defunct, as debtors to his trust-disponees, while the debts are unconfirmed, inept.
(2.) Arrestments in the hands of "Sibbalds Brothers," and of "the individual partners of that company," do not attach funds due by "Sibbalds Brothers and Co." to the common debtor.
(3.) Question raised, but not decided, whether an arrestment "in the hands of James Ker, Esq., Manager of the Leith Bank, of the sum of

* For VII. in the report read VI.

ARRESTMENT (Continued).

£5000, more or less, due and addebted by him to the said trustees," &c., attached debts due by the Bank, or only debts due by him as an individual. Henderson's Trustees and Others, Claimants, May 20. 1831, p. 618.

3. A party incarcerated upon a decree for expenses having obtained his liberation upon consignation of the amount in the hands of the governor of the jail, and having immediately thereafter arrested the same on the dependence of an action at his instance against the charger—Found, in an action raised by the charger's agents, (who had disbursed these expenses,) that the arrestment was incompetent, and that they were entitled to recover the amount. Ellis v. Muckersie and Rose, May 12. 1831, p. 585.

4. Circumstances in which an arrestment in the hands of a cautioner, at the instance of the executor of the principal debtor, was found not entitled to compete with an onerous assignation of a decree in foro, obtained by the creditor of the principal against the cautioner. M'Gregor and Fraser v. Macandrew and Fraser, June 15. 1831, p. 742.

5. A creditor, who had arrested rents, having consented that the tenant should pay out of these rents sums necessary to enable the common debtor to obtain an entry from the superior, but requiring him to retain the subsequent rents in liquidation thereof; and a ranking and sale having been brought of the property; and the tenant having paid the subsequent rents to the judicial factor, under a guarantee to repeat them; and brought a multiplepoinding as to one half-year's rents—Held,

(1.) That the tenant ought not to have paid the subsequent rents to the factor, but should have retained them in liquidation of the sums advanced; and that the arresting creditor was entitled to be preferred to the rents, as if they remained in the tenant's hands; and,

(2.) That it was competent in the multiplepoinding to have the fund enlarged, so as to embrace these rents. Baird v. Faulds and Others, June 16. 1831, p. 754.

6. Circumstances in which arrestments used on the dependence of an action concluding for £500 of damages, and £200 of expenses, were loosed on caution for £200. Miller v. M'Lean, July 9. 1831, p. 923.

ARRESTMENT JURISDICTIONIS FUNDANDÆ CAUSA. See *Jurisdiction*, 1. 9. 12.

ASSIGNATION. See *Arrestment*, 1.—*Legacy, Special—Process, XVII.* 6.

AUDITING OF AGENTS' ACCOUNTS.

1. Fee allowed to an Edinburgh agent going to the country to precognosce witnesses preparatory to a Jury trial, and objections to counsel's fees repelled. Mackersy v. ——, Jan. 15. 1831, p. 282.

2.—(1.) Fees allowed to counsel attending a consultation preparatory to a Jury trial.

(2.) Question as to the rate of fees, and number of counsel attending a Jury trial. M'Kenzie v. Roy and Others, June 17. 1831, p. 758.

3. Question as to fees to counsel for consultation prior to raising an action. A. v. B., June 17. 1831, p. 760.

4.—(1.) Expenses of a diligence allowed, though the documents recovered did not establish the allegations sought to be proved.

(2.) Charges for an agent going to a distance to precognosce and examine havers disallowed. Stirling v. Dunn, March 8. 1831, p. 562.

5. In ordinary cases, fees are not allowed to more than two counsel in taxing an account against an adverse party; but this rule, though general, suffers exceptions in important cases. Mitchells v. Mein, May 14. 1831, p. 588.

See Hunter v. Duff's Trustees, June 21. 1831, p. 786.

See *Process, VII.*

AUDITOR'S REPORT. See *Process, VII.*

BANK.

A party having, at the request of a bank-agent, given him bills which the agent ostensibly discounted, but the party allowed him to keep the proceeds for his private accommodation; and the agent having become bankrupt—Held that although the discount of the bills was reported to the Bank, they were not liable for the money. Armstrong's Assignees v. Leith Banking Company, June 29. 1831, p. 839.

See *Payment, Indefinite,* 2.—*Process, VIII.* 1.

BANK AGENT. See *Diligence, Legal,* 8.

BANK CHEQUE. See *Stamp Act,* 1.

BANKRUPT.

1. The trustee on a sequestrated estate having admitted and duly ranked a creditor's claim, without any objection having been made, and a scheme of division conformably thereto framed, and exposed during the statutory period of a month, also without objection; not entitled thereafter, of his own accord, to withhold the dividend, and strike the claim out of the ranking, on the allegation that it had originally been admitted through his ignorance or mistake. Hamilton v. Kerr, Nov. 23. 1830, p. 40.

2.—(1.) A creditor on a sequestrated estate not allowed, after a lapse of 20 years without complaint, to insist on an investigation into the trustee's management, even although he alleged neglect to follow out special instructions of the creditors, they having all acquiesced, and now approved of the trustee's conduct.

(2.) Held entitled, however, to insist on the infliction of any special penalty imposed by the bankrupt statute, as for penal interest on sums above £50 retained in his own hands. M'Lachlan v. Likly, Nov. 23. 1830, p. 54 and 57.

3.—(1.) Incompetent for creditors on a sequestrated estate, less than one-fourth in value, to remove the trustee; but,

(2.) Competent for the Court, on the prayer of such creditors, to inflict on the trustee the penalties of the statute.

(3.) Irregularities by a trustee held not sufficient to warrant his removal, but sufficient to subject him in modified expenses; and,

(4.) Question raised, whether creditors were barred by acquiescence from complaining of irregularities of the trustee; and whether a judgment of the trustee and commissioners, appointing a sum to be retained from the dividend allotted to a creditor, was final by lapse of thirty days. Mitchells v. Mein, Dec. 2. 1830, p. 115.

4. Pending a suspension in which caution had been found, the suspender having obtained a discharge under a sequestration awarded prior to the suspension—Held that no claim lay against the suspender or his cautioner for the principal sum; but a remit made to hear as to expenses in the suspension. Boyd v. Napier, Jan. 12. 1831, p. 260.

5. Circumstances in which the Court recalled a sequestration. Wood v. Thomson, Jan. 29. 1831, p. 351.

6. A party having insured his life with an English insurance company of the nature of a mutual benefit society, which had a subordinate board of agency in Edinburgh,—not liable to sequestration as an insurance broker in Scotland. Hunter and Others v. Gardner, Feb. 3. 1831, p. 383.

7. Though the whole claims lodged in a sequestration have been paid, and the creditors have agreed to a discharge, but no judicial discharge has been obtained, a new claim may competently be presented. Fraser's Trustee v. Lyall's Trustee, Feb. 4. 1831, p. 389.

8.—(1.) A sequestration having been settled by composition where the trus

BANKRUPT (Continued).

tee had recovered no funds, his commission limited to five per cent. on the amount of composition and expenses.

(2.) Competent for a cautioner under a composition in a sequestration to open up a decree in absence against the bankrupt for the expenses of the sequestration, in order to have the amount taxed.

(3.) An account for proceedings raised against debtors to the estate, after the date of the acceptance of a composition, not exigible from the cautioner. Brownlee v. Millar, Feb. 3. 1831, p. 384.

9. The estates of a company which had carried on business at Inverness and Wick, and whose creditors were scattered over Scotland and England, being sequestrated, and there being no creditors near the chief seat of business who could act as commissioners—Objection repelled to a trustee elected by a large majority in number and value, that he resided in Glasgow, where a considerable number of the creditors also resided. Forrester v. Mackenzie, Feb. 17. 1831, p. 465.

10. A party having been assoilzied with expenses from an action raised by a bankrupt, and insisted in by the trustee,—the subsequent decree of discharge and exoneration in the sequestration qualified by a reservation of the claim for these expenses, but limited, as against the bankrupt, to the composition on any claim falling under the sequestration. Rome v. Halden, Feb. 19. 1831, p. 482.

11.—(1.) A trustee on a sequestrated estate having entered into possession of a coal lease, and been infeft in feu-rights belonging to the bankrupt; and having for many years taken the benefit of the lease and feu-rights for the use of the sequestrated estate—Held that he, and the trustees who succeeded him, were bound to fulfil the prestations to the landlord, and not entitled to abandon the contracts.

(2.) The claims of the landlord against the estate having been settled down to a certain date by a decree-arbitral—Found that the contracts were not thereby abandoned, or the landlord's future claims foreclosed. Kirkland and Sharpe v. Gibson (Wilson and Son's Trustee), May 17. 1831, p. 596.

12. A trustee on a sequestrated estate having sisted himself as a pursuer in place of the bankrupt, and agreed to refer the question judicially, with a stipulation that the successful party "should be found entitled to the expenses of process incurred by him;" and the referee having assoilzied the defender, and found him entitled to expenses—Held (waiving the general question), in terms of the reference, that the trustee was liable in full payment of the expenses incurred prior to the sequestration, and the defender was not bound to rank on the estate for, and draw merely a dividend on the amount. Cullen v. Fontaine, May 27. 1831, p. 637.

13. The estates of a party being sequestrated pending a process; and the Court, before advising certain objections pleaded by him, having ordered the trustee to be made a party, and the trustee refused to appear;—the objection repelled, with expenses. Scot v. Fisher &c., May 27. 1831, p. 645.

14. Circumstances sustained as sufficient to bring a debtor within the description of a party liable to sequestration under the Bankrupt Act. Lugton v. Molle and Trustee, May 31. 1831, p. 647.

15. A creditor, who had applied for sequestration of the estates of a bankrupt, having been involved in a litigation as to the bankrupt's liability to sequestration; but sequestration having been awarded—Held that this creditor had a claim of relief against all the other creditors who ranked on the estate, including those who had opposed the application, for pay-

BANKRUPT (Continued).
ment of the expenses incurred by him in the litigation. Cook v. Jeffrey and Others, June 2. 1831, p. 667.
16. Where a father gratuitously disponed his estate to his son, mortis causâ, under the burden of provision to his widow and younger children, payable after his death; and the son was infeft on the disposition, but the estate subsequently proved unequal to the debts—Found (notwithstanding Remington and Co., Dec. 10. 1829) that the onerous creditors of the father were preferable to the widow and younger children. Bruce and Others v. Bruce and Others, June 9. 1831, p. 695.
17. Circumstances in which it was held established that a party who had obtained a discharge under a sequestration on a composition-contract had, subsequently to his discharge, become bound to allow one of his creditors to apply certain funds coming into his hands to the payment in full of the original debt. Roy v. Scoular, June 18. 1831, p. 766.
18. Circumstances in which a ranking and sale of the heritable estate of a party sequestrated under the Bankrupt Act having been brought, the Court awarded sequestration of the rents, and appointed a judicial factor different from the trustee in the sequestration. Bank of Scotland v. Smith's Trustee, July 2. 1831, p. 873.
See Barton &c. v. Eadie, March 10. 1831, p. 573.
See *Agent and Client*, 8.—*Appeal, Execution pending*, 1.—*Cautioner*, 9.—*Partnership*, 3. 4. 8.—*Poinding—Landlord and Tenant*, 14. 17.—*Process, XVI.* 4.—*Proof, V.* 2.—*Sale*, 4. 5.
BASTARD. See Warton or Cullen, Petitioner, Feb. 3. 1831, p. 382.
BILL-CHAMBER. See *Process, III.*
BILL OF EXCEPTIONS. See *Process, VIII.* 1.
BILL OF EXCHANGE.
1. Where an acceptor of a renewed bill did not deny having received value, but alleged an agreement by the creditor to grant indulgence when the first bill was drawn, the Court, being satisfied that as much indulgence had been given as was ever contemplated, refused a bill of suspension with expenses. Falconer v. Gray, Nov. 20. 1830, p. 38.
2. The acceptor of a bill of exchange allowed to prove by the oath of the holder an allegation that he was known to be the mere cautioner of another party primarily bound for the debt, which party the holder had discharged without his consent, on receiving payment of a composition. Hunters v. Evans, Foster, and Langton, &c., Nov. 26. 1830, p. 76.
3. Where the acceptor of a promissory note was under diligence for payment of it; and a stranger to the note paid it, and took an assignation to it and the diligence, and gave a charge to an indorser, who alleged that the charger was trustee of the acceptor; and the Lord Ordinary found the non-onerosity proveable by the charger's oath only—The Court recalled hoc statu, and allowed the indorser to lodge a condescendence "of the facts offered to be proved, and the manner of proof." Farquhar v. Sloane, Dec. 2. 1830, p. 112.
4. Question, whether a party was an onerous holder of a bill? Dickson v. Ker &c., Dec. 2. 1830, p. 125.
5.—(1.) A bill having been specially assigned by a testator, and new vouchers of the debt granted by the debtor to the assignee, who died without confirming to the testator, found that his executors confirmed might sue for the debt.
(2.) Action sustained for the contents of bills, where the debt was proved scripto beyond the years of prescription, and the drawer's name was not filled up. Elder &c v. Marshall, Dec. 3. 1830, p. 133.

Bill of Exchange (Continued).

6. One of four co-acceptors of a bill having become bankrupt; and the drawer having ranked on his estate, and agreed to a composition, and discharged him; but not having received the composition; and another co-acceptor having paid the bill to the drawer—Found, in a question between these two acceptors, that the one on whose estate the bill had been ranked was not entitled, on the allegation that a third party (also an acceptor) had got the contents of the bill, to refuse payment of the composition to the other who had paid the bill. Russel v. Douglas &c., Dec. 10. 1830, p. 163.

7. Non-onerosity on the part of the drawer of a bill of exchange only proveable by writ or oath, though not pleaded to any other effect than as a reply to a plea of non-notification, equally as if pleaded in defence against payment. Whyte v. Finlay, Jan. 19. 1831, p. 304.

8. Forgery being pleaded in defence against a summons for payment of two bills specially libelled on—Held competent under such summons to prove that the bills were delivered by the party himself as genuine, and sufficient to entitle the pursuer to decree. Miller v. Rae's Executor, Jan. 22. 1831, p. 328.

9. It is not relevant to suspend diligence by a company, onerous indorsees of a bill, for the acceptor to allege that one of the partners was a member of a committee of creditors of the drawer, and as such was participant in preventing delivery of the goods for which the bill was accepted, and that he had brought an action of damages against that partner and the other members of the committee. Lang v. Allan and Co., Jan. 27. 1831, p. 337

10. An agent having become bound for the interest on a bill of his client for £400; and the client having transmitted to him a bill for £50 drawn and indorsed by a third party, and accepted by the client, to apply the proceeds to the payment of the interest; and the agent, without discounting this bill, having, after a considerable interval, paid the interest—Held entitled to recover to that extent from the drawer. Ramsay v. Roberts, Feb. 3. 1831, p. 387.

11. Circumstances appearing from an oath on a reference made to the drawer of a bill of exchange by the acceptor, as to the furnishings which constituted the alleged value having been made on the order of third parties, not sufficient to establish non-onerosity. Wyllie v. Paton's Representatives, Nov. 26. 1830, p. 84.

12. Circumstances in which a plea of alleged non-notification of the dishonour of a bill was repelled. Mills v. Hamilton, Dec. 1. 1830, p. 111.

13. Charge on a Sheriff's precept, proceeding on a registered protest, interrupts the sexennial prescription of a bill of exchange, so as to allow a charge of horning to be insisted in after the lapse of the six years. Henderson v. Stewart, Dec. 14. 1830, p. 180.

14. The drawer of a bill having charged the acceptor for payment of the amount; and the acceptor having alleged that he had sent the money by a third party, who had paid it to the drawer; and the drawer having admitted that he received a sum from the third party, but alleged that it was in payment of a debt due to him by that party, and maintained that payment could be proved only by his writ or oath—A condescendence, before further answer, of facts by the acceptor, allowed. Crichton v. Watt, Mar. 1. 1831, p. 516.

15. The sexennial prescription of a bill of exchange held to be interrupted by the evidence of the execution of letters of horning afforded by an extract from the record of hornings. Thomson v. M'Kechnie and Chrystie, June 17. 1831, p. 759.

BILL OF EXCHANGE (Continued).

16. Circumstances in which it was held that the prescription of a bill of exchange was not interrupted by a correspondence in which the creditor's agent in England notified claims, including the bill, to the agent of the trust in Scotland; nor by a process before the King's Bench, alleged to have saved those claims from the Statute of Limitations. Hunter v. Duff's Trustees, June 9. 1831, p. 703.

17. The drawer and indorser of a bill having written a letter asking indulgence, and promising to settle it, not entitled to plead, that when he wrote this letter, he was ignorant of the legal effect of non-notification of dishonour, so as to enable him to found on alleged non-notification as a defence against payment. Turnbull v. Hill (for Montrose Bank), Feb. 16. 1831, p. 456.

18. The drawer of a bill having pursued the acceptors for relief of a proportion of its contents, upon the allegation that all parties had joined in the bill for the accommodation of a third person not named therein—Found that the joint liability created against the acceptors, ex facie of the document, must receive effect, subject to the admitted proportional restriction, unless taken off by the writ or oath of the drawer. M'Gregor v. Gibson and Others, Feb. 19. 1831, p. 483.

19. A domestic servant having, as indorsee of a bill for £10 drawn and indorsed by her master, charged the acceptor, and, on a reference to oath, deponed that she had received it in part payment of her wages—Held that she was an onerous indorsee. Hunter v. Pearson and Husband, Mar. 2. 1831, p. 524.

20. Held in a question between the drawers and holders of a bill, that although the holders admitted that they were originally no parties to the bill—that they took it up from a bank (with whom it had been discounted) after it was past due, without any indorsation by the Bank—that part of it had been previously paid by the acceptor—and that he was the brother of one of the chargers (a company)—yet these admissions were not sufficient, per se, to prove mala fides or non-onerosity. Muir and Co. v. M'Donald and M'Nab, Mar. 8. 1831, p. 535.

21. The holder of a bill claiming against a drawer, as having obtained it from a party now dead, having, on a reference to oath, admitted that he himself gave no value for the bill, and left it doubtful whether any value was given for it—Bill passed without caution or consignation. Cook and Crosbie v. Stirling and Co., Mar. 8. 1831, p. 561.

22. A bill having been granted blank in the drawer's name, and thereafter discounted with a Bank agent, who filled it up with his own name as drawer, and indorsed it to the Bank; and this agent having, on the Bank re-indorsing it for the purpose of his operating payment, delete his own name, and caused the party to whom it was originally granted to sign as drawer, and also as first indorser—Held, in an action at the instance of the Bank against the acceptors, that the Bank could not recover. Young's Trustees v. Scott (for Paisley Bank), also Scott v. Fleming and Leiper, March 10. 1831, p. 574.

23. The acceptance of a bill presumed to be for value until otherwise proved, although it was admitted that the precise value, viz. plumber work, which appeared ex facie of the bill, had not been received. Winton v. Gibson, June 1. 1831, p. 662.

24.—(1.) A charge having been given upon a bill within the six years, but not followed up by further diligence until after the six years, when a charge was given on new diligence—Found that the first charge was sufficient to interrupt prescription.

BILL OF EXCHANGE (Continued).

(2.) Circumstances in which an indorser, in a question of recourse against an indorsee, was held not bound to prove that he had received intimation of the dishonour of a bill which he had retired. Fraser's Representatives v. Urquhart, June 11. 1831, p. 723.

25. A bill indorsed by the drawer to a party who was his law-agent, and by him to a bank, on which diligence was raised by the bank within the six years, having been found in the repositories of the law-agent, with a blank re-indorsation by the bank, but without any receipt or assignation of the diligence—Held,

(1.) That the bill must be presumed to have been retired with the agent's own funds.

(2.) That the re-indorsation was equivalent to a receipt; and,

(3.) That the diligence by the bank saved it from prescription, so as to make it capable of being the foundation of an action raised after the six years. M'Kirdy's Executor v. Thomson, June 16. 1831, p. 753.

See Black v. Bell, Feb. 22. 1831, p. 486.

See Bell v. M'Kune, May 13. 1831, p. 587.

See *Cautioner*, 2.—*Diligence, Legal*, 2.—*Idiocy—Partnership*, 2. 3.—*Proof, V.* 2. 3.

BONA FIDES.

1. Where a party died infeft in heritable property, which he conveyed by a trust-deed to his widow and others; and she having disclaimed it, but, at the request of his creditors, concurred in conveying the property to a trustee for their behoof, under declaration that she should be entitled to claim every right competent to her; and the trustee intromitted with the rents for several years; and she was thereafter served to her terce—Found that the trustee was bound to account to her for her share of the bygone rents, although he alleged that he had bonâ fide paid them away to the creditors. Hepburn or Cowan v. Kerr &c., Dec. 15. 1830, p. 188.

2. Where a lease of part of an entailed estate was purchased by a party while under reduction, and thereafter a judgment was pronounced sustaining the lease; but contrary judgments were subsequently pronounced in other causes, and particularly in regard to certain leases under the same entail; and, after an interval of ten years, an appeal was taken, and considerable litigation occurred under a remit from the House of Lords, and the lease was ultimately reduced by that House—Held that the bona fides of the party subsisted till the appeal was taken, but then to have ceased. Stirling v. Dunn, Jan. 14. 1831, p. 276.

3. Circumstances in which a plea of compensation was repelled, as not in bona fide. Lawson v. Burman, Feb. 18. 1831, p. 478.

4. In a reduction, the rights of the defenders to an estate having been set aside, and, pending the reduction, a party having purchased the right of a defender, and a pro forma reduction having been brought against him—Found that his bona fides terminated, as if he had been a defender in the original action. Gracie v. Earl of Stair's Trustees and Others, Feb. 5. 1831, p. 393.

5. A piece of ground, of which certain portions had been feued out, having been sold by an heritable creditor, holding a disposition of the whole subject, under articles of roup, which excepted the parts feued—Held,

(1.) That the purchasers did not acquire right to the superiority and feu-duties of the ground feued; and,

(2.) That the purchasers, drawing the feu-duties for 20 years unchallenged, were not protected from repetition by the plea of bona fides.

BONA FIDES (Continued).
Moir and Mandataries v. Anderson, Glen, and Easton, June 15. 1831, p. 744.
See *Payment, Indefinite*, 1.—*Landlord and Tenant*, 1.—*Sale*, 10.
BREVI MANU. See *Road Acts*, 2.
BURDEN, PUBLIC.
By the statute labour conversion act for the county of Roxburgh, (46. Geo. III. c. 48,) superiorities or feu-duties, and teinds, though rated in the valuation-books of the county in cumulo with lands, are not liable to assessment. Curle v. Duke of Roxburghe and Curators, June 24. 1831, p. 801.
BURGAGE. See *Burgh Royal*, 2.—*Superior and Vassal*, 1.
BURGH ROYAL.
1. It being declared in a statute regulating the exaction by the Magistrates of Edinburgh of certain shore-dues leviable from freemen and unfreemen merchants, (the former being only liable in half the payment payable by the latter,) that every burgess and guild-brother "who by residence is or shall be liable in scot and lot, and in payment of city taxes," should be deemed a freeman merchant, and all others non-freemen—Held that burgesses and guild-brethren carrying on a distillery in the neighbourhood, and having a place of business within the city, (in respect of which they were liable in burgal prestations,) were freemen merchants under the intendment of the statute, and liable only in the low rate of dues, though not actually dwelling within the city. Haig and Son v. Magistrates of Edinburgh, Nov. 25. 1830, p. 72.
2. Circumstances under which the Court refused to appoint a commissioner to give infeftment to a party who alleged that he held burgage, but that there were no magistrates of the burgh. Richard v. Cochrane's Trustees, Jan. 13. 1831, p. 262.
See *Process, XVI.* 14.—*Poor*, 3.
CAUTIONER.
1. Where a party elected trustee on a sequestrated estate offered three cautioners; and a bond of caution was prepared by the agent for the estate, and sent to the trustee, who returned it as duly executed by himself and two of the cautioners, with a request to the agent to send it to the other, who lived in the same place with the agent; and the third cautioner signed it; and thereafter the trustee having intromitted, and become bankrupt in debt to the estate; and it appearing that the subscriptions of the two first cautioners, though genuine, had been adhibited outwith the presence of witnesses—Held that the third cautioner was not thereby liberated; and Observed that the two others could not have pleaded the above objection, after allowing the bond to be delivered and acted upon, as duly executed. M'Dougall's Executor v. Martinson and Stevenson's Trustee, Nov. 13. 1830, p. 12.
2. A party abroad, who was in course of building a ship which he was to consign with a cargo to merchants in this country in payment of furnishings sent out to him, having received from them a letter authorizing him to draw on them to the extent of two-thirds of the value of the freight and cargo—Circumstances in which the home merchants were held liable to honour drafts to that extent discounted more than a year and a half after the date of their letter by a foreign merchant on the faith of it, although in the mean time they had shipped further goods to their correspondent, which more than exhausted the value of the vessel, freight, and cargo. Smyth and Mandatory v. Hunter, Nov. 26. 1830, p. 76.
3. The seller of an estate having declared the price a real lien in his dis-

CAUTIONER (Continued).
position, and taken a bond of caution from third parties in further security; and while in the course of operating payment under his real lien, having recovered payment from the trustee for the creditors of a second purchaser, and assigned the bond of caution to the trustee—Held that the trustee could not recover from the cautioners under the bond so assigned. Fraser's Trustee v. Lyell's Trustee, Feb. 4. 1831, p. 389.

4. Competent for a cautioner threatened with diligence, and who has paid only his share of the debt, to call upon his co-cautioner to pay his proportion. Low v. Farquharson, Feb. 8. 1831, p. 411.

5. Where Commissioners of Supply, on electing a Collector of Cess, minuted a resolution that he should produce a discharge from the Receiver-General annually; and the cautioners bound themselves for his intromissions for that year, and each year of his re-election; and the collector was re-elected thrice without being required to produce the Receiver-General's discharge, and incurred arrears before the first re-election, and also afterwards; and no notice was given to the cautioners till nearly a twelvemonth after his resignation—Held that they were liberated, although special reference was not made to the minute in their bond.

(2.) Circumstances in which a cautioner having subscribed a letter written by another, obliging him to pay certain arrears of "assessed taxes and land-tax," was not held bound as to the land-tax. Dalsell and Others v. Menzies and Others, Feb. 15. 1831, p. 434.

6. Cautioners under a letter of guarantee for payment of bills discounted prior or posterior to its date, held liable, although they alleged (but did not prove) that it had been got from them on an agreement that cash should be given to the principal party, whereas the bills were put to the credit of others lying over dishonoured. Cadell v. Cassells, Feb. 16. 1831, p. 447.

7.—(1.) Circumstances held sufficient to establish that, at substituting one bond of caution by a bankrupt for another, and changing one of the cautioners, a new liability was incurred by the agent and cautioners for part of a past balance under the old bond not expressly referred to in the new, and for which the agent was not liable under the old bond.

(2.) After arrestment of a large sum belonging to the agent, a restriction of it to the sum contained in the warrant, whereby the agent was enabled to uplift the balance, held not to liberate the cautioners, though without their consent. Paisley Union Bank v. Hamilton and Marshall and Others, Feb. 24. 1831, p. 488.

8. The cautioner for a curator bonis held not liable for a bill as forming part of the curatorial estate, which, after the expiration of the curatory, was delivered to trustees (of whom the ex-curator was one) under a deed of settlement executed by the party who had been under curatory; and the contents of which were thereafter recovered by the ex-curator qua trustee. Morland v. Sprott, Feb. 19. 1831, p. 478.

9. A party operating on a cash-credit, dated in 1804, having become bankrupt in 1825; and his three co-obligants being some time predeceased—Held, that although the credit had been rarely operated on for five years, and not at all for two years prior to the bankruptcy, and no intimation of the death of co-obligants had ever been given by the Bank, the bond was still effectual against their representatives. Morrice (for Aberdeen Bank) v. Scott and Others, Feb. 19. 1831, p. 480.

10.—(1.) An obligation of guarantee by a company, holograph of the acting partner, held probative, though not tested, nor in re mercatoria.

(2.) An obligation being acknowledged by the principal debtor in a letter

CAUTIONER (Continued).
subjoined to which a guarantee was granted, and being also admitted in the guarantee, no further constitution against the principal debtor necessary in a question with the cautioner. Buchanan v. Dennistouns and Co., Mar. 4. 1831, p. 557.

11. A party having written a letter to another, stating that "in the event of any reference being made to you regarding the responsibility of my esteemed friend A. S. &c., I shall feel much obliged by your stating that he is in excellent credit, and possessed of capital for carrying on an extensive business;" and goods having been sold to A. S. eighteen months afterwards, on a reference to the holder of the letter, and on the faith of it—Held that the writer was liable for the price, although it was not alleged that the statement was false at the time the letter was written. Kembles, Masterman, and Johnston, and Mandatary, v. Mitchell, May 31. 1831, p. 648.

12. A letter binding a party "to guarantee an agent for four per cent. for commission and guarantee," being put in evidence at a jury trial; and merchants being tendered to prove "what they understood to be the effect and import of the undertaking in the letter"—Held,

(1.) That such evidence was inadmissible, as it belonged to the Court to interpret the obligation; and,

(2.) That the letter merely bound the party to make good the price for which the agent should sell, and that such agent should possess ordinary skill and good character. Calder v. Aitchison and Co., June 21. 1831, p. 777.

See *Bankrupt*, 4. 8.—*Bill of Exchange*, 2.—*Diligence, Legal*, 8.—*Insurance—Messenger*, 2.—*Reparation* 2.—*Process, XVII.* 6.

CESSIO.

1. Where a pursuer had been guilty of extensive and systematic imposition in obtaining credit on false pretences, and had lived extravagantly, and gave no satisfactory account of his funds, the Court granted the benefit of the cessio, only after an imprisonment of about three years and nine months. Stephens v. his Creditors, Nov. 20. 1830, p. 39.

2. The pursuer of a process of cessio having raised an action of damages against his incarcerator for wrongous imprisonment, ordained, on getting the benefit of the cessio, to grant a conveyance to the trustee for his creditors of "his eventual interest or benefit in that action, without prejudice, however, to the pursuer to prosecute and follow out the said action in his own name, if the trustee to be named in the disposition omnium bonorum shall decline, or unduly delay to do so." Macmaster v. His Creditors, Dec. 16. 1830, p. 206.

3. Circumstances in which the pursuer of a cessio was allowed to retain £122 per annum out of the free rental of an entailed estate amounting to £322 a year. A. B. v. His Creditors, Feb. 15. 1831, p. 441.

4.—(1.) The objection that all creditors are not called being once taken, and those alleged to be omitted cited, the objection not allowed to be repeated by another creditor cited in the original summons.

(2.) Not a sufficient objection to a certificate of imprisonment, that it merely bore the incarceration to be of a certain date, and the being in custody at the date of the certificate a month thereafter, without specially setting forth that the party remained in prison during the intervening period, —it not being averred that in point of fact he had not.

(3.) Averments held not relevant to warrant refusal or delay to grant the benefit of cessio. Gardner v. Hunter, Mar. 8. 1831, p. 562.

5. Cessio awarded to a superannuated officer of Excise holding a pension,

Cessio (Continued).
without any part of it being assigned. Reid v. His Creditors, Mar. 10. 1831, p. 572.
6. Interim liberation on caution granted, before decree, to a party found entitled to the benefit of the cessio. Chisholm v. His Creditors, Mar. 11. 1831, p. 578.
7. Circumstances in which the Court refused, hoc statu, the benefit of cessio to a bankrupt under sequestration, in consequence of the report of the trustee as to the state of his affairs. Fitchie v. His Creditors, May 27. 1831, p. 642.
8. The pursuer of a cessio being opposed by the mother of his natural child, cessio refused hoc statu, as he declared that he had paid nothing towards its aliment, and that he would not do so. Smith v. His Creditors, July 2. 1831, p. 865.
9. Objection to the execution of a summons of cessio bonorum, that it bore companies to have been cited by leaving service copies with their wives. Ainslie v. His Creditors, July 7. 1831, p. 901.
See M'Dougall v. His Creditors, July 9. 1831, p. 926.
Church.
1. A remit made, before answer, to a person of skill to report as to the best place to build additions to a church. Campbell &c. v. Jack &c., Dec. 11. 1830, p. 167.
2. The collector of an assessment for enlarging a church, under decree of a presbytery, found liable in expenses to the suspender of a charge given by him, reserving his relief against those who might have authorized him to proceed. Earl of Glasgow and Others v. Miller, Feb. 1. 1831, p. 370.
3. Same judgment as in the case of Methven, (ante, VI. 379.) Earl of Glasgow and Others v. Miller, Feb. 1. 1831, p. 370.
Citation. See *Cessio*, 9.—*Messenger*, 1.—*Process*, *IV.*
Clause.
1. A party having executed a general settlement of his estates in favour of certain substitutes, whom failing, his own nearest heirs and assignees whomsoever; and having afterwards executed a new disposition of part of his estates, for the special purpose of conferring a liferent, and making certain debts real, destining the same to his 'heirs and disponees' in fee, but not specially mentioning the substitutes called in the prior deed—Held that this did not import a revocation of these deeds, but that the substitutes therein called were still entitled to succeed. Murray v. Smith and Gibson, Feb. 2. 1831, p. 378.
2. The founder of an hospital having given the patronage to the Magistracy, Town Council, and "the four Ministers, commonly called the Town's four Ministers, of the old and new churches, and to their successors in their respective offices;" and there being only two collegiate churches and four ministers at the time; and the burgh being afterwards divided into six parishes, having each a single clergyman—Held that only four of these ministers could be patrons, two of them being always the ministers of the churches referred to in the deed of foundation, and the other two being chosen according to the seniority of their appointment as town ministers; or if coeval in that respect, then by their seniority as licensed clergymen. Governors of Gordon's Hospital v. Ministers of Aberdeen, July 8. 1831, p. 909.
See *Contract*, 1. 2.—*Entail*, 1. 2. 7.—*Fee and Liferent*, 2. 3.—*Heritable Office*—*Legacy*, 1.—*Marriage Contract*, 1.—*Partnership*, 6.—*Succession*, 1.—*Superior and Vassal*, 2.—*Testament*, 3. 4. 5.

CLERGYMAN.

The Court will not appoint a clergyman of the Established Church trustee for creditors. Brown v. Hunter and Others, Mar. 11. 1831, p. 578.

See *Arrestment*, 1.

COLLEGE OF JUSTICE.

The privilege of an advocate sustained against the jurisdiction of the Sheriff in a summary petition for interdict and damages. Macdonald &c. v. Mackintosh &c., Feb. 12. 1831, p. 429.

COMMONTY.

1. The rights in a muir of two proprietors of lands adjoining thereto having been determined, by an old decree, to be of property in the one, and servitude in the other—Held that no possession by the latter, (whose titles bore 'parts and pertinents,') consistent merely with a right of servitude, could confer on him, as by prescription, a right of property in the muir. Earl of Fife's Trustees v. Cumming, Jan. 25. 1831, p. 336.
2. A party interdicted, who, after a commissioner in a division of commonty had approved of a division and allotment of it, began to carry off stones from a lot marked off to another, and to break up the surface. Smith v. Webster or Guthrie and Others, Feb. 8. 1831, p. 401.
3. Under a deed conveying an estate to trustees to hold it for a term of years, and then denude in favour of certain parties, with a clause empowering them "to grant tacks of my lands, and appoint factors thereon, and to settle and adjust all accounts, of whatever kind, that may be unsettled at my death, and to do every thing relative to the management of my estate and affairs that I could do myself"—Found that the trustees were not entitled to raise an action of division of commonty. Graham's Trustee v. Boswell, Dec. 2. 1830, p. 121.

COMPENSATION.

1. Question raised as to whether an agent, disburser of expenses in a submission, having an assignation to a decree for them in favour of his client, could be met by a plea of compensation founded on a claim of expenses against his client in another process with the same party. Pollock v. Scot, Feb. 12. 1831, p. 432.
2. An insolvent debtor having conveyed two ships to two sets of trustees (one trustee only being different) for behoof of creditors specially mentioned, who were not entirely the same in both deeds—Held, in a question with a creditor specially named in one of the trusts, and being also a debtor to the other,

   (1.) That compensation might be pleaded by the trustees against his claim under the first trust; and,

   (2.) That he was entitled to plead recompensation by claiming under the second trust, though not specially mentioned therein. Carsewells v. Munn's Trustees, Mar. 9. 1831, p. 567.
3. The country agent in a sequestration having employed a writer in Edinburgh to conduct the proceedings there; and the latter having debited the former with the expenses; and on the sequestration being wound up on a composition-contract, the bond for these expenses having been taken to the country agent, as the sole creditor, with the knowledge of the Edinburgh agent—Held that the claim was transferred to the country agent, so as not to afford a ground of retention or compensation on the part of the Edinburgh agent against a creditor of the bankrupt. Mackintosh v. Macdonald, May 21. 1831, p. 626.
4. A cargo of flour being damaged in a carrying vessel, in consequence of improper stowage from want of dunnage, the proprietor held entitled to

COMPENSATION (Continued).
compensate the claim for freight by the counter claim of damage. Tayler v. Forbes, Dec. 2. 1830, p. 113.
See *Bona Fides*, 1. 3.
COMPETENT AND OMITTED.
1. In a conjoined process of sequestration by a landlord, and poinding by the tenant's creditors, the landlord having omitted to state a good plea against certain claims of compensation by the tenant, which were disputed by him unsuccessfully on other grounds; and having allowed the fund in medio to be uplifted and distributed among the creditors; not entitled afterwards to reduce, on the ground of the plea so omitted to be stated. Campbell &c. v. Browns, Jan. 11. 1831, p. 258.
2. A party who allowed the agent of his opponent to obtain decree in the Jury Court for expenses in his own name, found barred, by the exception of competent and omitted, from suspending a charge, on the allegation that the agent had no license. Ewing v. Wallace, Feb. 3. 1831, p. 385.
COMPOSITION-CONTRACT. See *Bankrupt*, 17.
CONDITIO SI SINE LIBERIS. See *Testament*, 1.
CONDITIONAL INSTITUTE. See *Succession*, 1. 3.—*Testament*, 3.
CONFIDENTIAL WRITING. See *Proof*, *VII.*
CONFIRMATION. See *Bill of Exchange*, 5.—*Legacy*, *Special*.—*Arrestment*, 2.
CONFUSIO. See *Entail*, 3.
CONSIGNATION. See M'Lean v. M'Neill, May 27. 1831, p. 646.
CONSISTORIAL CAUSES. See *Process*, *V.*
CONTINGENCY. See *Process*, *VI.*
CONTRACT.
1. Circumstances in which the Court refused, hoc statu, to enforce specific implement of a claim under a contract, to the full extent demanded by the party in whose favour it was stipulated,—but reserving the rights of parties, in the event of a change of circumstances. Shand v. Cousin &c., Dec. 9. 1830, p. 157.
2. Construction of clauses in a contract for the formation of a railway, by which the parties agreed to refer disputes as to the rate of payment for extra work to men of skill; and as to the general interpretation of the contract, to Professors of Law. M'Caul v. Monkland Railway Co., Mar. 1. 1831, p. 522.
3. Construction of a clause in a contract between a patentee of a process for refining sugar, and a company who held his licence to use the process, relative to the amount of per centage payable by the refiners, on the conversion of molasses into single-refined sugar by the reiterated application of the patent process. Few &c. v. M'Leish, Kayser, and Co., June 14. 1831, p. 732.
See Johnston v. Clark, Jan. 29. 1831, p. 398.
See *Globe*.—*Master and Servant*, 6.—*Landlord and Tenant*, 9.
CO-OBLIGANT. See *Cautioner*, 13.
CORPORATION.
(1.) Circumstances which were held not sufficient to infer a right to corporate privileges on the part of an association.
(2.) Circumstances in which a corporation was held not to have acquired right to levy a certain duty on all coals brought into a port. Dempster v. Masters and Seamen of Dundee, Jan. 21. 1831, p. 313.
See *Exclusive Privilege*.
COUNT AND RECKONING. See *Process*, *XI. 3.*—*Accounting*.

CREDITORS OF A DEFUNCT.
Creditors of a defunct, alleged to have been insolvent at the time of executing a discharge of a claim, have no title to sue reduction of such deed on the ground of its having been obtained from the defunct by fraud and circumvention, but must first vest themselves with the jus actionis competent to the defunct. Rodger v. Darroch &c., June 2. 1831, p. 671.
CURATOR AD LITEM. See *Cautioner*, 8.—*Homologation*, 3.
DEATHBED. See *Homologation*, 1.—*Process*, *XVI.* 2.
DECLARATOR. See *Process*, *VIII.* 1.
DECREE IN FORO.
Circumstances in which a decree in foro, pronounced in 1782, was held liable to reduction under a summons raised in 1826. Maule v. Maule, July 5. 1831, p. 876.
DEFENCES, PRELIMINARY. See *Process*, *VII.* 5.
DILIGENCE, LEGAL.
1. Certain words written on an erasure in the narrative of letters of horning no ground of suspension. Falconer v. Gray, Nov. 20. 1830, p. 38.
2.—(1.) No objection to the validity of a protest of a bill of exchange that the notary had, some years before, been a partner of a company, drawers of the bill, and was subsequently found liable for the debts of the company, in respect of insufficient notification of his retirement.
(2.) The short copy of a charge, given in the same year in which the bill charged on was dated, having omitted the year in reciting the date of the bill, held not a good objection to the diligence. M'Kenzie v. Smith, Nov. 23. 1830, p. 52.
3. It is no objection to a protest of a bill of exchange, made payable at the office of a son of the creditor, that it was taken by the son as notary. Reid and Cautioners v. Grindlay, Nov. 19. 1830, p. 31.
4. Diligence on a bill of exchange suspended, in respect of a decree in a judicial reference finding the bill extinguished, which, though challenged subsequently to the date of the diligence, had not been reduced. Banks v. Smith, June 24. 1831, p. 803.
5. Question as to the competency of charging in one county under decree of the Sheriff of another. Smith v. Skinner, Mar. 4. 1831, p. 543.
6. Where a bill was duly protested in November, and registered on the 20th of December following, and the word 'twentieth' was written on an erasure in the narrative part of an extract, on which diligence was done—Held,
(1.) That the erasure was no ground of suspension, it being immaterial on which day of December the registration took place.
(2.) Expenses refused to the charger, the litigation having arisen from the blunder of the clerk in making the extract, against whom he had relief. Crichton v. Watt, Nov. 25. 1830, p. 68.
7. A poinding proceeding on a bill which had been extinguished by a partial payment, and a renewal quoad ultra, and where the poinding had not been reported for nine months, found unavailing to confer a preference. Munro v. Hogg, Dec. 14. 1830, p. 171.
8.—(1.) Where it was provided in a bond by a Bank agent that a stated account from the Bank books, 'certified and signed by the cashier,' should constitute the balance against the agent—Held that an account merely dated and subscribed by the accountant and cashier, although having the letters E. E. (errors excepted) subjoined, was sufficient, without further certificate, to warrant diligence on the bond.
(2.) Untaxed law expenses, in relation to bills for which the agent was

DILIGENCE, LEGAL (Continued).
liable, incurred by the Bank after the agency had terminated, not a proper charge in the certified account to the effect of summary diligence.
(3.) The agent being bound to account to the Bank, whoever might be the partners for the time, and to the cashier for the time; and execution being made competent, either at the instance of the Bank or of the cashier; and having been raised in name of the partners and cashier; and, after the death of some of the partners, a charge being given in name of the survivors and the same cashier—Held that the charge was good. Paisley Union Bank v. Hamilton, Feb. 24. 1831, p. 488.
9. Question as to the regularity of a charge for arrears of assessment for erecting a church in virtue of several decrees, but without specifying under which decree the arrears were claimed. Ewing v. Reid, June 4. 1831, p. 683.
See *Bill of Exchange*, 1.
DISCHARGE.
A debtor having obtained a discharge from his creditors of all debts contracted by him previous to the 1st of June 1822, with right to the whole vouchers thereof; and having granted a bill to a creditor, dated the 25th of May 1822, payable nine months after date, upon which the creditor executed diligence several years thereafter—Found that, on a fair construction of the discharge, it included this bill. Adam v. Macdongall and Others, Mar. 9. 1831, p. 570.
See *Process, XVII.* 6.—*Tutor and Curator*, 3.
DOMICILE. See *Foreign*, 2.
DONATION.
Circumstances in which it was found that the subscribers to a charitable fund were not entitled to withdraw the balance of their subscription from the committee originally appointed, or to apply it to a different purpose, upon the ground that the original charitable purpose was fulfilled. Ewing and Others &c. v. M'Gavin, May 20. 1831, p. 622.
ENTAIL.
1. An heir of entail having, in reference to his eldest daughter's marriage-contract, granted a bond to pay £3000 to trustees within six months after his decease, and that he should, within three months, "so far as an heir of entail lawfully can or may, by and at his own proper costs and charges, well and sufficiently charge all his entailed estate aforesaid with the payment of the said sum of £3000;" and being sued by the trustees in an action concluding to have him decerned to execute a deed, in terms of 5. Geo. IV. c. 87, "binding the succeeding heir of entail in payment out of the rents and proceeds of the entailed estate;" the Court ordained him "to exercise in favour of the pursuers the powers competent to him, as heir of entail in possession of the estate, under the act of 5. Geo. IV. c. 87, of burdening the succeeding heirs of entail, and the rents and proceeds of the estate, with provisions for his children, and this to the extent of £3000, or of the largest of such smaller sums as he may have power so to provide in security of the payment of his bond of provision," Antrobus &c. v. Innes, Nov. 25. 1830, p. 70.
2. Circumstances in which the Court refused to restrict or reduce certain bonds of provision to younger children granted by an heir of entail, under a reserved power to make 'reasonable provisions.' Earl of Mar v. Erskine &c., Dec. 3. 1830, p. 126.
3.—(1.) The proprietor of two estates having entailed them with destinations, which, in a certain event, might send them to a different series of

ENTAIL (Continued).
heirs—Held that, in a question inter hæredes, the entailer's debts must be allocated rateably on the two estates, according to their respective value.
(2.) An obligation on heirs to purge diligencies done against the estate does not lay the burden of debts on the heirs, as contradistinguished from the lands.
(3.) An heir in possession having paid and taken assignations to the entailer's debts, and vested them in a trustee, held to have kept them up, and that they were not extinguished confusione.
(4.) Circumstances constituting such non valentia agere as to prevent the currency of prescription. Lawrie v. Donald and Jones, Dec. 7. 1830, p. 147.

4. Relevant to infer reduction of a sale of part of an entailed estate for redemption of the land-tax, that the property sold had previously been let to the intended purchaser collusively, and with a view to the sale, for a long period, and at an inadequate rent, in contravention of the entail; and that the proceedings had been carried through in consideration of a sum of money paid by the purchaser to the proprietor, over and above the price publicly offered. Hamilton v. Millar, Dec. 10. 1830, p. 165.
5. An Act of Parliament having empowered a canal company to purchase entailed lands in the line of their operations, with special directions as to the disposal and security of the price paid; and an heir of entail in possession having received, in terms of a private agreement without a jury, a sum of money as the price of the ground taken, and a separate sum to indemnify for a deviation of the line of canal nearer to the mansion-house—Found that the possessor was not entitled to appropriate, as the premium for his individual consent to the deviation, the sum paid in consequence; but that it must be secured in terms of the act, along with the rest of the price, for the benefit of future heirs, under deduction to the possessor of temporary damage. Maitland and Others v. Gibson &c., Feb. 15. 1831, p. 443.
6. Not relevant, after the lapse of the statutory limitation, to reduce a decree of declarator in absence under 10. Geo. III. c. 51, to allege that there was a misrecital of the statute in the summons; nor that no proper evidence was produced that the sum was expended in improvements; nor that the annual accounts had not been subscribed, or duly lodged and recorded along with their vouchers; nor that the expenditure related to many articles not authorised by the statute,—fraud not being libelled, nor the decree alleged to be false or improbative. Lord Macdonald v. Macdonald and Others, Feb. 17. 1831, p. 460.
7. Clause in the Aberdeen Act, authorising proprietors of entailed estates to grant provisions &c. in a certain proportion to the free yearly rent, "as the same may happen to be at the death of the granter," interpreted to mean the year current at the death of the granter. Campbell and Tutor ad Litem v. Lord John Campbell, May 21. 1831, p. 624.
8. An entail being defective in the resolutive clause, the estate held adjudgeable for the debts of an heir of entail who had been in possession. Mitchelson v. Atkinson, June 15. 1831, p. 741.
9. Opinion intimated, that in a process with an heir of entail in possession, (or entitled to possession,) the decree obtained in foro, if without collusion, is good against all substitute heirs, though not parties to the process. Maule v. Maule, July 5. 1831, p. 876.
10.—(1.) A party infeft in fee-simple having executed an entail; and not having disponed in favour of himself, but reserved a power of revocation; and having died, leaving the deed unrevoked and undelivered—Held that

ENTAIL (Continued).
a general service as heir-substitute of entail to the entailer was inept to take up the procuratory or precept granted by him.
(2.) Opinion by a majority of the whole Judges—1. That where the institute in such deed of entail predeceases the granter, no right has vested in him; and the surviving party next called to the succession is a conditional institute, who should make up a title by a declarator that the first institute had failed, and that he, as conditional institute, was entitled to take up the precept and procuratory. 2. That where such surviving party died without making up a title, the next substitute should raise a declarator to prove who was the conditional institute who survived the granter, and then expede a general service to such party. Colquhoun v. Colquhoun, July 8. 1831, p. 911.
ERASURE. See *Diligence, Legal*, 6.—*Writ*, 4. 5.
ERROR.
Circumstances in which a party, who, in the erroneous belief that she was fiar, received payment of the contents of an heritable bond, and bound herself to grant a discharge, was allowed to repay the money, and to relieve herself from the obligation to discharge the bond. Miller and Others v. Anderson, March 4. 1831, p. 542.
EXAMINATION OF PARTIES, HAVERS, &c. See *Proof*, 1.
EXCLUSIVE PRIVILEGE.
A discharged soldier, being ignorant of the business of a tailor, not entitled to carry on that trade within burgh by entering into a copartnery with an unfreeman, and employing workmen also unfreemen. Tailors of Aberdeen v. Munro and Others, Jan. 19. 1831, p. 291.
EXECUTOR. See *Arbitration*, 5.—*Jurisdiction*, 1.
EXHIBITION. See *Process; XVIII.* 6.
EXPENSES.
See *Agent and Client*, 13.—*Arbitration*, 4.—*Arrestment*, 3.—*Church*, 2.—*Compensation*, 1.—*Contract*, 1.—*Diligence, Legal*, 6.—*Messenger*, 1. 2.—*Poor's Roll*, 3.—*Principal and Agent*, 1.—*Process, III.* 1. 3.—*VII.*—*IX.* 3.—*XII.* 5.—*XIV.* 2.—*XVIII.* 2.—*Bankrupt Statute*, 3. 4. 10. 12. 15.—*Stamp Act*, 3.—*Testament*, 4.—*Trustee*, 3. 4.
FACTOR.
(1.) A party having become cautioner for payment of a composition offered by two individuals, partners in business, one of whom was his own brother-in-law, on condition of being allowed to realize their funds; but not having stipulated then, or at a subsequent settlement of accounts, for any commission for his trouble—Held not entitled to commission. Sanderson &c. v. Donaldson, Nov. 23. 1830, p. 74.
FACTOR, JUDICIAL. See *Arrestment*, 5.
FACULTY. See *Loan*.
FEE AND LIFERENT.
1. A husband having bound himself in an antenuptial contract to lay out £500 on security, at the sight of another, payable to himself and wife, and the longest liver of the two in liferent, and to the child or children of the marriage in fee; which failing, to him, his heirs and assignees, in fee; declaring, that if there were more children than one, the fee was to be divided among the children in such proportions as he chose; failing which, to be divided among them equally; and having, after children were procreated, taken a bond for the £500, with reference to the contract, payable as above in liferent, "and to the children already procreated, or to be procreated," in fee; whom failing, to himself, his heirs and assignees—

FEE AND LIFERENT (Continued).
Held that the fee was in the husband. M'Donald v. M'Lachlan, Jan. 14. 1831, p. 269.
2. Construction of a clause as to a right of fee and liferent under a trust-deed of settlement and relative codicil. M'Intyre &c. v. Stevenson, Dec. 16. 1830, p. 201.
3. A disposition in an antenuptial contract, by which the husband conveyed property to himself and wife, " in conjunct liferent during all the days of their lifetime, and to the longest liver of them, and to their heirs or assignees in fee," held to vest the fee in the surviving wife. M'Gregor v. Forrester, June 3. 1831, p. 675.
4. Circumstances in which a widow, who, before her marriage, was fiar of a freestone quarry, which was kept going during the whole marriage, was held not to have barred herself from continuing to work the quarry for her own benefit after her husband's decease, notwithstanding the terms of her contract of marriage, and a subsequent deed by which she conveyed the fee to her eldest son, reserving to herself the liferent use and enjoyment of her whole property. Eiston v. Eiston, June 10. 1831, p. 716.
See *Clause*, 2.
FERRY. See *Interdict*, 1.
FEU-HOLDING. See *Superior and Vassal*, 1.
FIAR AND LIFERENTER. See *Fee and Liferent—Inhibition*.
FISHING.
Proprietors of salmon-fishings in a river entitled to pursue an action for removing one of several dam-dikes across the river, as an obstruction to the passage of the fish, without previously, or at the same time, challenging the others, which would still prevent the passage of the fish, although that under challenge were removed. Lord Forbes and Others v. Leys, Masson, and Co., July 9. 1831, p. 933.
FOREIGN.
1. An action brought, after the lapse of six years, against an English solicitor alleged to have been employed by a person residing in Scotland to recover money in England, and to have then recovered it, barred by the Statute of Limitations. Fraser's Trustees v. Fraser, Dec. 14. 1830, p. 174.
2. Where a party had come to Scotland within a year after the contraction of a debt under the law of England, and continued domiciled in Scotland, found that he could not plead the English Statute of Limitations. Gibson and Mandatary v. Stewart, March 2. 1831, p. 525.
See *Discharge*, 2.—*Jurisdiction*, 1. 7. 11.—*Process*, *XVI.* 1.—*Trust*, 5.—*Tutor and Curator*, 3.
FOREIGNER.
A foreigner contracting in this country is presumed to know the laws in the same manner as one of the lieges, and cannot resile on alleged ignorance. Cloup and Pellissie v. Alexander, Feb. 16. 1831, p. 448.
FORGERY.
Question whether a bill was forged; and Observed, that a genuine signature, written after the date of a charge, is inadmissible with a view to comparison. Cameron v. Fraser and Co., Dec. 4. 1830, p. 141.
See *Bill of Exchange*, 8.—*Proof*, *VI.* 2.—*Record*, 5.
FREEHOLD QUALIFICATION.
1.—(1.) Commissioners of Supply having pronounced a decree of division in 1774, which was ex facie regular; and five freeholders being enrolled on the portions so split; and successive enrolments having taken place without objection till 1826, when a claim was made on one of these portions—

FREEHOLD QUALIFICATION (Continued).

Objection repelled, that the Commissioners had slumped two cumulos before splitting.

(2.) A barony containing 46,000 acres being valued, in 1691, at £2208, and 48 acres of it being acquired by the Crown in 1692; and the remainder having paid cess on a valuation of £2208, as before; and the above proceedings having taken place in 1774 and 1826 respectively—Objection repelled, that the Commissioners had divided the whole £2208, as if no part of it rested on the 48 acres. Lord Macdonald &c. v. Grant, March 2. 1831, p. 527.

2. Three several infeftments under three several charters being taken, and included in one instrument written on a 9s. stamp—Held, in a question as to a claim of enrolment as a Freeholder,

(1.) That the instrument afforded no legal evidence of the infeftment, and therefore that the claim was properly dismissed; and,

(2.) That in a complaint against such rejection, the objection could not be cured to the effect of altering the judgment of the Freeholders, by having the additional stamps adhibited to the instrument. Macintosh v. Grant, May 12. 1831, p. 583.

3.—(1.) Held to be no objection to an enrolment as a Freeholder in virtue of a conveyance by a married lady of an open charter, that although trustees under her marriage-contract concurred as disponers, yet no conveyance in their favour was produced.

(2.) Retour of lands in which the deceased had been infeft in warrandice only, received as evidence of the extent of these lands. Campbell v. Wallace, May 27. 1831, p. 643.

4. A party domiciled in England having been struck off the roll of Freeholders, and a petition and complaint being presented in his name, but no mandate for him being produced within the four months—Complaint dismissed. Stewart v. Grant, June 14. 1831, p. 727.

5. The entry of a service in the fragment of a book which had lain in the Register House from a period beyond the memory of man, and which purported to be minutes of the proceedings of a Sheriff Court, having been recorded in Chancery, without any previous proceedings to have the authenticity of the document determined on by the Court—Held that an extract thereof was not sufficient evidence of old extent to warrant enrolment as a Freeholder; and a party enrolled thereupon ordered to be struck off the roll, without allowing him to establish the authenticity. Campbell v. Murray, July 1. 1831, p. 861.

FRIENDLY SOCIETIES. See *Jurisdiction*, 5.

FUND IN MEDIO. See *Process, IX.* 1.

GLEBE.

A clergyman who had obtained decree from his presbytery for a glebe and minister's grass, which the sole heritor of the parish intended to challenge, having entered into an agreement with him for the possession of a farm at a certain rent, to subsist while the 'question regarding the glebe' should be under discussion; and the Court having, in a reduction of the decree, determined the question of the glebe proper, but not that of the minister's grass—Held that the clergyman was not entitled to retain possession of the farm till it also should be decided. M'Rae v. Mackenzie's Trustees, Feb. 5. 1831, p. 392.

See *Manse—Teinds*, 2.

GUARDIAN AND MINOR. See *Discharge*, 2.

HARBOUR.

An ambiguous clause in a statute as to the amount of harbour-dues autho-

HARBOUR (Continued).
rized to be levied, interpreted consistently with the usage of levying, as established on a proof. Girdwood and Co. v. Campbell, Dec. 14. 1830, p. 170.
HAVERS. See *Process, XII.* 3.
HEIR. See *Warrandice*, 1.
HEIRS AND DISPONEES. See *Clause*, 1.
HEIR-APPARENT.
(1.) An apparent heir, whose propinquity and apparency are admitted, entitled, in virtue of his apparency alone, without any service, to pursue a reduction of the service and infeftment of a party whom he averred to have been illegally served, in respect of alleged illegitimacy.
(2.) Where a party has, on apparency, raised up a tentative title by adjudication on a trust-bond, but on which no charter or infeftment has followed, it is no objection to the title of a subsequent heir apparent to pursue, that he has not obtained a transmission of the adjudication. Rutherfurd v. Nisbet's Trustees, Nov. 12. 1830, p. 3.
HERITABLE BOND.
1.—(1.) The act 1696, as to heritable securities to cover debts to be contracted, cannot be founded on by the granter of the bond as a defence against payment.
(2.) An heritable bond by a wife over her separate estate, though in security of advances to be made to her husband, is effectual.
(3.) Powers of sale under a bond for a specified sum, or such part thereof as shall be due on a current account, cannot be exercised without a previous constitution of the amount due, there being no provision for its liquidation in the bond.
(4.) A bond containing a personal obligation by one party, and an heritable security by another, is subject only to the single stamp-duty imposed on heritable bonds. Brown or Smith &c. v. Bedwell and Yates, Dec. 3. 1830, p. 136.
2.—(1.) Advertisement in a mere advertising paper held sufficient compliance with a provision in a bond requiring advertisement in a 'newspaper.'
(2.) A meeting for sale of lands, under powers in an heritable bond, having been adjourned to a future day specified; but a new series of advertisements having been commenced for a sale on that day, as for an original exposure—Held that the sale then effected was not liable to objection, from some irregularity in the advertisements prior to the first exposure. Dickson v. Magistrates of Dumfries, Jan. 15. 1831, p. 282.
3. Where an heritable bond was granted for £900, on the narrative that the sum was 'actually received of the date of these presents; but the creditor, while he admitted that that sum had not been advanced, alleged that he had advanced £300, and the debtor admitted only an advance of £5—Held that the bond afforded no proof of the payment of the £300, and therefore charge suspended, except for the £5. Hotson and Husband v. Paul, June 7. 1831, p. 685.
HERITABLE CREDITOR.
1. A tenant being creditor of the landlord, and holding his possession under a stipulation that he was to be allowed to apply the rents in liquidation of the debt, held entitled, in a question with an heritable creditor pursuing an action of mails and duties, so to apply the rents actually fallen due prior to citation to the action. Elmslie v. Grant &c., Dec. 15. 1830, p. 200.
2.—(1.) An action of mails and duties by a creditor in an heritable bond

HERITABLE CREDITOR (Continued).
having been raised before interest was due, but his debtor's estate being sequestrated, and the action not being called in Court till after a term's interest was past due, held not to be prematurely brought.
(2.) Three months premonition being stipulated before calling up the principal sum, and no such premonition being used before raising the action, and its conclusions not being restricted to the extinction of the interest only, held nevertheless to have been regularly laid. Ferrier v. Dunlops, June 29. 1831, p. 837.

HERITABLE OFFICE.
The heritable bailie of a regality having, by his charter, right to a fee of eight bolls of meal, termed therein 'firmæ molendinales,' out of lands subject to a feu-duty to the Crown of eight bolls four pecks; and the bailie fee having been paid out of this feu-duty by the King's Chamberlain, on collecting the same, till the date of a lease of the Crown duties of the regality in favour of the bailie, who thereafter drew the whole feu-duty without distinction—Held, after the expiry of the lease, that the lands were subject only to the feu-duty specified in the titles, but that eight bolls thereof were payable to the bailie as his bailie fee. Balfour v. Officers of State and Others, June 3. 1831, p. 676.

HERITABLE OR MOVEABLE. See *Succession*, 3.

HOLOGRAPH. See *Writ*, 6.

HOMOLOGATION.
1. Circumstances in which an heir at law who had made up titles under an entail executed by his father on deathbed, was (by a judgment of the Lord Ordinary acquiesced in) held not to be barred by homologation from setting aside the entail. Gardner v. Gardner, Dec. 3. 1830, p. 138.
2. A transaction by which a substitute heir sold his eventual interest under a lease to the tenant, but which the tenant afterwards renounced, held to be no bar to the heir, after his succession, pleading res judicata. Innes v. Duke of Gordon, May 26. 1831, p. 632.
3. An officer in the army, nearly 19 years of age, having granted a mandate, when abroad, to uplift any sum arising to him out of a certain process; and the mandatary having done so, and granted a discharge of the process; and the officer having made repeated drafts on the sum uplifted, and, after majority, fitted an account with the mandatary, and discharged him—Held not entitled to insist on reducing that discharge, and the discharge of the process, after a lapse of fifteen years, on the allegation that no curator ad litem had been appointed to him during the process, or that the mandatary had exceeded his powers in discharging it. Roberton v. Roberton and Others, July 2. 1831, p. 865.

HUSBAND AND WIFE.
1 A married woman living separate from her husband, and maintaining herself, is entitled to insist in an action of damages in her own name for slander, and to have a curator ad litem appointed when her husband refuses to concur. M'Kenzie or Cullen v. Ewing, Nov. 19. 1830, p. 31.
2. An heritable bond by a wife over her separate estate, though in security of advances to be made to her husband, is effectual. Brown or Smith v. Bedwell and Yates, Dec. 3. 1830, p. 136.
3. Decree having been pronounced in a declarator of marriage against a man who had an income of £200 a year, but who was not shown to possess any capital—Held,
(1.) That £50 per annum was a sufficient aliment to his wife, whom he refused to receive into family; and,

HUSBAND AND WIFE (Continued).

(2.) That she was not entitled to any allowance for purchasing furniture. Elder v. M'Lean or Elder, Feb. 5. 1831, p. 393.

4.—(1.) A bill granted by a woman before marriage having been discharged, and renewed by another bill after marriage—Held that the renewed bill was not effectual against her.

(2.) A decree of constitution against a married woman having proceeded on a docqueted account dated on the day of her marriage, but the date appearing to be false, the paper having a water-mark of two years later date—Held not capable of supporting a claim in a multiplepoinding regarding the separate estate of the lady. Balfour and Others, March 5. 1831, p. 558.

5.—(1.) Held that after a husband had prohibited a vintner from making furnishings to his wife, he could not be liable for articles not necessary for the maintenance of herself and family according to his fortune.

(2.) Question how far the separate peculium of the lady of a Baronet in embarrassed circumstances could be subjected for chaise-hires, wines, &c. furnished by a vintner to her order. Buie v. Lady Gordon &c., July 9. 1831, p. 923.

See *Aliment*, 1. 2.—*Arbitration*, 2.—*Fee and Liferent*, 1. 3.—*Proof*, *V.* 2.—*Title to Pursue*, 8.

HYPOTHEC, WRITER'S. See *Agent and Client*, 7. 9.

IDIOCY.

It is not relevant, to set aside a decree, to allege that the defender was in sane at the date of it, he not being then cognosced. Thomson v. Kechnie, June 17. 1831, p. 759.

IMPLIED ASSIGNATION.

An assignation to a lease held to carry right to a depending action of removing from the subjects comprehended under it, and also to a claim for violent profits for subsequent retention of possession, and to a bond of caution for the same lodged in the process of removing. Underwood's Trustee v. Bell, Jan. 25. 1831, p. 334.

IMPLIED OBLIGATION.

1. Trustees having inserted a clause in a building feu-contract, that the feuar should have no claim against them for the expense of mutual gables &c., "but should be entitled to claim half of that expense from the feuars of the adjoining lots," and granted warrandice from fact and deed; and having omitted to insert in the contract of an adjoining feuar an obligation to pay the half; and the first feuar having raised an action for it against the second, who was assoilzied, as not being bound in his feu-contract, though subjected on a separate ground, and no expenses allowed to either party—Held that the trustees were bound to relieve the first feuar of the expenses incurred by him. M'Kenzie v. Morison's Trustees, Nov. 23. 1830, p. 44.

2. A party having been requested by subscribers to sit for his portrait, as in reference to a public purpose; and having done so—Found that his son and representative was entitled to insist that it should not be diverted from that purpose. Clerk and Others v. Adam, June 10. 1831, p. 708.

INDEFINITE PAYMENT. See *Payment, Indefinite.*

INFEFTMENT. See *Sasine.*

INFERIOR COURTS A. S. See *Master and Servant*, 7.

INHIBITION.

A liferenter, with power to let leases for any period of duration, having used inhibition against a tenant for securing the prestations of his lease—Held

INHIBITION (Continued).
that this inhibition was not, after his death, available to the fiar. Liddle v. Grieve, Jan. 18. 1831, p. 286.
See *Landlord and Tenant*, 13.—*Sale*, 4.
INNER-HOUSE ROLLS. See *foot-note*, p. 21.
INSTITUTE. See *Entail.*
INSURANCE.
A party having borrowed money from an Insurance Company, and granted bond, along with a cautioner for payment of that sum, and for the premium on a policy of insurance to that amount effected with the company, which he assigned to them in further security; and, after the limited time for paying the premium was past, having left a bill in the hands of the company's secretary, equal in amount to the premium and interest, and died in that year—Held that the cautioner was not bound to pay the debt. Barker v. North British Insurance Co., July 2. 1831, p. 869.
See *Landlord and Tenant*, 3.
INTERDICT.
1. Interim interdict refused against proprietors of steam-boats landing and receiving passengers at a certain point on the Clyde in their passage up and down the river, in alleged violation of a right of ferry,—but bill passed to try the question. Hunter v. Napier &c., Nov. 27. 1830, p. 86.
2. Interim interdict against the appointment of a schoolmaster. Clark v. Irvine Academy, Nov. 30. 1830, p. 97.
3. Interim interdict granted as to certain operations on a mutual wall. Williamson v. Hill, Jan. 14. 1831, p. 269.
4. An interdict of a sale of horses at the instance of a party alleging himself to be a creditor of the seller, but having no constituted claim, refused as incompetent, although it was averred that the object of the seller was to defeat the right of the creditor. Commercial Bank v. Gilchrist and Trustee, May 31. 1831, p. 646.
See Ferrier v. Walker &c., Nov. 27. 1830, p. 85.
See *Commonty*, 2.—*Landlord and Tenant*, 2. 11.—*Nuisance.*—*Process*, *III.* 2.
INTEREST.
Interest is not due upon arrears of feu-duty, unless expressly stipulated in the contract. Napier v. Spiers' Trustees, May 31. 1831, p. 655.
See *Legacy*, 1.—*Provision to Children.*
INTERIM EXECUTION. See *Appeal.*
IRRITANCY. See *Landlord and Tenant*, 10.—*Superior and Vassal*, 3.
ISSUE. See *Process*, *XVI.* 8.
JOINT OWNERS.
Where there is nothing to prevent the part-owners of a ship from acting in concert, it is incompetent for one of them to pursue for recovery of his alleged proportion of freight or demurrage. Scotland v. Walkinshaw, Nov. 18. 1830, p. 25.
See *Proof*, *IV.* 5.
JUDICIAL EXAMINATION.
Circumstances in which judicial examination of copartners allowed before answer. Wilson v. Beveridge, Feb. 19. 1831, p. 485.
JUDICIAL FACTOR. See *Payment*, *Indefinite*, 1.
JUDICIAL REMIT. See *Proof*, *II.*
JURY TRIAL. See *Auditing of Accounts*, 1. 2.—*Cautioner*, 12.—*Process*, *VII.* 13. 14.—*VIII.*
—— COURT. See *Process*, *VIII.*—*XVI.* 4.

JURISDICTION.

1. Held that arrestment jurisdictionis fundandæ causâ cannot create a jurisdiction in the Courts of this country against an executor resident in a foreign country, (where the office fell to be executed,) to the effect of calling him to account here for the execution of his office. Brown's Trustees v. Palmer, Dec. 17. 1830, p. 224.
2. A bill of advocation and answers in the Admiralty Court ordered to be transmitted to the Lord Ordinary on the Bills. M'Kirdy v. Glass, Dec. 8. 1830, p. 153.
3. Held, with reference to certain statutes for the improvement of the navigation of the Clyde,

(1.) That the judgment of the Sheriff, on the titles of parties claiming right to ground required by the river trustees, was, after the lapse of a certain period, final to the effect of transferring the ground, assessing damages, and ordering payment of them; but,

(2.) That the judgment on the titles was thereafter subject to review by reduction, to the effect of deciding, as between competing claimants, which of them had right to the property, and consequently to the damages. Wright and Others v. Logan and Others, Jan. 22. 1831, p. 323.

4. Where a poinding has been executed in virtue of a precept on decree by Magistrates of a royal burgh, but not reported, it is competent for the Sheriff of the county, on the application of a third party claiming the goods, to grant interdict against proceeding with the poinding. Steel v. Smith, Feb. 2. 1831, p. 371.
5.—(1.) Circumstances under which an action by a member of a Friendly Society against other members was held to be competent before the Justices; and,

(2.) No power in the Court of Session to review their judgment. Lindsay and Others v. Orr, Feb. 11. 1831, p. 426.

6.—(1.) Under a local police statute conferring authority on Justices to prevent nuisances on the streets, they have no power to interdict de futuro.

(2.) A petition praying for such interdict, and otherwise not strictly in terms of the statute, and not referring to it, is incompetent.

(3.) An incompetent appeal to the Quarter Sessions, from decree in absence by the Justices, not necessary; and a suspension competent and well founded. Sim v. Hodgert and Others, Feb. 24. 1831, p. 507.

7.—(1.) A foreigner cited in an action of transference, as the representative of a deceased defender, held not liable to the jurisdiction of the Scottish Courts.

(2.) Circumstances not inferring a prorogation of the jurisdiction.

(3.) The mandatary of a foreigner having sisted himself to an action, and pleaded on the merits, but only under reservation of a declinator of the jurisdiction, which was ultimately sustained, held amenable to the jurisdiction of this Court for the expenses of process, but, in the circumstances, not liable for them. Reoch or M'Lachlan and Husband v. Rob and Mandatary, May 14. 1831, p. 588.

8. The Sheriff has jurisdiction, as Commissary, under the stat. 4. Geo. IV. c. 97. to entertain an action for slander concluding, with concourse of the procurator-fiscal, for damages, fine, and palinode. Turner v. Cuthbert and Husband, June 21. 1831, p. 774.
9. The creditor of a Scotchman domiciled abroad having used arrestments jurisdictionis fundandæ causâ, and thereupon raised an action against him, on the dependence of which he again arrested in common form, and in

JURISDICTION (Continued).
which he obtained decree; and a multiplepoinding as to the funds arrested having thereafter been brought in name of the arrestees, to which the common debtor was edictally cited—

(1.) Held that no jurisdiction had been created over him quoad the multiplepoinding, so that he had not been made a party thereto; and the process dismissed accordingly.

(2.) Observed, that an arrestment in common form, proceeding on a bill granted by the debtor, while on a visit to Scotland, for goods then purchased by him, could not compete with a subsequent arrestment, on the dependence of an action founded on the arrestments jurisdictionis fundandæ causâ. Harvey, Hall, and Co. v. Black and Son, June 21. 1831, p. 785.*

10. Observed—An Inferior Judge has no jurisdiction in determining how far a party is entitled to be freed from a written contract. Young v. Roberton &c., Nov. 24. 1830, p. 59.

11. Possession of a real estate in Scotland creates a jurisdiction against the proprietors, though foreigners, in ordinary personal actions; and if merely trustees, in such actions against them qua trustees. Ferrie &c. v. Woodward &c., June 30. 1831, p. 854.

12.—(1.) An arrestment used by the creditor of a foreign partner of a company in Scotland, in their hands, and over goods belonging to them, held to create a jurisdiction over the partner, although he alleged that he had no claim on the company funds; and an investigation as to this refused in support of a preliminary defence founded on the alleged want of jurisdiction.

(2.) Question raised, if in an action to determine whether a lease of premises in Scotland had been entered into by a foreigner, the subsistence of the lease can be assumed to the effect of sustaining, in the mean time, the jurisdiction to try the question. Douglas v. Jones, June 30. 1831, p. 856.

See Warton or Cullen, petitioner, Feb. 5. 1831, p. 382.

See *College of Justice—Poor*, 4.—*Road Acts*, 1. 3.—*Sheriffs' Small Debt Act—Tutor and Curator*, 2.

JURATORY CAUTION. See *Process, III.* 8.

JUS TERTII. See *Landlord and Tenant*, 16.

KING'S FREEMEN. See *Exclusive Privilege.*

KIRK-SESSION. See *Poor*, 1. 2.—*Poor's Roll*, 2.

LAND ESTATE, SEQUESTRATION OF. See *Landlord and Tenant*, 5.

LANDLORD AND TENANT.

1. Parties having obtained a lease of a mill for twenty years from Magistrates of a burgh, stipulating that they were to receive the value of their meliorations at the end of the twenty years, or obtain a new lease; and having continued to possess for more than twenty years additional after the twenty years, but without getting any express renewal; and having thereafter obtained a charter from the Magistrates of two-thirds of the subjects, and erected works and machinery upon the whole of it; but this charter having been afterwards set aside, in an action of reduction, as void, in respect of their not having the authority of an act of council thereto—Held, with reference to a claim for meliorations made in that action,

* See Mansfield, June 17. 1795, (2494.)

LANDLORD AND TENANT (Continued).

(1.) That the parties could not claim the value of those on that third, to which they had obtained no charter, nor of erections made prior to the charter, nor of moveable machinery; but,

(2.) That they had a claim for all fixtures and permanent erections, which improved the property resumed, made after the date of the charter, and prior to decree of reduction. Magistrates of Selkirk v. Clapperton &c., Nov. 13. 1830, p. 9.

2. Circumstances in which the tacksmen of a quarry were found not entitled to an interdict against the sale or removal, by a canal company, of part of the stones composing the quarry, although their landlord was debarred from opening any new quarry within the grounds let to them,—the operation being in implement of an agreement entered into by the landlord with the canal company prior to the tack, and being necessary for the cutting of a tunnel under the canal, for the purpose of the tacksmen's ulterior workings; and the canal company being obliged to pay a lordship for the stones excavated, as well as to be at the expense of the excavation. Fraser &c. v. Edinburgh and Glasgow Union Canal Co., Nov. 23. 1830, p. 46.

3. The tenant of a distillery being entitled, under his lease, to make certain new erections, and to carry them away at the end of the lease, if the landlord did not then take them at a valuation; and having made such erections of a value exceeding £100, and insured against fire for £100 on the distillery premises, and for other sums on his utensils and stock; and the premises, old and new, as well as the stock and utensils, being burnt during the currency of the lease—Held,

(1.) That the landlord was not entitled to claim from the insurance office, as an arresting creditor of the tenant, any part of the value of the buildings consumed; but,

(2.) That he was entitled to claim for rents due prior, but not posterior to the fire. Scottish Union Insurance Co. v. Mackintosh, Jan. 21. 1831, p. 310.

4. Where the proprietor in part of a loch let his share to a tenant who held a lease of the other part, and who erected on the stream issuing therefrom an embankment and sluice for the collection and regulation of the water to supply works; and the proprietor thereafter let a portion of his lands, past which the stream flowed, for the purposes of bleaching &c., but without mention of any right to the loch, or of the stream, (the use of which, however, was necessarily enjoyed when the tenant of the loch opened the sluice); and, at the expiry of this lease, again let the bleachfield, 'as possessed' by the former tenant; and, on the termination of the lease of the loch, ejected the tenant, in consequence of which the sluice was removed, and the water allowed to run in its natural course—Held, in an action at the instance of the tenant in the bleachfield, that the lease did not imply a warrandice of the artificial supply. Macdonald, Young, and Co. v. Hamilton, Feb. 8. 1831, p. 402.

5. A landlord and his trustee having agreed to allow a tenant to retain a proportion of his rent in liquidation of a debt—Held, in a question with a judicial factor appointed under a sequestration of the estate, that the tenant was entitled to retain, as agreed upon, from the term's rent fallen due prior to the sequestration. Thomson v. Jameson, Dec. 11. 1830, p. 168.

6. Where a party obtained and enforced, as principal tacksman, a decree of removing against a tenant of a house, and it appeared that he was neither tacksman nor proprietor, but factor for another who was not alleged to

LANDLORD AND TENANT (Continued).

have authorized the proceedings, the Court reduced the decree. Johnstone v. Dickson, Feb. 16. 1831, p. 452.

7. The tenant of a mill, who alleged that he had suffered damage by the act of a third party claiming right to and taking possession of the mill-dam, having been charged by the landlord for payment of rent, the Court refused to pass a bill of suspension without caution or consignation, except to the extent of damage, of which he produced primâ facie evidence. Houstoun v. Harveys, March 8. 1831, p. 560.

8.—(1.) A clause in a lease, though expressed in the form of an irritancy, may, if truly forming a reasonable condition of the contract, support an action of removing before the Sheriff.

(2.) Declaratory expressions do not necessarily infer a declaratory summons, so as to render it incompetent before the Sheriff.

(3.) A composition-discharge, founded on a private trust-deed for behoof of creditors, not sufficient to purge an irritancy arising on the execution of such a trust-deed.

(4.) The right to purge such condition in a lease held to be waived by a letter from the tenant admitting the irritancy, and consequent termination of his lease. Hall v. Lady Grant, May 19. 1831, p. 612.

9. Provision in articles of lease as to buildings, held to supersede an alleged local custom as to remunerating the tenant for meliorations thereon. Gordon v. Thomson &c., June 14. 1831, p. 735.

10. It being stipulated in a minute of tack that the tenant should pay his rent in advance before getting possession; and the entry being at Martinmas; and the tenant having offered his rent on the 23d of November, and demanded entry; and being refused possession, as having failed to enter and pay on the term-day—Held that the tender was made debito tempore, and that the landlord was liable to give possession, or pay damages for failure. Smith v. Robertson, June 16. 1831, p. 751.

11.—(1.) A landlord having obtained sequestration in security and payment of a half-year's rent as already past due, and the rent not being then due —Sequestration recalled.

(2.) Horses and oats being sequestrated, and the tenant having thrashed six bolls of the oats, and given them to the horses, without applying for judicial authority—Held that no breach of sequestration was committed.

(3.) Opinion intimated by a Lord Ordinary, that a process of sequestration for rent, after the term is past, containing also a prayer for a warrant of sale, is essentially different from a process of sequestration for rent currente termino, and the one is not convertible into the other. Miller v. Paterson and Ireland, June 23. 1831, p. 792.

12. A fiar not entitled to remove a tenant without concurrence of the liferenter. Buchanan v. Yuille, June 29. 1831, p. 843.

13. A tenant having used inhibition upon an action of damages against his landlord; and the inhibition being recalled on caution for a limited sum, in addition to certain rents retained by the tenant; but the landlord not having availed himself of this recal—Held, in an action of removing under A. S. 1756, founded on the tenant being more than one year's rent in arrear, that the rents retained by him might be taken into consideration, so as to bring the case under the A. S. Hamilton v. Cuthill and Trustees, July 9. 1831, p. 926.

14. In a lease (including various farms previously possessed by different tenants) where the term of entry was to certain of the farms after the separation of crop 1826 as to arable lands and out-houses; at Martinmas as to grass lands

LANDLORD AND TENANT (Continued).
and dwelling-houses; and the entry to certain other farms was at Whitsunday of the same year as to grass &c., and the separation of the crop as to arable lands; and the term of removal as to all the farms was at Whitsunday 1845 from the grass and houses, and at the separation of the crop from the arable land; and the rent was payable at "Candlemas and Lammas immediately succeeding the crop for which such rent was payable;" and it was stipulated that the tenant should keep at all times a full and sufficient stocking on the lands, and that "in case of the bankruptcy of the tenant, his creditors shall have no power under it to appoint a manager, or in any manner of way to interfere with the subjects let, or for the tenant himself to continue his possession, directly or indirectly, for behoof of his creditors;" and the tenant became bankrupt in August 1829; and the trustee for his creditors reaped the crop—Held, in a question with the creditors,
(1.) That the above clause did not infer a voidance of the lease; and,
(2.) That at all events, as each year's possession was to be considered as extending from Whitsunday to Whitsunday, the landlord was entitled to enforce performance of the prestations for the year 1829-30 against the creditors. Bruce v. Kinloch, June 28. 1831, p. 831.
15. A landlord who consented to a poinding creditor selling his tenant's effects, on condition of being paid out of the proceeds the rents due him, and in consequence did not execute a warrant of sale obtained by himself under a sequestration—Held (in a question with the other creditors claiming a pari passu preference with the first) not to have abandoned his right of hypothec quoad the effects poinded and sold. Russell and Ramsay v. Cochrane and Others, Jan. 19. 1831, p. 304.
16. Where a lease was destined to the heir-male of the tenant, on condition that the subjects were left completely stocked; and the tenant died intestate, so that the stocking went to his executors, who for some years possessed under the lease; but the heir-male acquired the stocking before expiry of the lease, paid the last half-year's rent, and concurred with the landlord in naming parties to appraise meliorations payable at the end of the lease—Held that although the landlord might have excluded the heir-male, yet that, having recognised him as tenant, it was jus tertii to a party liable for the meliorations to plead that the heir-male was not entitled to the lease under the destination. Fraser v. Fraser, June 30. 1831, p. 849.
See Ramage and Co. v. Briggs, Jan. 15. 1831, p. 281.
See Gordon's Trustees v. Williamson, Feb. 3. 1831, p. 387.
See Fraser v. Fraser, Feb. 25. 1831, p. 511.
See *Reparation*, 4.—*Sequestration under Bankrupt Statute*, 12.—*Thirlage*, 2.
LAW AGENT. See *Mandatary*, 2.
LAND ESTATE, SEQUESTRATION OF. See *Landlord and Tenant*, 5.
LAND TAX. See *Entail*, 4.
LEASE. See *Landlord and Tenant*, 14. 16.—*Thirlage*, 2.
LEGACY.
1. Circumstances in which it was found, under the terms of a settlement, that a specific legacy of £30,000 was to be set apart for younger children; and that the interest arising thereon, before it became exigible, accreseed to the capital. Glasgow's Trustees v. Glasgows, Nov. 30. 1830, p. 87.
2. Two brothers in this country being appointed residuary legatees by a brother dying abroad; and one of them having desired the foreign administrators to send him, at an appraised value, a trunk of wearing apparel of the deceased, instead of exposing it to public sale; and this having been done—Held,
(1.) That the other legatee was nevertheless entitled to an actual division of the contents of the trunk; and,

LEGACY (Continued).

(2.) That he might competently sue for delivery in the form of a summary application. Blair v. Blair, Feb. 26. 1831, p. 514.

3. A lady having delivered to a relation a letter binding her heirs and successors to pay him an annuity of £200 per annum after her death—Held,

(1.) That the provision was not testamentary; and,

(2.) That though gratuitous, yet having been delivered, it was not revocable. Duguid v Caddall's Trustees, June 29. 1831, p. 844.

See *Clause*, 1.—*Succession*, 3.—*Trustee*, 3.

——— SPECIAL.

An executer to whom a share in a company was specially bequeathed, having claimed in a multiplepoinding raised by the company—Held that his right was thereby completed without confirmation, so as to exclude other legatees who subsequently confirmed as executors-creditors. Bell &c. v. Willison &c., Jan. 13. 1831, p. 266.

See *Freehold Qualification*, 4.—*Homologation*.

LETTER OF CREDIT. See *Cautioner*, 4.

LIBEL, AMENDMENT OF. See *Process* 10. 12.—*Wrongous Imprisonment*, 2.

LOAN.

A debtor having borrowed £60,000, and granted an heritable bond payable at Candlemas 1829, with interest at five per cent. during the non-payment; and the creditor being bound not to exact repayment of the principal sum before Candlemas 1835, if the interest were regularly paid, and at which term the lands were to be redeemable by the debtor—Held that the debtor was entitled to repay the loan, and redeem the lands at an earlier period than Candlemas 1835, if he thought fit. Fraser v. Globe Insurance Company, Dec. 16. 1830, p. 207.

LOCUS PŒNITENTIÆ. See *Master and Servant*, 1.—*Pactum Illicitum*.

MAILS AND DUTIES. See *Heritable Creditor*, 2.

MANDATE. See *Principal and Agent*, 1.—*Homologation*, 3.

MANDATARY.

1. A defender not resident in Scotland is bound to sist a mandatary. Allsopp v. Allsopp, Nov. 23. 1830, p. 48.

2. Law agent in an application for a meditatio fugæ warrant, in a jurisdiction where the applicant was not resident, not responsible as a mandatary. Cowan v. Campbell, Feb. 23. 1831, p. 486.

3. Possession of an heritable property in Scotland held not sufficient to relieve an absent party from the necessity of sisting a mandatary. Stalker v. Railton, Feb. 12. 1831, p. 434.

See *Jurisdiction*, 7.—*Homologation*, 3.

MANSE.

Circumstances in which a dwelling-house, offices, &c. built as a manse, under a decree of the Presbytery, upon ground excambed for the old glebe, were found to form part of the benefice, and that the old glebe was not the only place where a manse could legally be erected. Bremner v. Officers of State, June 29. 1831, p. 838.

MARRIAGE CONTRACT.

A father having, in the marriage contract of his eldest daughter, become bound to pay, six months after his death, such share of his estate as should be equal to the 'portion or fortune' which any of his other daughters might have or become entitled to from him during his life, or after his death; and having, in the marriage contract of another daughter, bound himself to pay her £2000 six months after his death, but with interest from her marriage—Held that the interest must be considered as part of her portion or fortune in determining the share to which the eldest daughter was entitled. M'Queen &c. v. Nasmyth, Jan. 29. 1831, p. 355.

MARRIAGE-CONTRACT (Continued).
2. The parents of an intended husband having, in their son's contract of marriage, conveyed the property to him and the children of the marriage, and marriage having followed thereupon—Held no ground for reducing the disposition, that the subscription of the bride was not properly tested. Kibbles v Stevenson &c., Dec. 18. 1830, p. 233.
See Smith v. Smith, Nov. 25. 1830, p. 68.
MASTER AND SERVANT.
1. A lady having written to another to engage a servant, and thereafter not to do so; and the two letters having been delivered, through the post-office, simultaneously to the servant—Held that there was no completed contract, and that the servant was not entitled to wages. Countess of Dunmore &c. v. Alexander, Dec. 15. 1830, p. 190.
2. Held,
(1.)—(By the Lord Ordinary, and acquiesced in,)—That a party who was hired to take charge personally of a vessel, forfeited his wages by failure to do so, although he employed a delegate; but,
(2.) That he was entitled to reimbursement for the expense of employing the delegate, as in rem versum of the owners. Campbell v. Price &c., Jan. 13. 1831, p. 264.
3. Where a salary of £30 had been offered to a clerk by an agent, in place of full payment for writings, but not accepted by the clerk, and no specific sum was agreed upon, the rate of payment was to be regulated by the principle recognised by the parties in payments already made. Stewart v. Clyne, Feb. 2. 1831, p. 382.
4. General allegations by a writer of incapacity and negligence on the part of his clerk, not complained of while the clerk was in his service, held not to be a relevant defence against the clerk's claim for salary, in terms of an admitted agreement entered into after the clerk had been six months in his employment. Fraser v. Lang, Feb. 10. 1831, p. 418.
5. A ship-owner assoilzied from a claim made by a party for wages, as having been hired for a voyage, and unwarrantably dismissed, in respect of the failure of the party to prove a concluded contract. Thomson v. Izat, May 18. 1831, p. 598.
6. Circumstances in which a master having agreed to give his servant, in addition to wages, a present of £20 as an encouragement to assidu ty, it was held that the contract was renewed in all its parts by tacit relocation from year to year. Earl of Mansfield v. Scott, June 21. 1831, p. 780.
7. Claim by a discharged servant for wages and board-wages not of a summary nature, and held not to fall within the provision for summary procedure in the Inferior Courts A. S. Ritchie v. Radley &c., Dec. 17. 1830, p. 223.
See *Bill of Exchange*, 19.
MEDITATIO FUGÆ.
Circumstances which justified an arrest, as in meditatione fugæ, of a Scotsman who was sued on a liquid debt for a large sum in this country, although he had concerns abroad, and alleged that he was going abroad to take certain requisite steps for instructing his defence against the debt. M'Kinnon v. Nairne and Macdonald, May 20. 1831, p. 615.
See *Mandatary*, 2.
MELIORATIONS. See *Landlord and Tenant*, 1.—*Process, XV.* 4.
MESSENGER.
1. A messenger at arms having, according to common form, returned an execution bearing that he had cited a defender to appear, "place and time specified in the summons," which was, as usual, blank in the day of compearance; and the summons having been called without the blank being filled up, and the

MESSENGER (Continued).

Lord Ordinary having dismissed it—Held that the messenger (who declined authorizing the Lord Ordinary's interlocutor to be reclaimed against) was not responsible for the expenses thereby incurred. Wilsons v. M'Kay, Jan. 18. 1831, p. 288.

2. A messenger having disobeyed instructions to use arrestments for a debt due by a party who was his cautioner, found liable in a fine, and in the expenses of a complaint to the Lyon Court against him. Clyne v. Murray, Jan. 27. 1831, p. 338.

See *Reparation*, 2.

MINOR. See *Homologation*, 3.

MORA. See *Sale*, 3. 6.—*Cautioner*, 9.

MORTIFICATION.

On the failure of the trustees under a mortification, the Court appointed a Kirk-session factors to execute the trust,—refusing, however, specially to find them entitled to make an allowance to their clerk for management, and leaving them to act in that, as in other matters, according to the rules of law. Falconer, petitioner, Dec. 4. 1830, p. 142.

MULTIPLEPOINDING. See *Process, IX.*

NOTARY PUBLIC. See *Diligence, Legal*, 2. 3.

NUISANCE.

A bill of suspension being passed to try whether a whale-blubber boiling establishment, about to be set agoing in the neighbourhood of a sea-port, was a nuisance, the Court at the same time granted interim interdict de plano, although no operations had commenced, so as to show, by actual experience, whether it really was a nuisance in the situation proposed. Trotter v. Farnie &c., Dec. 7. 1830, p. 144.

OATH IN LITEM. See *Proof, III.*

OATH ON REFERENCE. See *Proof, IV.*

OBLIGATION. See *Legacy*, 3.—*Error.*

OFFICER, PUBLIC.

1. A Substitute Sheriff Clerk having issued a defective precept, a charge on which was suspended; and the charger having litigated the question for a considerable time, (during which the suspender became insolvent,) without intimating the defect to the Substitute Clerk or his Principal; but having at last intimated to the clerk, who thereafter aided in carrying on the suspension to a judgment which found the precept null, and suspended simpliciter—Held, in an action of relief against the clerk, that he was not liable for the debt in the decree, and that he was only liable for such part of the expenses in the suspension as were incurred after intimation to him of the defect. Henderson v. Drysdale and Campbell, Mar. 3. 1831, p. 536.

2. A party in possession of an office, under a commission subsequently set aside, having been found entitled to a reasonable allowance for such duties as he could instruct to have performed, not having shown that any duty was done, held not entitled to any part of the emoluments. Gibson-Craig v. Walker, May 13. 1831, p. 587.

3. A complaint having been presented against an assistant clerk of Court for a deviation from the regulations of Court, in twice giving up a partibus of a summons to be called against the complainer, when the clerk had not the summons in his custody, nor any receipt to show for it, and the summons had not been fee-funded—Held,

(1.) That the clerk had committed an irregularity; but,

(2.) That this arose from an innocent and harmless mistake, and therefore no expenses found due to the complainer. Lang v. Lang, June 16. 1831, p. 748.

See *Road Acts*, 4.—*Statute.*

PACTUM ILLICITUM.

The managers of a French company of comedians having hired a minor theatre "for their performances" at a rent of £120, not entitled to resile on an allegation that they had afterwards discovered it was illegal for them to represent their pieces in that theatre,—the theatre being a lawful place of exhibition for various performances, and the contract not specifying any of an illegal sort for which it was let. Cloup and Pelissie v. Alexander, Feb. 16. 1831, p. 448.

PACTUM DE QUOTA LITIS. See *Agent and Client*, 4.

PARENT AND CHILD.

Trustees ordained to pay certain interests bequeathed to children in minority, on the discharge of their father as administrator at law; but the latter not allowed to apply these interests (which were bequeathed to the children equally) towards the education &c. of one preferably to the others. Willison &c. v. M'Quarie &c., Dec. 9. 1830, p. 160.

PAROLE. See *Proof, V.*

PARTIES TO A SUIT. See *Poor*, 3.—*Process, X.*

PARTNERSHIP.

1.—(1.) Circumstances and evidence relevant to establish parnership.

(2.) Agreeing to accept a fixed annual sum out of the profits of a concern is sufficient to constitute the party so agreeing a partner of the concern. M'Kinlay &c. v. Gillon, Nov. 30. 1830, p. 90.

2. The executor of an individual who had carried on business under a firm of which he was sole partner, entitled to recover debts contracted to the firm. Mills v. Hamilton, Dec. 1. 1830, p. 111.

3. The partner of a company in Scotland having had a commission of bankrupt issued against him in England, under which he obtained a certificate; and no notice having been given that he was not to continue thereafter a partner of the company; but, on the contrary, he having thereafter written letters in the company's name—The Court refused to pass, without caution, a bill of suspension of a charge given him, as a partner of the company, on a bill of exchange granted by the company subsequent to his bankruptcy and discharge Hunter v. Evans, Foster, and Langton, Dec. 9. 1830, p. 159.

4.—(1.) The great majority of partners to a joint stock company are entitled to sue for performance of the obligations under the contract, although others may refuse to concur, or may have died, or become bankrupt.

(2.) Circumstances in which death or bankruptcy of partners held not to dissolve a company.

(3.) Circumstances in which a provision that the capital stock of a company should be a certain sum divided into so many shares, held not to be a condition of the existence of the company, which was found validly constituted, though only about one-third of the stock was finally subscribed.

(4.) Circumstances in which a partner not entitled to plead alleged mismanagement, or even deviation from the contract, as liberating him from his obligations.

(5.) The calling up of instalments of stock subscribed for held to be an act of ordinary administration, and so competent to the quorum of the committee of management intrusted with the ordinary business of the company.

(6.) Partners having expressly bound themselves to pay their instalments; and it being provided that, on failure, the committee of management should have power to forfeit their shares, provided the sum already paid by them did not amount to £20; but that when such sum did amount to £20, they should have no power of forfeiture, but should be obliged to sell the shares—Held that, in this last case, the company were not bound to exercise this privilege of selling the shares, but might enforce, by action at law, the obligation of payment on the partner failing. Sclater &c. v. Clyne, Jan. 11. 1831, p. 248.

PARTNERSHIP (Continued).

5. An action against one partner of a dissolved company, concluding, not for a general accounting, but for a balance as arising on certain branches of the business only, is competent at the instance of the remaining partners. M'Intyre &c. v. Maxwell, Jan. 15. 1831, p. 284.

6. A clause in the contract of a shipping copartnery, relative to the division of "free profits," held to imply gross profits under deduction of repairs on the vessels &c., and of a sum equivalent to the loss caused by their annual deterioration from age, although a limited sinking fund was provided "for upholding the number of vessels necessary for carrying on the company's trade, and meeting any risks which the company may have incurred," &c. Flowerdew v. Dundee, Perth, and London Shipping Company, Feb. 2. 1831. p. 373.

7. Where a committee of a joint stock company was appointed to make an investigation for behoof of the company, and one of their number, a writer to the Signet, acted as their clerk, but did not stipulate for remuneration—Found not entitled to make a charge for his time and trouble, but entitled to reimbursement of his outlay, besides a charge for making copies, in his own chambers, of the proceedings of the committee for their behoof. Duncan v. Union Canal Company, Feb. 8. 1831, p. 398.

8. Circumstances where a debt due to a person as a member of one firm was found not to fall under the assignment in the commission of bankrupt of that person's estate, as one of the partners of a separate firm. Stein's Assignees v. M'Clumpha's Trustees, Feb. 12. 1831, p. 432.

9. Circumstances in which a claim for the joint expense of housekeeping, founded on an alleged agreement to that effect, was found not to be established. Cuninghame v. M'Gachen, Feb. 17. 1831, p. 472.

10. One of two joint proprietors of an estate purchased on speculation not allowed to charge a commission for his trouble in management. Hunter v. Cochrane's Trustees, Feb. 18. 1831, p. 477.

11. In an action to constitute a debt against a company, although dissolved and bankrupt, all the partners must be called. Dewar v. Munnoch, Feb. 23. 1831, p. 487.

12.—(1.) Articles of a partnership by which the committee of a trading society was found to have sufficient powers to hire a salesman for a twelvemonth.

(2.) The Society found liable in wages, having unjustly dismissed the salesman during that period, Batchelor v. M'Gilvray (for Dundee Commercial Society), Mar. 4. 1831, p. 549.

13. Circumstances in which extraordinary calls for contribution being made on the partners of a banking concern on the allegation of severe losses, the Court held a partner entitled to further investigation by a remit to an accountant before decerning for these calls. Fife Bank v. Holliday, June 9. 1831, p. 693.

14.—(1.) Parties retiring from a company on the terms prescribed by the contract are not liable to relieve the remaining partners from the consequences of defalcation of funds subsequently arising.

(2.) A partner who had retired, but did not advertise out, having been called upon to pay debts afterwards contracted by the company, not entitled to relief against others who had previously, or at the same time retired, and had advertised out; and as to those who did not retire and advertise out till after him, entitled only to relief for such debts as then subsisted, and would have been claimable against them. Wright and Others v. Gardner's Trustees &c., June 10. 1831, p. 721.

15. Where the prospectus of a proposed Joint Stock Co. stated that the powers of the directors were to be defined by the contract; and a party applied for shares in reference to the prospectus; and a contract was extended, which differed materially from the prospectus; and a summons was raised by the

PARTNERSHIP (Continued).

"acting directors of the intended company," libelling on the prospectus and contract, and other procedure, and concluding against the party for a sum, "being the first call under the contract"—Found that the defender was not liable,—reserving to the parties having interest to insist for payment of the defender's share of the expenses necessarily incurred in the affairs of the intended company. Learmonth and Others v. Adams and Co., June 23. 1831, p. 787.

16. Circumstances in which it was held that an individual partner, who had subscribed both the original and the renewed and modified contract of a banking company, could not object (when called on for an extra contribution to account of losses sustained under both contracts) that the concerns under each contract were separate, and that his liability under each contract should be established in separate actions. Drummond v. Holliday, Jan 18. 1831, p. 284.

See *Cautioner*, 10.—*Process*, X. 1.—*XVIII.* 5.—*Proof*, *IV.* 3.—*Title to Pursue*, 6. 7.

PASSIVE TITLE.

1. Sisters found liable to account to the creditor of a deceased brother, for the value of annuities granted to them, under an arrangement with another creditor, by which they made up titles, and conveyed to him certain foreign property of the deceased, of which the chief part had been previously mortgaged to that creditor. Lang v. Orr &c., Dec. 1. 1830, p. 98.

2. Circumstances not inferring a passive title. Young &c. v. Marshall, May 27. 1831, p. 638.

PATENT. See *Contract*, 3.

PAYMENT.

Circumstances where, in an action to substantiate claims against a trust estate, it was found that the interest of a bond, prior to the death of the granter, had been extinguished by a gratuitous annuity from him to the creditor. Hunter v. Duff's Trustees, June 9. 1831, p. 703.

See *Proof*, *V.* 3.—*Sale*, 8.

PAYMENT, INDEFINITE.

1. In a reduction, the rights of the defenders to an estate having been set aside; and, pending a question as to their bona fide possession, a judicial factor having of consent been appointed, who collected from the tenants rents due both prior to and at and subsequent to Martinmas 1822; and it having been ultimately decided that the pursuer was entitled to the rents due at and after that term; and that, prior to this date, the defenders were bonâ fide possessors; and the funds collected by the factor being insufficient to satisfy the claims of all parties—Found that the pursuer was entitled to payment primo loco of the rent due at and after Martinmas, leaving the deficiency to fall on the prior rents. Gracie v. Earl of Stair's Trustees, Feb. 5. 1831, p. 393.

2. A drawer of a bill of £704, discounted with a bank, having offered to retire it by transmitting another of £140, and applying in payment of the balance a sum at his credit in his account; and the offer being accepted, and the new bill transmitted; but the drawer thereafter becoming bankrupt, while the bill of £704 still remained with the bank—Found, in a question with the acceptor, that the bank could not impute the second bill, and the balance at the credit of the account, to other transactions with the drawer, so as to have recourse upon the acceptor of the bill for £704. Allan v. Allan and Co., Mar. 1. 1831, p. 519.

PEERAGE.

A summons being raised by a party claiming a peerage, (but whose right thereto had never been recognised by any competent tribunal,) under the style and

PEERAGE (Continued).
title of a peer, allowed to proceed, contrary to the previous judgment ante, VIII. 404. Earl of Stirling v. Officers of State, Feb. 9. 1831, p. 413.
PERSONAL EXCEPTION. See *Competent and Omitted*, 1. 2.
POINDING.
The creditor of a tenant, after executing a poinding, and obtaining warrant of sale, having abandoned his diligence, and allowed the sale to proceed at the instance of the tenant; and another creditor having rendered the tenant bankrupt within sixty days, and claimed a share of the proceeds of the sale under § 5 of the Bankrupt Statute—Held, that as the sale was not under the poinding, the claim could not be sustained. M'Farlane v. Greig and Husband, Mar. 2. 1831, p. 529.
See *Sale*, 5.—*Jurisdiction*, 4.—*Landlord and Tenant*, 15.
POOR.
1. A pauper enforcing a claim for aliment against a kirk-session, should bring her action before the Sheriff, and not before the Court of Session. Morrison, petitioner, Jan. 14. 1831, p. 269.
2. A kirk-session having for some time, in addition to the usual plate at the church-door for collecting alms for the poor, allowed certain extra plates to be placed in the church-yard for the purpose of receiving contributions towards carrying on a litigation with the heritors, the object being always intimated from the pulpit previous to dismissing the congregation, when the collection for this purpose was made, and the plates being distinguished from that for the poor—Held that the members of session who received these collections were not bound to account therefor to the poor's funds. Heritors of Neilston v. Fleming and Others, June 1. 1831, p. 659.
3. In an action at the instance of the landward heritors of a parish containing a royal burgh, to have it declared that the Magistrates of the burgh were bound to maintain their own poor; or otherwise, in the event of failing in that conclusion, that the burden of maintaining the poor must be laid equally on the whole inhabitants in burgh and to landward, according to their substance—Held,
(1.) That any heritor had a title to pursue; and,
(2.) That it was sufficient to call as defenders the Magistrates and Council, and that it was not necessary to call the proprietors within burgh, or certain landward heritors who had disclaimed the action. Duchess Dowager of Roxburghe and Others v. Magistrates and Town Council of Dunbar, June 2. 1831, p. 669.
4.—(1.) The Sheriff has jurisdiction to entertain an application by a third party, in whose hands a child has been left destitute by its parents, to have the Heritors and Kirk-session ordained to take it off his hands, or, failing their doing so, to pay a sufficient aliment.
(2.) Circumstances in which the Heritors and Kirk-session were held bound to have instantly taken a child so left; and,
(3.) Action having been raised against the minister and certain heritors of a parish, as representing the Heritors and Kirk-session, and the Heritors and Kirk-session having appeared as parties, and litigated the cause—Held that they were not afterwards entitled to object that they had not been properly called. Orr v. Heritors and Kirk-session of Glassford, July 9. 1831, p. 928.
POOR'S ROLL.
1. A man with one child, having a house rent free, with the use of coals and candles, and an income of £46. 16s. per annum, refused the benefit of the poor's roll. Christie v. A. B., Dec. 14. 1830, p. 169.
2. Application for the benefit of the poor's roll remitted to the lawyers and agents for the poor, though the certificate of the kirk-session merely bore that

Poor's Roll (Continued).
the truth of the applicant's statement rested on his declaration alone, and that they knew no reason to doubt his credibility, but without bearing positively that they knew him to be worthy of credit. Cumming, petitioner, Jan. 27. 1831, p. 342.
3. It is no objection to a party getting on the poor's roll that she may be unable to pay previous expenses before she can be reponed against an interlocutor,—that being a subsequent question. Sassen v. Campbell, Mar. 2. 1831, p. 533.
See Jan. 20. 1831, p. 308.
Possessory Judgment.
Circumstances in which the Court found a party entitled to the benefit of a possessory judgment, and therefore granted interdict against certain operations which changed the existing channel of a stream, and ordained that channel to be restored. Campbell and Curator v. Marquis of Bute, June 30. 1831, p. 848.
See Cuningham and Others v. Learmonth &c., July 7. 1831, p. 902.
Presbytery. See *Schoolmaster*.
Prescription, English. See *Foreign*, 1. 2.
——— Long.
1. Circumstances constituting such non valentia agere as to prevent the currency of prescription. Lawrie v. Donald &c., Dec. 7. 1830, p. 147.
2. Circumstances in which a decree in foro, pronounced in 1782, was held liable to reduction under a summons raised in 1826. Maule v. Maule, July 5. 1831, p. 876.
See *Commonty*, 1.—*Corporation—Decree in Foro—Freehold Qualification*, 1.
——— Quinquennial. See *Proof, IV.* 4.
——— Septennial. See *Proof, IV.* 4.
——— Sexennial. See *Bill of Exchange*, 7. 13. 15. 24. 25.
——— Triennial.
Circumstances in which the triennial prescription was found to be elided by the letters of a factor, as constructively the writ of party. Smith v. Falconer and Others, Feb. 17. 1831, p. 474.
See Milligan v. Skinner, June 10. 1831, p. 720.
See *Proof, IV.* 5.
Presumption.
A foreigner contracting in this country is presumed to know the laws in the same manner as one of the lieges, and cannot resile on alleged ignorance. Cloup and Pellissie v. Alexander, Feb. 16. 1831, p. 448.
Principal and Agent.
1. Circumstances in which, with reference to a negotiation for a loan of money conducted on the part of the proposed lenders by a third party who had no special or written authority, expenses having been incurred in consequence of the lenders intempestive resiling—The Court found,
(1.) That the intended borrower was entitled to decree for these expenses against the party acting as agent, but not against the principal parties; and,
(2.) That the agent was entitled to full relief against the principals, as having sanctioned his proceedings. Glassford &c. v. Lennox or Morrison, Dec. 1. 1830, p. 105.
2. Circumstances in which a party acting under a factory which exempted him from liability, except "for his actual intromissions," was found not responsible for a debt alleged to have become irrecoverable through his negligence. Fraser's Trustees v. Falconer, Dec. 14. 1830, p. 178.
3. Terms of an agreement which the Court found to import the constitution of

PRINCIPAL AND AGENT (Continued).
a mercantile agency, and not a contract of sale. Blakemore and Co. v. Blyth and Co., Feb. 9. 1831, p. 468.
See *Bank*.

PROCESS, I.—ADMIRALTY CAUSES.
1. An action of constitution of debt, and sale of a ship, having been raised in the High Court of Admiralty, where it was the practice, after obtaining decree of constitution, to present a petition for warrant to inventory the ship; and the cause having, under 1. Wm. IV. c. 69, been transferred to the Court of Session, where the Lord Ordinary pronounced decree of constitution —Held that, instead of a petition, a minute to the Lord Ordinary, craving warrent to inventory, was the proper form of proceeding. Taylor v. Williamson &c., Jan. 13. 1831, p. 265.
2. An action being raised in the Court of Admiralty against two defenders residing in separate jurisdictions, and decrees obtained there against them, and the pursuer being desirous to extract against both—Process ordered to be transmitted to the Clerk of the Court of Session. New Clyde Shipping Company, petitioners, June 4. 1831, p. 682.
3. Reduction of Admiralty decrees in maritime causes must be enrolled in the Regulation Roll, and not before the junior Lord Ordinary. A. v. B., June 25. 1831, p. 805.

——— II.—ADVOCATION.
1. In an advocation of a Sheriff's judgment repelling a declinator of his jurisdiction, both parties having made up a record embracing the declinator, and also the merits of the whole matters in dispute; and the Lord Ordinary having pronounced a judgment on the merits, without disposing of the declinator—The Court recalled, and remitted to his Lordship to decide that question. Macdonald &c. v. Macintosh &c., Dec. 1. 1830, p. 104.
2. Circumstances in which it was held by the Lord Ordinary, and acquiesced in, that an advocation was competent, though the debt in dispute was less than £12. Hunter v. Anderson, Jan. 19. 1831, p. 289.
3. Where a proof has been taken in a Sheriff Court, and the judgment brought under advocation, the Lord Ordinary, in reviewing the Sheriff's judgment, should specify the facts which he finds proved, and how far his judgment proceeds on matter of fact, or on matter of law, in terms of 6. Geo. IV. c. 120, § 40. Batchelor v. M'Gilvray, Jan. 25. 1831, p. 330.
See *Jurisdiction*, 2.

——— III.—BILL-CHAMBER.
1. Where, after a suspender had been found liable in the expenses of two refused bills, and a remit made to the Auditor, a bill of suspension and liberation relative to the same debt was passed before the charger applied to have the Auditor's report approved of; and the suspender consented that the charger's claim for these expenses should be made in the suspension and liberation; the Court refused to approve of the Auditor's report, or decern for the expenses hoc statu. Steel v. Black &c., Dec. 1. 1830, p. 105.
2. A bill of suspension and interdict presented during vacation having been passed, but the interdict refused, a new bill held competent to the next succeeding Ordinary, although not presented. Trotter &c. v. Farnie &c., Dec. 7. 1830, p. 144.
3.—(1.) Where a bill of suspension would have been passed on caution in common form, it will be passed on juratory caution, where caution cannot be found.
(2.) Competent to award expenses of opposing a reclaiming note against an interlocutor in the Bill-Chamber passing a bill. Milne v. Scott, Jan. 20. 1831, p. 308.
4. The lodging of answers to a bill of suspension not having been intimated to

PROCESS, III.—BILL-CHAMBER (Continued).
the suspender's agent in terms of the A. S. June 14. 1799—Held that the interlocuter on advising the same was null. Linton v. Aytoun and Patten, June 4. 1831, p. 683.
5. A certificate of refusal of a bill, if no execution have followed, does not render a reclaiming note incompetent. Knox v. Robertson, June 23. 1831, p. 795.
——— IV. CITATION.
1. Action dismissed in respect the execution of citation was dated prior to summons, although not pleaded by the party, who objected to the citation on a separate ground. Hamilton &c. v. Murray and Co., Dec. 7. 1830, p. 143.
2. An objection to the execution of citation originally written on a paper apart, and afterwards stitched to the summons, that it did not contain the designations of the parties, in terms of 1672, c. 6, sustained. Stewart v. M'Ra, Jan. 19. 1831, p. 261.
See *Process, II.*
——— V. CONSISTORIAL CAUSES.
The Court cannot remit to any commissioner, other than the Commissaries of the Court recently abolished, to take proof in consistorial causes; and the Commissaries cannot delegate their powers. Malcolm v. Smith, Feb. 15. 1831, p. 442.
——— VI. CONTINGENCY.
There is not such a contingency between an action at the instance of an agent for payment of his business account, and the suit still depending in the previous stages of which the account was incurred, as to warrant a remit thereto. Landale v. Roughead or Tod &c., Jan. 13. 1831, p. 268.
See Scott v. Anderson, Nov. 13. 1830, p. 12.
See Clyne v. Stewart, Nov. 16. 1830, p. 20.
See Shand v. Cousin &c., Dec. 3. 1830, p. 126.
——— VII.—EXPENSES.
1. Circumstances in which neither party was found entitled to expenses. Stalker v. Munnoch, Nov. 19. 1830, p. 30.
2.—(1.) A judgment by the Court, on the primary conclusion of a summons, having been pronounced without any mention of expenses, when this, by the practice of the Court, precluded a demand for them afterwards—Held that a subsequent interlocutor, awarding all expenses 'competent' to be awarded, did not include those prior to this judgment.
(2.) The intervention of an appeal, in which the judgment of this Court is affirmed without mention of expenses, leaves the question regarding them just as if there had been no appeal; and,
(3.) Incompetent for this Court to award the expenses of an appeal not awarded by the House of Lords. Lawrie v. Donald and Jones, Dec. 7. 1830, p. 147.
3. Circumstances in which the Court allowed expenses to neither party, the judgment of this Court having been reversed on appeal. Marquis of Queensberry v. Duke of Queensberry's Executors, Dec. 9. 1830, p. 156.
4. A defender in an action of mails and duties found liable in expenses. Binny v. Maclean, Dec. 15. 1830, p. 200.
5. In adhering to interlocutors of Lords Ordinary repelling *preliminary* defences with expenses, the Inner House, if they intend to award additional expenses, must repeat the finding; allowed, however, in this case, in respect of a contrary practice, without such special finding. Rutherfurd v. Nisbet's Trustees, Dec. 18. 1830, p. 232.
6. Circumstances in which expenses prior to appeal were awarded, though the judgment of the House of Lords was silent as to the matter. Stirling &c. v. Dunn, Jan. 14. 1831, p. 276.

PROCESS, VII.—EXPENSES (Continued).

7. To entitle a party to object to an Auditor's report, he must lodge a note of objections before it comes out to be moved. Kibbles v. Stevenson, Jan. 15. 1831, p. 282.

8. A party against whom judgment had been pronounced in the Inferior Court having objected, for the first time in this Court, that no record had been prepared, found liable in the previous expenses. Hunter v. Anderson, Jan. 19. 1831, p. 289.

9.—(1.) A reclaiming note having been presented against an interlocutory judgment, and refused, and the respondent found entitled to the expenses of opposing the note—Held competent for the Lord Ordinary thereafter, at finally deciding the cause, to determine the whole Outer House expenses from the commencement of the process.

(2.) A simple adherence by the Court to an interlocutor of the Lord Ordinary awarding expenses of process, carries the additional expenses of opposing a reclaiming note. Lyon v. Reid, Jan. 20. 1831, p. 308.

10. A suspender having printed his letters and reasons of suspension, and no answers being lodged by the charger; but an intention to lodge answers being intimated by his agents; and they having borrowed six copies of each of the printed papers; and the suspender being allowed his expenses—Held that the charger was not entitled to object that the printing should be disallowed in the suspender's accounts, as an expense which was unnecessary in virtue of A. S. July 11. 1828, § 37. Alston v. M'Beth, Jan. 21. 1831, p. 311.

11.—(1.) Where the necessity of a multiplepoinding is imputable solely to the raiser, and he is the party who substantially derives benefit from the decree therein pronounced, he will not be allowed his expenses out of the fund in medio.

(2.) The date of an interlocutor from which expenses were intended to be found due, having been erroneously written out in that awarding the expenses—Held that, in auditing the account, it might be limited to the true date. Jeffrey v. Clyne and Others, Jan. 28. 1831, p. 350.

12. The Court of Session having assoilzied defenders, but found no expenses due, and afterwards altered, and decerned with expenses; and the defenders having appealed against the first judgment so far as it found no expenses due, and from the subsequent judgments on the merits; and the House of Lords having reversed the first judgment, so far as appealed from, and also the subsequent interlocutors—Held that, in applying the judgment of reversal, this Court could not award the expenses of process to the defenders. M'Tavish v. Mackenzie's Trustee, Feb. 12. 1831, p. 431.

13. A verdict being returned for the defenders in a Jury trial, and the pursuer, a trustee, having thereafter obtained an order for a new trial; but his title as trustee being subsequently reduced before further proceedings—Found that the defenders, who had compromised the case with a new trustee, were not entitled to the expenses of the trial with the former. Scott v. Russel &c., Feb. 26. 1831, p. 513.

14. The defenders in an action of damages having, after a verdict against them, presented a Bill of Exceptions against the Judge's charge; and, on this being disallowed, having appealed to the House of Lords, who allowed a new trial, on the ground that there had been no sufficient evidence to support the verdict; and the defenders having thereupon obtained a verdict—Held that the pursuer was entitled to the expenses of the former trial. Robertson v. Allardyce and Boswell, Mar. 11. 1831, p. 580.

15. Circumstances in which the expenses of a petition for execution pending appeal were awarded against the respondent, though, in respect of the appeal

PROCESS, VII.—EXPENSES (Continued)
having been dismissed, the petition became unnecessary. Irvine v. Scot, May 27. 1831, p. 645.
16. It is no ground for not awarding expenses against an unsuccessful party in an advocation that an error calculi was corrected, which might, if noticed, have been corrected in the Inferior Court. Stove v. Colvin and Others, May 26. 1831, p. 633.
17. Intimated by the Court, that an adherence by the Inner House to an interlocutor of a Lord Ordinary finding expenses due should in future carry the expenses in the Inner House, but that the Clerks were to insert a finding to that effect. July 2. 1831, p. 864.
See Forrester or Glass v. Campbell and Arnott, Jan. 28. 1831, p. 349.
See M'Neal v. Galbreath, Jan. 29. 1831, p. 351.
See Black v. Malcolm, Feb. 12. 1831, p. 429.
See Balfour and Others, v. Laing, July 7. 1831, p. 902.
PROCESS, VIII.—JURY TRIAL.
1. The only objection taken on the record to the validity of a draft on a banker being that it was drawn ten miles from the office; and parties having gone to issue on this objection before a Jury; and the only plea raised on the trial, after failure to prove knowledge of the defect on the part of the bank, being that a draft drawn beyond ten miles was not a good voucher, whether paid knowingly or not; and the Judge having specially directed the Jury that it was necessary to instruct knowledge, in order to preclude its being used as a voucher; and a Bill of Exceptions having been tendered, which, in the narrative of the counsel's argument, set forth another objection which had not been pleaded either on the record or at the trial, and which further bore the charge to have commenced with a general statement 'that the said several matters' were not sufficient to exclude the defence—Held incompetent to introduce the new objection at discussing the Bill of Exceptions. Aytoun &c. v. Dougall &c., Dec. 15. 1830, p. 194.
2. The Court remitted to the Lord Ordinary to proceed in a case which came back from the Jury Court under a verdict disposing of part of the cause. Mason v. Merry, Dec. 15. 1830, p. 187.
3. The Court, in the exercise of the discretion committed to them by 1. Wm. IV. c. 69, § 5, refused to grant a trial by jury before a full Bench, and intimated this as a general rule in all cases. Stewart v. Fraser, Dec. 17. 1830, p. 212.
4. A new trial granted where the Court considered the verdict contrary to the real evidence, although the verdict was conformable to the opinion of the Judge. Gavin v. Montgomery, Dec. 17. 1830, p. 213.
5. Heirs at law having raised a reduction on the head of deathbed; and trustees under the challenged deed having raised a declarator of liege poustie; and the actions having been conjoined—Held that the pursuers of the reduction should stand as pursuers at the trial in the Jury Court. Macdougalls v. Gordon and Others, Feb. 5. 1831, p. 392.
6. Incompetent for the Court, even of consent of parties, to remit to the Lord Ordinary to decide a question relating to the application of a verdict. Mason v. Merry, June 11. 1831, p. 722.
7. In conjoined processes of reduction of a decreet-arbitral, and a petitory action for implement, the pursuer of the reduction entitled to stand as pursuer on issues as to the validity of the decree. M'Phersons v. Ross, June 23. 1831, p. 797.
8. Sufficient ground to overrule the pursuer's choice of Edinburgh as the place of trial, that the witnesses were chiefly in Inverness-shire, and that the expense of bringing them to Edinburgh would be considerable. M'Phersons v. Ross, July 1. 1831, p. 861.

PROCESS, IX.—MULTIPLEPOINDING.

1. A creditor called in a summons of multiplepoinding, and who had given in a claim, having lodged objections to the raiser's condescendence of the fund in medio, as making deductions which he was not entitled to charge against it, the Court refused to decide on the objections till a plea of the raisers, that the objector's claim was not preferable to his claims of deduction, should be determined. Mackintosh v. Macdonald, Nov. 19. 1830, p. 35.

2.—(1.) Under an action of mails and duties relative to rents, an interim decree having been pronounced as to those for crop 1827, and that judgment being under appeal—Competent to raise a summons of multiplepoinding as to the rents of crop 1828, although it was alleged that the parties to the multiplepoinding, and also its merits, were the same as those in the process of mails and duties.

(2.) Observed, incompetent to raise a process of multiplepoinding as to rents yet 'to become due.' Pentland v. Royal Exchange Assurance Co. &c., Dec. 10. 1830, p. 164.

3. Circumstances in which objectors to a multiplepoinding allowed to be heard on a new objection, after the record was prepared, but not closed, without payment of previous expenses. Marjoribanks' Trustees v. Chalmers' Trustees, May 17. 1831, p. 595.

See Mackintosh or Fraser v. Mackintosh's Creditors, Nov. 27. 1830, p. 87.
See M'Laine v. M'Gillivray &c., Dec. 4. 1830, p. 143.
See M'Lellan v. Kilpatrick &c., Dec. 18. 1830, p. 247.
See *Arrestment, 5.—Process, VII.* 11.

——— X.—PARTIES TO A SUIT.

1. A petition and complaint, founded on a penal statute, (5. Geo. III. c. 49,) against a company, and the individual partners thereof, without naming them, dismissed as incompetent quoad the company, but sustained against two persons named and described as the manager and clerk of the company. Miles v. Finlay and Co. &c., Nov. 16. 1830, p. 18.

2.—(1.) An interlocutor pronounced in a suspension, before closing the record, repelling preliminary objections on the part of the suspender, embraces all objections to the instance of the charger, and form of the diligence.

(2.) Parties styling themselves 'the committee and congregation' of a religious association, having granted a bill, 'conjunctly and severally,' in payment of the rent of a place of worship, not entitled to plead that, as a committee, they had no persons to bind themselves, or that they were not personally liable. Ross v. Young &c., Jan. 14. 1831, p. 275.

3. In an action to constitute a debt against a company, although dissolved and bankrupt, all the partners must be called. Dewar v. Munnoch, Feb. 23. 1831, p. 487.

——— XI.—RECORD.

1. Circumstances in which, after a record was closed, and the time for reporting a diligence expired, a complainer was allowed to make a new production with his Revised Case, which had not been recovered under a diligence, and which the respondent had not seen; but the respondent allowed to re-revise his Case, and a remit made to the Lord Ordinary to determine "whether any and what expenses ought to be found due to him in respect of the re-revisal." Lord Macdonald &c. v. Grant, Jan. 15. 1831, p. 280.

2. In a competition arising in an application for the sale of poinded goods, a record must be made up. Hunter v. Anderson, Jan. 19. 1831, p. 289.

3. In a count and reckoning against parties resident in England, they having, when the record was nearly about to be closed, given in a new plea, founded on the English Statute of Limitations, which had not been stated in defence—Held,

(1.) That they were entitled to have this plea added; but,

PROCESS, XI.—RECORD (Continued).

(2.) That they were only so entitled on paying the expenses already incurred by the pursuer in preparation of the record, reserving right to them to claim repetition, should the plea be repelled, and the cause decided on their statements and pleas already on record. Donaldson and Trustees v. Bannatyne and Others, Jan. 25. 1831, p. 333.

4. A plea in bar of action not having been stated among the defences, and, though afterwards inserted in the record, not having been decided or reserved before the record was closed—Held incompetent afterwards to entertain it. Laidlaw v. Dunlop, March 11. 1831, p. 579.

See A. v. B., Feb. 8. 1831, p. 398.

——— XII.—RECLAIMING NOTE.

1. Incompetent for parties, by consent, to dispense with the rules prescribed by the statute as to reclaiming notes. Hopkirk v. Shotts Iron Co., Dec. 8. 1830, p. 152.

2. A reclaiming note is not incompetent, although a Revised Case is not appended; but it ought to be so. Loch's Trustees v. Loch, Dec. 14. 1830, p. 180.

3. A Lord Ordinary having found payment of a bill proveable only by writ or oath of a charger, and granted diligence to the suspender to examine havers; and the diligence being extracted, and the charger examined as a haver; and the suspender having afterwards reclaimed against that part of the judgment which limited the mode of proof—Not barred from so reclaiming. Crichton v. Watt, March 1. 1831, p. 516.

4.—(1.) Where parties in an advocation agreed to hold the Inferior Court record, with additional note of pleas, as the record in this Court, a reclaiming note, which had not the Inferior Court record appended to it, found incompetent.

(2.) The Court refused to write on a note defective in this way—Observing that the clerk was entitled to score his marking, so as to prevent its proving any obstacle to extracting the decree. Birtwhistle's Trustees v. M'Ra, Jan. 13. 1831, p. 265.

5. A reclaiming note, on a point of expenses, having no copy of the summons appended, refused as incompetent, although the revised condescendence and answers were appended. Cook v. Forbes and Others, Feb. 12. 1831, p. 429.

——— XIII.—REMITS, &c.

1. An accountant's report having been lodged in a multiplepoinding raised by certain creditors in name of a trustee; and the creditors having given in objections thereto, and these having been repelled; and the trustee having been found entitled to retain certain expenses of the litigation out of the trust-funds; but not having asked decree against the creditors personally—Held not entitled subsequently to give in objections to the report, to the effect of having the expenses laid on these individuals. Fraser v. M'Naughton and Others, June 10. 1831, p. 720.

2. Objections to the report of a surveyor as to the value of an estate having been repelled, and the report approved of, incompetent afterwards to bring forward further objections that the value of woods, minerals, &c. had not been specially considered and included. Hunter v. Cochran's Trustees, Feb. 18. 1831, p. 477.

——— XIV.—REPONING.

1. Not competent, on a mere application to be reponed against a decree in absence, to enter into the consideration of how far the party may have been barred, by intervening circumstances, from insisting in his defence. Spence v. Hee, Jan. 15. 1831, p. 282.

2. After warrant to extract protestation against a party for not calling has been

PROCESS, XIV.—REPONING (Continued).
obtained from the keeper of the minute-book, the party cannot be reponed. Graham v. Boosies, March 9. 1831, p. 566.
3. To entitle a party to be reponed, under the 48. Geo. III. c. 151, against an interlocutor become final by mistake, he must pay the previous expenses. M'Ra v. Birtwhistle's Trustees, March 11. 1831, p. 582.
4. Circumstances in which a party was reponed against a decree in absence, only on consigning part of the amount, and paying expenses. Gibson and Others v. Auld and Spouse, June 4. 1831, p. 685.
5. Circumstances in which the Court refused to repone a party against an interlocutor pronounced on failure to obtemper, by the day appointed, an order for answers to a condescendence. Gordon v. Fraser, June 7. 1831, p. 690.
——— XV.—RES JUDICATA.
1. The judgment of a Lord Ordinary in the Bill-Chamber, refusing a bill of suspension and liberation offered by the wife during her imprisonment till she should execute the discharge, is not res judicata, so as to bar a reduction of the discharge thereupon executed by her. Wilson or Tait and Husband v. Wilson, June 4. 1831, p. 680.
2. An interlocutor having found a decree to be res judicata, and a party, in terms of it, entitled to fish 'from the march at Breakenord down to the sea;' 'but in respect parties are not agreed as to the march between the lands of Balblair and Breakenord,' appointed a condescendence on that subject; and the interlocutor having become final—Held that it was still competent to inquire in what sense the words 'the march at Breakenord' were used in the decree. Mackenzie and Munro v. Magistrates of Dingwall and Others, June 17. 1831, p. 761.
3. A previous decision as to the incompetency of certain alterations proposed on a building, found not to afford a plea of res judicata. Young v. Cuddie, Feb. 24. 1831, p. 500.
4. A judgment dismissing a claim for ameliorations, in a question with an heir of entail in possession, held to form res judicata in a question with a succeeding heir. Innes v. Duke of Gordon, May 26. 1831, p. 632.
——— XVI.—SUMMONS.
1.—(1.) A summons of declarator of facts, not followed by any conclusion of right on the part of the pursuer, incompetent.
(2.) Question raised, whether it be competent by a relative summons to supply a statement of fact in a record in another action. Lyle and Trustee v. Balfour, Nov. 17. 1830, p. 22.
2. A party to whom an English bond had been assigned in security and for payment of what might be due on a current account, having obtained judgment in the English Courts against the debtor in the bond, and imprisoned him thereon; but having liberated him, on receiving a partial payment, without consulting the original creditor, whereby he, according to the law of England, discharged the bond, and became liable to account for the full amount of it; and having been, immediately thereafter, repeatedly asked for information as to the nature of the settlement, which he withheld; and having been also warned that he would be held responsible; but no steps having been taken for more than six years, during which time both parties were resident in Scotland, and by the lapse of which period the assignee was said to have lost recourse against his attorneys in England; but being then called in an ordinary action of count and reckoning, proceeding on a general statement of his intromission with the bond, without specially libelling his misconducting the proceedings against the debtor—Held,
(1.) That under this libel it was competent to found on this misconduct, as preventing him from taking credit for the balance unrecovered.

PROCESS, XVI.—SUMMONS (Continued).

(2.) That the action was not barred by acquiescence; and,

(3.) That the English Statute of Limitations did not apply. Banner v. Gibsons, Nov. 24. 1830, p. 61.

3. A party having raised a declarator containing general conclusions of accounting, but without any narrative to sustain an accounting, except with reference to the subject-matter of the declarator; and having raised another properly drawn summons for a general accounting, which was thrown out of Court on a defence that the previous action constituted lis pendens; and the declaratory conclusions of the first action having been passed from; and the defender having now pleaded that the conclusions for a general accounting were not supported by the narrative—The Court refused to listen to this as a defence to exclude the action, but allowed the pursuer to amend his libel. Finlayson's Trustee v. Pedie, Dec. 16. 1830, p. 211.

4. It being averred, in a summons of proving the tenor, that the settlement of a deceased lady had never been cancelled or altered by her in any shape, and had been placed in her repositories, 'but has been since abstracted from the said repositories, or at least has disappeared;' and it being objected that the casus amissionis was irrelevantly libelled, no casus amissionis being stated—The Court refused to sustain the libel, but allowed an amendment. Kerr v. Kerr &c., Dec. 16. 1830, p. 204.

5.—(1.) A summons concluding for reduction of the indorsations of certain bills by a bankrupt to one of his creditors, and for repetition of their contents, insufficient to reach payments in cash by the bankrupt, or the proceeds of a bill indorsed by the bankrupt's brother.

(2.) A summons having concluded for reduction of two bank cheques, and repetition of their contents; and the Court having assoilzied as to one, but reduced the other, and remitted to the Jury Court to try an issue relative to the funds against which it was drawn; and a verdict being returned; and a supplementary summons being thereafter raised to reach the cash payments and indorsations above specified—Incompetent to conjoin the actions.

(3.) A supplementary action having reference to a transaction falling under the act 1696, but not libelling on the act, and containing no reductive conclusions, dismissed as inept. Blincow's Trustee v. Allan and Co., Jan. 22. 1831, p. 317.

6. Where a party executed a summons in which there was a slight error in the name of the defender, and thereafter, without calling it, raised a second, with the same conclusions, referring to the first, but correctly naming the defender, and declaring that he only craved one decerniture for the sums concluded for; an objection to the second summons, that it was supplementary to an inept summons, repelled. Gordon v. Fraser, Jan. 22. 1831, p. 328.

7. A statutory petition and complaint at the instance of a private party, concluding for penalties to the amount of £18,000, for contravention of the statute 5. Geo. III. c. 49, by issuing notes for 5s. or 7s. respectively, dismissed as irrelevant, in respect of the vagueness of the libel. Miles v. Finlayson and Marshall, Jan. 25. 1831, p. 331.

8. Under a summons libelling a special agreement as the ground of debt, a pursuer is not entitled to resort to other grounds. Cuningham v. M'Gachen and Others, Feb. 17. 1831, p. 472.

9. The pursuer of a reduction on the head of fraud &c. having, before closing the record, recovered documents on which he meant to found an alternative conclusion of declarator of trust; and having raised a supplementary declarator of trust—Actions conjoined, reserving all questions of expenses. Howatson v. Murdoch, March 3. 1831, p. 534.

10. One of several copartners having, as treasurer of the association, granted a

PROCESS, XVI.—SUMMONS (Continued).

bill; and summons for payment having been raised against him individually; and he having objected that it ought to have been brought against the partners; but having closed a record on the merits, this objection being reserved; and the Court having found that the other partners must be called; and a supplementary summons having been raised accordingly, and a record in it having been closed on summons and defences—The Court conjoined it with the first process. Thomson v. Gilkison &c., also Paterson v. Thomson, Nov. 18. 1830, p. 27, and March 1. 1831, p. 520.

11. Under a summons of reduction, calling for a deed of settlement described as having two codicils attached thereto, specially setting forth 'all &c. to be seen &c., and reduced,' for reasons (chiefly founded on the allegation that the deceased was not of a disposing mind) which only mentioned the 'foresaid disposition and settlement,' without specially referring to the codicils—Held competent to take an issue as to the codicils, as well as to the principal deed. Donaldsons v. Donaldson's Trustees, March 9. 1831, p. 565.

12. In an action at the instance of the landward heritors of a parish containing a royal burgh, to have it declared that the Magistrates of the burgh were bound to maintain their own poor; or otherwise, in the event of failing in that conclusion, that the burden of maintaining the poor must be laid equally on the whole inhabitants in burgh and to landward, according to their substance—Held,

(1.) That any heritor had a title to pursue; and,

(2.) That it was sufficient to call as defenders the Magistrates and Council, and that it was not necessary to call the proprietors within burgh, or certain landward heritors who had disclaimed the action. Duchess Dowager of Roxburghe and Others v. Magistrates and Town Council of Dunbar, June 2. 1831, p. 669.

13. An objection, founded on the act 1696, c. 19, relative to summonses of interruption of prescription, found not effectual against a summons registered in the Record of Interruptions, and proceeding on a bill as a summons of interruption, when pleaded in bar of its being insisted in as an ordinary action. Magistrates of Edinburgh v. Brown, June 23. 1831, p. 796.

14. A summons founded exclusively on the act 1701 cannot support a conclusion for damages at common law, independently of the penalties imposed by the act; but an amendment of the libel allowed. Millar v. Mills and Vary, May 21. 1831, p. 625.

15. Conclusions against an heir of entail for ameliorations generally, held to include a claim for them to the extent of a power under the entail to contract debt, though not specially founded on in the summons. Innes v. Duke of Gordon, May 26. 1831, p. 632.

16. A summons having been raised in an Inferior Court, founding on an informal decree-arbitral; and the Judge having ordered a proof—Found incompetent thus to rectify the decree-arbitral; but the libel allowed to be amended, so as to be laid on the facts of the case, independent of the decree. Campbell v. Mitchell, July 2. 1831, p. 875.

17. Trial delayed in a cause in which the Magistrates of a royal burgh were parties, in respect that their election under a royal warrant required the confirmation of the Privy Council, which was to be opposed. Magistrates of Dundee &c. v. Berry, July 1. 1831, p. 860.

See Inglis and Co. v. Lane and Co., May 18. 1831, p. 599.

See *Bill of Exchange*, 8.—*Officer, Public*, 3.—*Peerage*—*Process, IV.* 1. 2.—*VII.* 2.—*XVIII.* 1.—*Teinds*, 1.—*Wrongous Imprisonment*, 2.

PROCESS, XVII.—SUSPENSION.

1.—(1.) After a Sheriff's decree of ejection has been extracted, and put to full execution, a suspension is an inapplicable remedy.

PROCESS, XVII.—SUSPENSION (Continued).

(2.) This rule applied where, after a first bill of suspension had been refused, and a remit made to the Sheriff to allow the suspender ten days to find caution, and a second bill was refused simpliciter, and a reclaiming note lodged, but no prorogation of the sist being obtained, the charger got a certificate of refusal, and executed the decree before the note came to be advised. Mackintosh &c. v. Robertson, Nov. 26. 1830, p. 75.

2. A bill of suspension and liberation having reference solely to the incarceration as irregular in respect of a previous sist; but the expede letters being so framed as to apply to objections to the decree and horning on which the caption proceeded; and the letters having been suspended simpliciter in general terms, but which were afterwards explained to apply solely to the liberation—Held that the process was exhausted, and that the merits of the decree and diligence were not still in dependence under it. M'Christie v. Kea or Fisher, May 31. 1831, p. 653.

3. The Lord Ordinary, having sisted process as to representatives pleading defences in law, till the result of an accounting with a trustee, which might render a decision of these defences unnecessary, the Court altered, so as to allow the representatives to go into the accounting, if they saw fit; but superseded the discussion of the pleas in law. Mackintosh v. Macqueens and Others, Feb. 10. 1831, p. 419.

4. Bill of suspension offered without caution or consignation of a charge on a registered bond for a liquid debt refused with expenses. Falconer v. Mansfield, June 15. 1831, p. 741.

5. Where a bill of suspension has been presented on caution, and this has not been found within the time prescribed by the A. S. June 14. 1799, and the bill has been refused, the Court will not, on a reclaiming note, allow juratory caution. Hay v. Jopp's Trustees, June 25. 1831, p. 806.

6.—(1.) Competent to pass a bill of suspension, on caution, of a charge under a bond which provided that no such bill should pass, but on consignation only.

(2.) Circumstances in which, a balance due under a bond by six co-obligants being paid by third parties, who offered a discharge to each co-obligant on receiving payment of his proportion of their advance, but refused to assign their debt to three co-obligants who tendered them full payment, and alleged they had paid a sum to account of the bond before the balance was paid by the chargers,—the Court refused the bill as to such sum as would have been due by the suspenders in a question with their co-obligants, even if they had made all their alleged separate advances, and passed it on caution quoad ultra. Gilmour &c. v. Finnie &c., July 8. 1831, p. 907.

See *Appeal, Execution pending*, 4.—*Arbitration*. 5.—*Nuisance*—*Partnership*, 3.—*Process, III.* 2. 3. 4.—*VII.* 10.—*X.* 2.—*XVII.* 2.—*Sale*, 2.—*Bankrupt*, 4.—*Sheriff Small Debt Act.*

PROCESS.—XVIII. VARIOUS.

1. A Lord Ordinary acting for another having pronounced a judgment in a cause which had previously been remitted by an Act of Sederunt to a third Lord Ordinary—Held that the judgment was null. Mackenzie &c. v. M'Leod &c., Jan. 20. 1831, p. 307.

2. In a suspension of a sale of wood on the estate of an heir of entail, the heir having died after the record was closed, but before judgment on the merits; and it being thus impossible to cut the wood—Held that a judgment on the merits of the suspension, as originally brought, should still be pronounced in reference to the ulterior claims of damages and expenses. Murray and Others v. Renton, Jan. 20. 1831, p. 306.

PROCESS, XVIII.—VARIOUS (Continued).

3. A party requiring exhibition of the whole correspondence of her deceased father for a course of years, and declining an offer of exhibition in his house where the documents were—Found liable in the expense of an inventory thereof, if removed for exhibition elsewhere. Cleland &c. v. Mack &c., Mar. 1. 1831, p. 524.
4. The pursuer of a reduction on the head of fraud &c. having, before closing the record, recovered documents on which he meant to found an alternative conclusion of declarator of trust; and having raised a supplementary declarator of trust—Actions conjoined, reserving all questions of expenses. Howatson v. Murdoch, Mar. 3. 1831, p. 594.
5. Incompetent, after warrant to extract has been issued, to interdict the extractors from extracting protestation. Graham v. Boosies, Mar. 9. 1831, p. 566.
6. Party, after concluding his cause on the merits, without stating an objection to the competency, still allowed so to object, without payment of previous expenses. MacAuly v. M'Kenzie, Nov. 23. 1830, p. 48.
7. Several points having been argued in minutes of debate before the Court, who decided most of them, and remitted one point to the Lord Ordinary, but omitted to decide or remit as to another; and the Lord Ordinary having refused to allow discussion of that last point, as not falling under the remit; and having pronounced a judgment as exhausting the cause—New remit granted by the Court, embracing the point in question. Blincow's Trustee v. Allan and Co., May 19. 1831, p. 599.

PROFITS, VIOLENT.

See Ramage and Co. v. Briggs, June 15. 1831, p. 281.

See *Bona Fides*, 2.

PROOF, I.—EXAMINATION OF PARTY, HAVER, &c.

1. After a precognition has been taken by the procurator-fiscal, and a party committed, in order to trial, on a charge of the felonious abstraction of writs — Incompetent to examine the accused under a diligence against havers, granted in a relative civil process incidentally for the recovery of the same writs. Livingston v. Murrays, Dec. 10. 1830, p. 161.
2. Part of the deposition of a haver, being of the nature of evidence in the cause, ordered to be delete. Dyc and Mandatary v. Reid, Jan. 27. 1831, p. 342.
3. An Insurance Company resisting payment of a policy effected by an agent on the life of a client, on the ground that he was addicted to habits which rendered his life not insurable, and that the declaration made by the agent as to the client's state of health was not true, nor in bona fide—Held entitled to recover, preparatory to trial of an issue, letters of the agent written after the date of the policy. Inglis's Trustee v. Commercial Insurance Company, June 29. 1831, p. 842.
4. A party charged with a criminal offence, not bound to produce a letter written in relation to the subject, but not sent. Livingston v. Murrays, June 17. 1831, p. 757.

——— II.—JUDICIAL REMIT.

An offer of proof, to contradict a report by a person of skill upon a judicial remit of consent, incompetent. Halkett v. Earl of Elgin, Feb. 9. 1831, p. 412.

——— III.—OATH IN LITEM.

Circumstances in which the Court refused, in hoc statu, to allow an oath in litem by a pursuer as to the alleged contents of a book which had been traced into the hands of the defender, but could not now be made forthcoming. Sinclair v. Sinclair, Nov. 18. 1830, p. 28.

PROOF, IV.—OATH ON REFERENCE.

1. It being admitted, on a reference to oath of resting-owing, that certain balances of rent were unpaid, but alleged that they had been extinguished by an agreement to allow counter claims; and it appearing from the oath that no positive agreement had been made, but merely that the tenant understood that it had been so agreed—The tenant found liable for the balance claimed, reserving to him his counter claims. Hunter v. Lord Kinnaird's Trustee, Dec. 9. 1830, p. 154.

2. In a question with creditors, a reference by a debtor, after verdict, to the oath of a discharged bankrupt, held incompetent,—the discharge having deprived the bankrupt of all interest as a party;—and observed, that he might have been adduced as a witness at the trial. Ferrier v. Graham and Others, Feb. 10. 1831, p. 419.

3. The liability of a dissolved company for a bill, apparently signed by the firm, being referred to the oath of the two copartners; and one having deponed negative, while the other made various admissions—The first held entitled to absolvitor, independently of the issue of the action as against the last. Easton v. Johnston and Others, Feb. 15. 1831, p. 440.

4. A tenant pursued, along with his cautioner, for rent, after the lapse both of the quinquennial and septennial prescription, having, on an oath on reference, stated that the cautioner had conducted a sale of his stocking, out of which he considered the rent to have been satisfied—Found incompetent to prove resting-owing by the oath of the cautioner. Cochrane and Others v. Fergussons, Feb. 24. 1831, p. 501.

5. A prescribed debt for furnishings to a ship, alleged to have been contracted by the ship's-husband, who was also a joint owner, being referred to the oath of all the joint owners; and the ship's-husband having deponed affirmative, but the others that they never knew that the furnishings had been made—The latter assoilzied. Duncan and Others v. Forbes, March 4. 1831, p. 540.

See *Bill of Exchange*, 11. 19. 21.

——— V.—PAROLE.

1.—(1.) Proof by parole allowed, that a letter of relief, sued upon in an Inferior Court, which had disappeared after judgment, and for which the defender's agents' receipt stood unscored, had been returned; and also of irregularity in the practice of that Court as to receipts for borrowed processes.

(2.) The proof having failed, found that the letter having been pronounced genuine by the Judge comparatione literarum, and no improbation offered, the pursuer was entitled to the presumption that it was genuine. Fraser's Representatives v. Urquhart, June 11. 1831, p. 723.

2. The wife of a defender in an action of reduction of the acceptance of a bill, of which he was drawer and indorser, admissible as a witness for the acceptor as against the holder. Gavin v. Montgomerie, Dec. 17. 1830, p. 213.

3. Circumstances in which proof by parole was admitted as to the res gestæ at granting a bill of exchange, with a view to determine whether it had been granted in full of a disputed claim, or as a payment of interest. Flockhart v. Lawson, July 2. 1831, p. 873.

——— VI.—SEMIPLENA PROBATIO.

1. Questions of semiplena probatio as to filiation depend upon their own circumstances, and cannot be held ruled by precedent. M'Crone v. Bell, June 9. 1831, p. 692.

2.—(1.) Confidential correspondence between a party and his law-agent, relative to an indictment for forgery of a bill, not admissible as evidence

PROOF, VI.—SEMIPLENA PROBATIO (Continued).
against the party in an action of reduction of the same bill as forged and fraudulent.
(2.) Defences prepared by a party with reference to an indictment for forging a bill, but not lodged, inadmissible evidence against him in an action of reduction of the bill. Gavin v. Montgomerie &c., Dec. 17. 1830, p. 213.
See *Prescription, Triennial.—Writ.*
PROPERTY.
1. Circumstances in which it was held that, in rebuilding an old tenement within burgh, strict conformity to the old plan was not necessary; but a remit of the new plan to men of skill granted to ascertain that a servitude oneris ferendi was not thereby increased, nor any injury done to the inferior tenement. Young v. Cuddie, Feb. 24. 1831, p. 500.
2. A private school-house having been built by heritors, aided by a parish subscription, on the estate of one of their number, who made no objection, and was a subscriber; but no title having been got from him; and he having afterwards sold his estate—Held,
(1.) That the purchaser was entitled to the property of the house, and to decree of removing against the tenant; and,
(2.) That the heritors could not retain possession until repaid the expense of building the house. Beattie v. Lord Napier and Others, May 27. 1831, p. 639.
3. Circumstances in which the feuar of building-stances in a town was bound, by a reference in his contract, to a plan as to the line of the street, and in which other feuars were held entitled to object to the deviation. Fowlers and Fitzmaurice v. Commercial Bank, June 9. 1831, p. 705.
See *Interdict*, 3.—*Servitude*, 1. 2. 3.
PROTESTATION. See *Process, XIV.* 2.
PROVISION TO WIVES AND CHILDREN. See *Bankrupt*, 16.—*Entail*, 1. 2.—*Testament*, 5.
PROVISION TO CHILDREN.
Younger children being entitled to certain provisions, with interest from their father's death, forming a burden on the heir; and having, during their childhood, been supported out of the rents of an entailed estate belonging to the heir, then also a minor,—the interest for that period imputed to their aliment. Dudgeon v. Arnot, Nov. 19. 1830, p. 36.
See *Succession*, 3.—*Testament*, 1. 2. 3.
PUBLIC BURDEN. See *Burden, Public.*
PUBLIC OFFICER. See *Officer, Public.*
QUALIFICATION, FREEHOLD. See *Freehold Qualification.*
RANKING AND SALE.
1. Circumstances in which it was held that, in a ranking and sale, a creditor who has obtained a warrant to sell, may proceed with its execution, so long as any part of his debt covered by the warrant remains unpaid. Carruthers v. Dickson &c., Nov. 12. 1830, p. 1.
2. A party having conveyed heritable property to a trustee, with powers of sale; and he having been infeft, and sold part thereof, but without granting any conveyance; and a ranking and sale being afterwards brought, including this property. The Court, on the application of the purchaser's agent, (against whom the purchaser was seeking relief for not having secured her by obtaining titles,) ordered the sale to be suspended hoc statu. Cheyne v. Cameron's Trustees and Wood, Jan. 19. 1831, p. 302.
See *Arrestment*, 5.—*Bankrupt*, 18.
RECLAIMING NOTE. See *Process, III.* 5.—*VII.* 9.—*XII.*

RECORD. See *Process, VII.* 3.—*IX.* 3.—*XI.*— *XII.* 4.—*XVIII.* 2.

RECORDS, PUBLIC.

A registered deed given out on receipt of the Crown Agent, with a view to the investigation of an alleged forgery of one of the names thereon. King's Advocate, Petitioner, Feb. 3. 1831, p. 387.

See *Freehold Qualification*, 5.

RECOMPENSE. See *Master and Servant*, 2.—*Partnership*, 7.

REGALITY. See *Heritable Office.*

RELIEF.

See Brown v. Alexander and Others, June 28. 1831, p. 830.

See Craig v. Duke of Hamilton, May 26. 1831, p. 632.

RELIEF INTER HÆREDES. See *Entail*, 3.

REMITS, &c. See *Process, XIII.—XVIII.* 16.

REMOVING.

Formal warning not necessary to remove a tenant of port customs. Earl of Elgin and Trustees v. Marquis of Tweeddale &c., July 7. 1831, p. 901.

REPARATION.

1. Where a law-agent was employed to expede an adjudication at the instance of a creditor of an heir of entail in possession, and in place of obtaining a decree adjudging the lands, took one of the liferent right of the heir, on which charter and sasine were expede, and the title so consituted was found, in competition with another creditor, to be inept—Held that the agent, having followed the usual practice in such cases, was not liable for the debt, but only to repeat the amount of the account paid to him. Grahame v. Alison &c., Dec. 3. 1830, p. 130.

2. Circumstances in which a messenger having blundered the execution of a diligence for a small sum, which gave rise to a series of lawsuits involving the messenger, his cautioner, and his employer, the employer was found entitled only to partial relief of the expense against the messenger's cautioner. Fraser v. Andrew, Jan. 28. 1831, p. 345.

3. Circumstances in which a party who sold a farm was assoilzied from an action of damages at the instance of the purchaser, who alleged that his avowed object in making the purchase was to plant trees on the farm, and that he was obstructed in carrying this into effect by a tenant, who founded on a missive of lease by the seller, said to have been concealed by the seller's agent at the date of the sale. Reddie v. Syme, Feb. 10. 1831, p. 413.

4. A Substitute Sheriff Clerk having issued a defective precept, a charge on which was suspended; and the charger having litigated the question for a considerable time, (during which the suspender became insolvent,) without intimating the defect to the Substitute Clerk or his Principal; but having at last intimated to the clerk, who thereafter aided in carrying on the suspension to a judgment which found the precept null, and suspended simpliciter—Held, in an action of relief against the clerk, that he was not liable for the debt in the decree, and that he was only liable for such part of the expenses in the suspension as were incurred after intimation to him of the defect. Henderson v. Drysdale and Campbell, Mar. 3. 1831, p. 536.

5. Circumstances in which the representatives of a party were found not entitled to revive and insist in an action of damages which had been raised by their author upon a clause of warrandice in his subtack, pending a threatened removal, which was ultimately prevented by an arrangement betwixt the principal tenant and the landlord. Watson and Others v. Turner, June 7. 1831, p. 687.

See *Agent and Client*, 1.—*Compensation*, 4.—*Husband and Wife*, 1.—*Officer, Public*, 3.—*Principal and Agent*, 2.—*Process, XVII.* 2.—*Trustee*, 5.

REPONING. See *Process, XIV.*
RETOUR. See *Freehold Qualification*, 3.
RES JUDICATA.
Certain judicial procedure held not to be res judicata. Maule v. Maule, July 5. 1831, p. 876.
See *Arbitration*, 2.—*Process, XV.*
RETENTION. See *Compensation*, 4.—*Heritable Creditor*, 2.
REVOCATION.
A lady having delivered to a relation a letter binding her heirs and successors to pay him an annuity of £200 per annum after her death—Held,
(1.) That the provision was not testamentary; and,
(2.) That, though gratuitous, yet having been delivered, it was not revocable. Duguid v. Caddall's Trustees, June 29. 1831, p. 844.
See *Clause*, 1.—*Legacy*, 3.—*Trust*, 5.
RESTITUTION.
A party having assumed the charge of a pocket-book belonging to a person who had fallen into a canal, and having delivered it to a party in whose service they both were—Held that he was not relieved thereby from the obligation to make restitution. Kinniburgh v. Dickson, Dec. 8. 1830, p. 153.
RIVER. See *Fishing—Possessory Judgment.*
RIGHT IN SECURITY. See *Ranking and Sale*, 1.
REPETITION. See *Donation.*
REMOVING. See *Glebe—Landlord and Tenant*, 8.
ROAD ACTS.
1. Question raised, whether competent for the Court of Session to review the decision of Justices under a Road Act declaring their decision final, Key &c. v. Stirling and Drymen Bridge Road Trustees, Dec. 11. 1830. p. 167.
2.—(1.) Proceedings of road trustees held null, in respect of deviation from the forms prescribed by the statute under which they act.
(2.) An obstruction built across a road, and interfering with a right of servitude thereon, without proper authority, may be immediately removed by the parties having right to the servitude. Calder and Others v. Learmonth and Others; also Monro and Others v. Learmonth and Others, Jan. 27. 1831, p. 343.
3.—(1.) Under the General Road Act, which provides that if trustees 'shall erect' a toll-bar without authority in any Act of Parliament, it shall be be lawful to complain to the Sheriff or Justices of the Peace, and that the judgment of the Sheriff or Justices in all matters committed to them shall be final and without review, it is incompetent to apply to the Court of Session for interdict against the erection of such bar.
(2.) The application equally incompetent, though the bar have not been erected, but merely a warrant granted to erect it. Wilson v. Leith Walk Trustees, June 11. 1831, p. 725.
4. A party subjected in the penalty imposed by the General Road Act for acting both as clerk and treasurer, though nominally holding only one of the offices. Muckarsie v. Walker, June 25. 1831, p. 804.
SALE.
1. Circumstances in the conduct of the seller of outstanding debts which were held not sufficient to liberate the purchasers from their contract. Young v. Roberton &c. Nov. 24. 1830, p. 59.
2. Where the purchaser of heritable property, part of a sequestrated estate, suspended a charge by the trustee for the price on objection to the title, but offered to pay on getting a good title; and the Court found the trus-

SALE (Continued).
the bound only to concur in such supplementary titles, at the purchaser's expense, as he might think necessary, and the purchaser liable in expenses of process; and the House of Lords reversed this judgment, declaring the trustee bound to give a good title, and remitted to this Court without any finding as to expenses; and a title, after some further procedure in this Court, was prepared; but the purchaser, who had never hitherto proposed to throw up the bargain, having done so now, on the ground of delay in giving him a title—Held,
(1.) That it was competent to plead this abandonment in the suspension; but,
(2.) That, in the circumstances, the plea was inadmissible.
(3.) That it was no sufficient objection to the title offered, that the original trustee being dead, the present trustee had been appointed under a remit from the House of Lords, on a petition to the Court at the instance of only one creditor instead of two, as required by the Bankrupt Statute; and,
(4.) Expenses prior to the appeal awarded to the pursuer. Dick v. Corbet's Trustee, Nov. 30. 1830, p. 93.
3. A purchaser of goods furnished, and accompanied with accounts, not entitled to object, after the lapse of a year, that the prices charged were above the market-price at the time. Mills v. Hamilton, Dec. 1. 1830, p. 111.
4. The seller of an estate, which he had derived though a conveyance from a bankrupt and his trustee under a sequestration, not bound to purge the record of an inhibition against the bankrupt, which had not been recorded till after the sequestration. Sprot's Trustees v. Mackenzie's Trustees, Dec. 2. 1830, p. 120.
5. Circumstances in which a party who had executed a poinding of the furniture of a person by whom a disposition omnium bonorum was granted to a trustee for behoof of creditors, having purchased them from the trustee, keeping the poinding concealed, was found not entitled to withhold payment, and apply the price in satisfaction of his debt. Munro v. Hogg, Dec. 14. 1830, p. 171.
6. A delay having occurred in furnishing goods according to agreement; and the purchaser having in consequence demanded a reduction in the stipulated price; but the sellers having intimated, on sending the goods, that they would not agree to any reduction; and the purchaser having thereafter accepted them without objection—Held bound to pay at the price originally stipulated, and not entitled to found on an alleged deficiency in weight, of which he had not complained tempestivè, as a ground for an abatement. Harford, Brothers, and Co. v. Robertson, Jan. 29. 1831, p. 352.
7.—(1.) Advertisement in a mere advertising paper held sufficient compliance with a provision in a bond requiring advertisement in a 'newspaper.'
(2.) A meeting for sale of lands, under powers in an heritable bond, having been adjourned to a future day specified; but a new series of advertisements having been commenced for a sale on that day, as for an original exposure—Held that the sale then effected was not liable to objection, from some irregularity in the advertisements prior to the first exposure. Dickson v. Magistrates of Dumfries, Jan. 15. 1831, p. 282.
8. Circumstances in which a proof was allowed that it was the general practice of the trade between fleshers and cattle-dealers to pay for cattle on delivery. Stewart v. Gordon, Feb. 17. 1831, p. 466.
9. A correspondence acknowledging the receipt of pictures, and requesting to be informed of the prices set upon them—Held not sufficient evidence

SALE (Continued).
of a contract of sale. Hunter and Mandatary v. Duff's Trustees, June 9. 1831, p. 703.
10. A piece of ground, of which certain portions had been feued out, having been sold by an heritable creditor, holding a disposition of the whole subject, under articles of roup which excepted the parts feued—Held,
(1.) That the purchasers did not acquire right to the superiority and feu-duties of the ground feued; and,
(2.) That the purchasers, drawing the feu-duties for 20 years unchallenged, were not protected from repetition by the plea of bona fides. Moir and Mandataries v. Anderson, Glen, and Easton, June 15. 1831, p. 744.
11. The private trustee of a party who was rendered bankrupt within 60 days of the trust-conveyance, having made a bona fide sale of trust-heritage which was free of burden; but it being alleged that all the creditors did not concur in the trust—Held that the purchaser, being offered warrandice against the truster absolutely, against the trustee from fact and deed, and against the creditors to the extent of the portions of the price drawn by them respectively, was entitled to no other warrandice. Read v. Storie (Russell's Trustee), July 9. 1831, p. 925.
See *Entail*, 4.—*Interdict*, 4.—*Poinding.—Principal and Agent*, 3.—*Reparation*, 3.
SASINE.
1. A precept of sasine held not to be exhausted by an unrecorded infeftment, but still competent to take a second infeftment thereon. Kibbles v. Stevenson, Dec. 18. 1830, p. 233.
2. Precept of sasine not exhausted by an infeftment not duly recorded. Fulton v. M'Allister, Feb. 15. 1831, p. 442.
SCHOOL. See *Interdict*, 2.—*Property*, 2.
SCHOOLMASTER.
The heritors of a parish having elected and chosen a party 'to be schoolmaster &c., to be approved by the presbytery;' and the presbytery having thereafter found him qualified, and declared him the legal schoolmaster—Held that his appointment was of the date of the approval by the presbytery. Rae or Smith v. Pyper, July 2. 1831, p. 866.
See *Freehold Qualification*, 2.
SEMIPLENA PROBATIO. See *Proof, VI.* 3.
SEQUESTRATION UNDER BANKRUPT STATUTE. See *Bankrupt*.
SEQUESTRATION OF LAND ESTATE.
Circumstances in which application for sequestration of a landed estate was refused. Ralston or Alison &c. v. Rowat, June 18. 1831, p. 766.
See Howatson v. Murdoch, Dec. 15. 1830, p. 188.
SERVITUDE.
1. Held, in a question between the proprietors of the upper storeys of a tenement, (who had access to their cellars situated in the sunk storey by a lower stair leading from the common stair, but no exclusive right to the lower stair,) and the proprietor of the shop and sunk storeys, that he was entitled to let the sunk storey as a separate dwelling with access by the lower stair, although the shops and sunk storeys communicated with each other by an inside stair. Anderson and Others v. Saunders, Mar. 9. 1831, p. 564.
2. A clause in a feu-charter, by which the proprietor had right to collect the water of the springs on adjacent lands, and convey them to the dominant lands, found not to include a right to bore for water. Tennent v. Muter, May 13. 1831, p. 586.
3. A party having acquired land from one to whom it was feued, with a ser-

SERVITUDE (Continued).
vitude of making, on an adjacent piece of ground, a water-cut from an adjoining river, and which had been exercised for a considerable time, though latterly disused—Circumstances held to be insufficient to instruct that the servitude had been abandoned. Robison v. Charles, May 24. 1831, p. 627.
See *Property*, 1. 3.—*Road Acts*, 2.
SERVICE. See *Entail*, 10.—*Heir Apparent*, 2.—*Succession.—Title to Pursue*, 1.
SHERIFFS' SMALL DEBT ACT.
A party designed in a summons, raised before the Sheriff of Lanarkshire under the Sheriffs' Small Debt Act, 'portioner, Tollcross,' which is within the county,) having been cited personally, and allowed decree in absence to pass against him; and having been charged thereon, according to the execution, 'at his dwelling-house, Tollcross,' and thereafter imprisoned—The Court passed, on caution, a bill of suspension and liberation presented on the allegation that he had no residence in Lanarkshire, but had been merely on an occasional visit when personally cited. Scott &c. v. Anderson, Nov. 24. 1830, p. 65.
See *Slander*.
SHERIFF COURT. See *Freehold Qualification*, 5.—*Trustee*, 1.
SHIP. See *Compensation*, 4.—*Joint Owners*, 1.—*Master and Servant*, 5.—*Proof, IV.* 5.
SHORE DUES. See *Burgh Royal*, 1.
SIST. See *Process, XVII.* 1. 3.
SLANDER.
A party who had raised an action in the Small Debt Court, and while irritated at the production of a surgeon's certificate which excused the absence of two defenders, being asked by the Justices as to the character of the surgeon, called him a habitual drunkard, and renewed the charge after leaving the Court—Found liable in damages. Campbell v. Mann, Nov. 18. 1830, p. 24.
SOCIETY. See *Process, X.* 2.—*Title to Pursue*, 3.
SPECIAL LEGACY. See *Legacy, Special*.
SPUILZIE.
A party of the inhabitants of one of the Shetland Isles having discovered a shoal of small whales off the island, and succeeded in driving them into a bay, where they were joined by another party who assisted in killing and taking them, and thereby, according to usage, became entitled to a share of the blubber; and this second party having attended at the flinching to receive their share; but having then been prevented and ordered off by the factor of the proprietor of the ground, who was entitled to one-half of the fish—Held,
(1.) That he had, as guilty of a spuilzie, become liable to them for the loss thereby suffered.
(2.) That the second party, though entitled to a share, was not entitled to the same share with those who discovered and drove in the fish. Stove v. Colvin, May 26. 1831, p. 633.
STAMP ACT.
1. An unstamped draft having been drawn by a party on his banker, at a place beyond ten miles from the office of the bank, but so obscure that they could not be presumed to know that the draft had been drawn beyond the ten miles—Held that, to preclude the bank from availing themselves of it as a voucher to discharge them, it was necessary to instruct their

STAMP ACT (Continued).
knowledge, when they paid it, of its being beyond the limit. Aytoun &c. v. Dougall &c., Dec. 15. 1830, p. 194.
2. A bond containing a personal obligation by one party, and an heritable security by another, is subject only to the single stamp-duty imposed on heritable bonds. Brown or Smith v. Bedwell and Yates, Dec. 16. 1830, p. 136.
3. A party pursuing on an unstamped disposition, and who eventually succeeded in his action with expenses, not allowed the expense of stamping the dispostion. Munro v. Hogg, Dec. 18. 1830, p. 225.
See *Bill of Exchange*, 22.—*Freehold Qualification*, 2.—*Writ*, 3.

STATUTE.
Under a statute providing compensation for offices &c. thereby abolished, but limiting the period for claiming to twelve months 'after any claim for compensation shall have arisen'—Held that this period falls to be calculated from the date when the act came into operation, and the office thereby fell; and not from the first term thereafter, at which the salary would have been due, had the office continued. Veitch v. Harvey, Nov. 16. 1830, p. 20.
See *Burgh Royal*, 1.—*Entail*, 5.—*Harbour—Jurisdiction*, 3.

STAT. 1572, c. 6. See *Process, IV.* 2.
—— 1696, c. 15. See *Writ*, 5.
—— 1696, c. 19. See *Process, XVI.* 12.
—— 1701, c. 6. See *Wrongous Imprisonment*, 1. 2.
—— 2. Geo. II. c. 36. See *Master and Servant*, 5.
—— 2. Geo. III. c. 31. See *Master and Servant*, 5.
—— 5. Geo. III. c. 49. See *Process, X.* 1.—*XVI.* 6.
—— 10. Geo. III. c. 51. See *Entail*, 6.
—— 33. Geo. III. c. 54. See *Jurisdiction*, 5.
—— 46. Geo. III. c. 48. See *Burden, Public.*
—— 46. Geo. III. c. 116. See *Jurisdiction*, 6.
—— 47. Geo. III. c. 85. See *Schoolmaster.*
—— 48. Geo. III. c. 151. § 15. See *Appeal, Execution pending*, 2.
—— 48. Geo. III. c. 151. See *Appeal*, 3.—*Process, XIV.* 2.
—— 49. Geo. III. c. 125. See *Jurisdiction*, 5.
—— 54. Geo. III. c. 137. § 5. See *Poinding.*
———— § 15. See *Bankrupt* 15.
—— 55. Geo. III. c. 184. See *Freehold Qualification*, 2.
—— 56. Geo. III. c. 67. See *Exclusive Privilege.*
—— 4. Geo. IV. c. 97. See *Jurisdiction*, 8.
—— 5. Geo. IV. c. 87. See *Entail*, 7.
—— 6. Geo. IV. c. 120. § 40. See *Process, II.* 3.
—— 7. Geo. IV. c. 67. See *Title to Pursue*, 8.
—— 1. Wm. IV. c. 69. See *Jurisdiction*, 2.—*Process, I.* 1. 2.—*VIII.* 2. 3. 6.

STEAM-BOAT. See *Interdict*, 1.
SUBSTITUTE. See *Succession*, 1. 3.
SUBMISSION. See *Arbitration.*
SUBSCRIPTION. See *Property*, 2.

SUCCESSION.
1. A party having, mortis causâ, disponed her estate to William, (the second of a family of nephews,) and the heirs of his body, 'whom failing before me, then' to Adam (the third,) and the heirs of his body, 'whom also failing before me, then' to the fourth, and the heirs of his body, 'whom all failing, then to my own nearest heirs and assignees whomsoever;'—the

SUCCESSION (Continued).
disposition in all parts, when mentioning the persons called to the succession, setting forth William, ' whom failing as aforesaid, the said Adam, and the other substitutes above mentioned ;' and William having survived her, but died without issue—Held, in a competition between the eldest nephew as heir of conquest to William, the heirs whatsoever of the granter,—and Adam,—that Adam was entitled to succeed. Govan or Smith &c. v. Stewarts, Dec. 14. 1830, p. 180.

2. A party having conveyed his property to trustees, with directions to pay the rents to Joseph during his life, and to convey the property to him, and the heirs of his body, in the event of his marrying and having children ; but in the event of his not marrying, and not having children, to convey the property to William, ' his heirs and assignees whatsoever ;' and William having predeceased Joseph without issue ; and Joseph having afterwards died without having been married—Held, in a competition between the heir of line and heir of conquest of William.
(1.) That no right had vested in William prior to his death ; and,
(2.) That the heir of line was the party entitled to succeed. Miller v. Miller and Curators, Jan 19. 1831, p. 295.

3.—(1.) A party having, by a trust-deed of settlement, conveyed his property to his daughter, under the burden that she should pay to each of J. and W., his two grandchildren, ' £2500 at the first Whitsunday or Martinmas after they have respectively attained the age of twenty-one years complete, with the legal interest of the same' from the first term after his death till paid, ' provided that in the event of the death of either of the said J. and W. without lawful children, the survivor shall succeed to the share of the predeceaser ; and in the event of the death of both without lawful children,' his daughter ' and her foresaids shall succeed to the whole of what is herein provided to them ;' and W. having died in minority, and J. after majority, both without issue, and intestate—Held that the fund belonged to the heir at law of J., and not to the daughter.
(2.) Question raised as to the effect of a requisition of payment, and other acts of a creditor, in converting an heritable bond into a moveable quoad succession.
(3.) A testator having conveyed to trustees a sum to " be paid to J. at the first term of Martinmas after he shall attain the age of twenty-one years complete ; but failing his surviving that term, or if he should survive that term, then, failing his specially disponing the same himself, I appoint, in both of these events, my said trustees to accumulate the trust-fund" for behoof of grandchildren ; and the trustees not having accepted, and J. having survived the above term, and uplifted the fund, and thereafter died intestate—Held that it belonged to his executors, and not to the grandchildren. Johnstons v. Greigs, June 28. 1831, p. 806.

SUMMONS. See *Process, XVI.*

SUMMARY COMPLAINT.
See Livingston v. Murrays, July 2. 1831, p. 866.
See *Title to Pursue*, 4.

SUMMARY APPLICATION. See *Legacy*, 2.—*Master and Servant*, 7.

SUPERIOR AND VASSAL.

1. Where Magistrates ' disponed, and in feu-farm demitted,' certain burgage land by a charter containing procuratory of resignation, but no precept of sasine, ' to be holden of the king in free burgage, fee and heritage, for ever,' for prestation of burgal services,—' and also to be holden of the Magistrates in feu-farm' for payment of an annual sum in name of

SUPERIOR AND VASSAL (Continued).
feu-duty,—' and doubling the said feu-duty the first year of the entry of each heir, and of each singular successor thereto, as use is in feu-farm;' and the disponee was infeft under the procuratory by a Magistrate, the Town Clerk being notary; and the sasine was registered in the burgh books; and the disponee sold, with procuratory, to a party who was similarly infeft, and who paid the annual prestations due in name of feu-duty for several years; and the Magistrates raised an action to have him decerned to pay a sum ' as the double feu exigible on his succession to the said lot'—The Court assoilzied, ' reserving to the Magistrates to bring such action against the defender as they may be advised to institute for fulfilment of the prestations or other stipulations contained in their contract with him, as accords; and to the defender his defences thereto.' Magistrates of Perth v. Stewart, Dec. 18. 1830, p. 225.

2.—(1.) A vassal being restricted in his feu-rights from allowing any alehouses or public-houses to be erected on his feu—Held that this applied to a hotel or inn.

(2.) Proof of the superior's consent to waive this stipulation in a particular case, limited to writ or oath. Scot v. Cairns, Dec. 18. 1830, p. 246.

3. A vassal being taken bound by a contract of feu to erect dwellings within a certain period from his entry, under an irritancy; the superior, after a lapse of many years, during which the vassal possessed without building, raised an action of declarator of irritancy, in which he obtained an interlocutor recognising the conditions of the contract, but not immediately irritating the feu; and the superior having represented against this interlocutor, but thereafter abandoned further procedure—Found, in a new action raised by a succeeding superior many years thereafter for implement of the same contract,

(1.) That in respect of the termination of the procedure in the former action, the superior could not now maintain an irritancy, or claim damages; but,

(2.) That the superior was entitled to claim arrears of feu-duty, and also repetition of the public and parochial burdens paid by him.

(3.) That the building clause in the contract must now be implemented under penalty of the forfeiture. Napier v. Speirs' Trustees, May 31. 1831, p. 655.

4. The lord of a lordship erected out of church lands, with all the duties thereto effeiring, found entitled to exact from the vassals of the lordship the duties immemorially paid by them, though not enumerated in the titles produced by them,—they not making a full production. Earl of Mansfield v. Scone's Lethindy Trustees, June 14. 1831, p. 739.

See *Warrandice*.

SUSPENSION. See *Process, XVII.*

TEINDS.

1. Where the proprietor of a barony sold part of it with the teinds, obliging himself and his heirs to free the purchaser from stipend and augmentations, and (in respect of doubts as to the validity of the title to the teinds) allowed the purchaser to retain the price, on granting a bond to pay whenever a valid title should be furnished; and the proprietor thereafter sold the remainder of the lands with the teinds, allowing, in like manner, the purchaser to retain the price of the teinds, and assigned to him the above bond, but did not expressly bind himself to relieve the second purchaser of stipend &c.; and that purchaser paid the whole sti-

TEINDS (Continued).
pend under two several localities, but afterwards reduced them, and obtained a rateable proportion laid on the parcel first sold—Held, in an action of relief at the instance of the proprietor of that parcel,
(1.) That the second purchaser was not bound to relieve him; and,
(2.) That the grounds of an alternative conclusion by the heir of the original seller against the purchaser of the second for payment of the retained price of the teinds of his lands, and reconveyance of the bond for the price of those of the other parcel, not being set forth with sufficient distinctness in the summons, it must be dismissed. Waldie &c. v. Cuthbert &c., Dec. 2. 1830, p. 122.
2.—(1.) A superior, who had right, as a sub-tacksman, to intromit with his teinds, having agreed, in a feu-contract, that the teinds due out of the lands feued should be taxed to £10. 13s. 4d. Scots, besides feu-duty, and that he should free the vassal 'of all teind and public burden payable forth of the lands in all time coming;' and having disponed the lands to be holden for payment of a feu-duty, and also the above sum 'in name of teind-duty, and public burden;' and bound himself to relieve the vassal 'of all teinds, parsonage and vicarage, and public burden, payable forth of the said lands, for payment of the foresaid sums, and that for ever hereafter; with power to the vassal to intromit with and receive from the tenants the teind and public'—Held that the superior was liable to relieve the vassal from future augmentations.
(2.) Lands mortified by a private individual, as a glebe &c. to the minister of a parish, not teind-free. Wilson v. Agnew &c., Feb. 1. 1831, p. 357.
TENOR, PROVING OF. See *Process, XVI.* 3.
TEROR. See *Bona Fides*, 1.
TESTAMENT.
1. Circumstances which were held not sufficient to exclude a grandchild, under the condition si sine liberis, from the provisions of her grandfather's settlement in favour of his children. Booths v. Booth or Black and Husband, Feb. 8. 1831, p. 406.
2.—(1.) Circumstances in which a bequest by a father to a daughter, in name of legitim, held not to be revoked by subsequent provisions in testamentary writings.
(2.) Where a bank receipt was taken by a father in name of his daughter, kept by him during his life, and bequeathed by him to her in liferent, and to another in fee; and the daughter, after his death, acted on the footing that it was not her property—Found that her next of kin could not take it as her property. Jeffrey v. Aitken and Gray and Others, Feb. 11. 1831, p. 423.
3. A clause in a disposition and settlement declaring that in the event of the death of any daughter of the granter, her provision therein contained was to be equally divided among the surviving children—Found that the clause imported a conditional institution in favour of the survivors, and that the daughter's provision did not lapse in consequence of her predeceasing the granter. Allan or Aitchison v. Allan, Feb. 16. 1831, p. 454.
4.—(1.) Construction of an obscure dispositive clause in a family settlement.
(2.) Expenses of all parties relative to the interpretation of an obscure trust-deed laid on the trust-estate. Bryden and Others v. Grierson and Others, Feb. 17. 1831, p. 457.
5.—(1.) Terms of a letter, written by a father in reference to the marriage

TESTAMENT (Continued).
of his son, found to import an obligation to invest a sum of £4000, so that the interest might yield an annuity to the lady, only after her husband's death.

(2.) A sum of £9000 being provided to the oldest son by a codicil to a settlement which contained other provisions in his favour; and a subsequent letter being granted by his father, binding himself to secure £4000, on certain terms, in reference to the interests of the wife and children of the son's intended marriage,—held not to import a new provision additional to the £9000. Rennies v. Rennies, June 10. 1831, p. 714.

THEATRE. See *Pactum Illicitum*.

THIRLAGE.

1. The original mill of a thirl having been allowed to fall into disrepair, and a new one having been erected at a different place, and on other lands, which served the thirl for a period not exceeding 30 years, during which time a decree of declarator of thirlage as to the original mill was obtained —Held, on the original mill being rebuilt at the expiry of this period, that the proprietors against whom this decree had been obtained were still astricted to that original mill. Kinloch v. Morrison &c., Dec. 18. 1830, p. 244.

2. The tenants of certain farms, some of whom were taken bound in their leases to carry their grain to any mill to which the same 'are or shall be thirled,' and to pay 'accustomed multures,' having, from time immemorial, resorted to a particular mill, both when it was the property of their landlord, and after he had conveyed it away 'cum multuris,' &c.—Found,

(1.) That a title by progress to the mill in question, cum multuris &c. was relevant, without any special clause of astriction, to sustain a claim of thirlage, founded on immemorial usage, against the landlord and his tenants in farms alleged to be so astricted.

(2.) That the thirlage was sufficiently established against the landlord and his tenants by proof of immemorial usage of those tenants to carry their corns there, with occasional performance of mill-services and payment for abstracted multures, although no decree had been obtained against the landlord, and he had taken some of the tenants bound in their leases to pay certain multures to himself. Macalester and Tutor v. Duke of Argyll, June 17. 1831, p. 763.

TITLE TO PURSUE.

1.—(1.) An apparent heir, whose propinquity and apparency are admitted, entitled, in virtue of his apparency alone, without any service, to pursue a reduction of the service and infeftment of a party whom he averred to have been illegally served, in respect of alleged illegitimacy.

(2.) Where a party has, on apparency, raised up a tentative title by a adjudication on a trust-bond, but on which no charter or infeftment has followed, it is no objection to the title of a subsequent heir apparent to pursue, that he has not obtained a transmission of the adjudication. Rutherfurd v. Nisbet's Trustees, Nov. 12. 1830, p. 3.

2. Where there is nothing to prevent the part-owners of a ship from acting in concert, it is incompetent for one of them to pursue for recovery of his alleged proportion of freight or demurrage. Scotland v. Walkinshaw, Nov. 18. 1830, p. 25.

3. The members of an unincorporated society of subscribers for building a town-house &c. having by articles bound themselves to pay a subscription by five instalments to a committee, and authorized the committee to ap-

TITLE TO PURSUE (Continued).
lift the subscription—Held that two of the members who had paid two instalments were not entitled to object to the title of the committee to pursue for the remaining instalments. Gemmels v. Barclay &c., Nov. 19. 1830, p. 33.

4. Incompetent for a private party, without concourse of the public prosecutor, to insist in a complaint against an inferior judge for malversation in office, though in reference to causes in which the complainer was a party, but concluding only for deprivation of office and penalties. M'Aulay v. M'Kenzie, Nov. 23. 1830, p. 48.

5. Under a deed conveying an estate to trustees to hold it for a term of years, and then denude in favour of certain parties, with a clause empowering them 'to grant tacks of my lands, and appoint factors thereon, and to settle and adjust all accounts, of whatever kind, that may be unsettled at my death, and to do every thing relative to the management of my estate and affairs that I could do myself'—Found that the trustees were not entitled to raise an action of division of commonty. Graham's Trustee v. Boswell, Dec. 2. 1830, p. 121.

6. Where the office-bearers of a society have, by the articles thereof, power to sue, they must set forth that title in their libel, and that the defender has become a party to these articles. Gillies &c. v. Hunter, Jan. 11. 1831, p. 357.

7. The Fife Banking Company, though only existing for the purpose of winding up its affairs when the statute 7. Geo. IV. c. 67. was passed, found entitled to pursue by its cashier. Drummond v. Holliday, Jan. 7. 1831, p. 284.

8. Trustees acting for behoof of a married lady and her children, having employed a law-agent to secure a sum heritably, and take the liferent to the lady, secluding the jus mariti, and the fee to her children; and loss having arisen from the error of the trustees or the agent—Found that she was entitled to sue in her own name, and for her own interest. Graham v. Hunter's Trustees, March 4. 1831, p. 543.

9. Creditors of a defunct who was alleged to have been insolvent at the time of executing a discharge of a claim, have no title to sue reduction of such deed on the ground of its having been obtained from the defunct by fraud and circumvention, but must first vest themselves with the jus actionis competent to the defunct. Rodger v. Darroch &c., June 2. 1831, p. 671.

See *Arbitration*, 6.—*Bill of Exchange*, 5.—*Creditors of a Defunct—Fishing—Heir Apparent—Husband and Wife*, 1.—*Implied Assignation*, 1.—*Joint Owners*, 1.—*Landlord and Tenant*, 12.—*Officer, Public*, 3.—*Partnership*, 2.—*Poor*, 3.

TRUST.

1. A trust, said to have stipulated a supersedere of diligence, having been granted for behoof of creditors; and the truster having died, and no successor being nominated; and the truster having, several years after the date of the trust, granted to one of his creditors a bill for the amount of a debt which had been previously ranked for on the estate—Held that the creditor was not thereby barred from suing the truster for payment of the bill. Mills v. Hamilton, Dec. 1. 1830, p. 110.

2. A trust-deed for creditors not acceded to, not sufficient to divest the granter, so as to invalidate a subsequent conveyance, the trustees not competing therewith. Underwood's Trustees v. Bell and Cautioners, Jan. 25. 1831, p. 334.

TRUST (Continued).

3. A trust-deed having named one of the trustees as factor on the trust-estate, the other trustees not entitled to supersede him, and appoint a new factor. Fulton v. M'Allister, Feb. 15. 1831, p. 442.

4. A trust-disposition of an estate for behoof of creditors, with powers of sale, subject to an obligation on the trustee to reconvey the remainder (if any,) although followed by infeftment, does not divest the truster of his radical right to the lands; and therefore held, that although a reconveyance by the trustee was informal, yet the truster could, in virtue of his radical right, execute an effectual entail by procuratory of resignation. M'Millan v. Campbell, March 4. 1831, p. 551.

5.—(1.) Held, that a trust-disposition of all heritage of which a party should die possessed, and referring to trust-uses, as specified in any will executed or to be executed by him in the English form, formed, with such a will, an effectual trust-conveyance of heritage in Scotland.

(2.) That a formal trust-disposition of heritage could not be revoked by an English will not probative according to the law of Scotland; and,

(3.) That the legal effect of the combined trust-deed and will was a question to be decided by the law of Scotland, and not England. Cameron v. Mackie and Others (Dick's Trustees), May 19. 1831, p. 601.

6. Circumstances in which a creditor was held not precluded from constituting his debt against a trust-estate by transacting with the truster, independently of the trustees, during the subsistence of the trust. Bell v. Moir's Trustees, May 31. 1831, p. 651.

7. Under a deed conveying an estate to trustees to hold it for a term of years, and then denude in favour of certain parties, with a clause empowering them 'to grant tacks of my lands, and appoint factors thereon, and to settle and adjust all accounts, of whatever kind, that may be unsettled at my death, and to do every thing relative to the management of my estate and affairs that I could do myself,'—Found that the trustees were not entitled to raise an action of division of commonty. Graham's Trustee v. Boswell, Dec. 2. 1830, p. 121.

See *Bona Fides*, 1.—*Clause*, 2.—*Compensation*, 2.—*Mortification*.

TRUSTEE.

1. Circumstances under which a decree under the Small Debt Act against a trustee on a sequestrated estate, was held to be against him personally, although he had no funds. Jaffray v. Gordon and Waddell, Feb. 10. 1831, p. 416.

2. Trustees who were exempted from responsibility for omissions and sufficiency of security, and empowered to lend on personal security—Held not liable for loss arising from prior burdens over lands on which the trust-money was lent. Graham v. Hunter's Trustees, March 4. 1831, p. 543.

3. Circumstances in which a trustee was found liable in the expenses of process and arrestment to the pursuer of an action for payment of his legacy under the trust. Murray v. Johnston, May 24. 1831, p. 631.

4. Action being raised against a party under trust, and against his trustees; and the trustees having defended, and also raised a counter action; and having failed in both processes—Found that they were personally liable for the expenses of both actions. Raeburn v. Dawson and Others, June 14. 1831, p. 728.

5. Circumstances in which it was held that statutory trustees had received, or become liable for, the price of a superiority sold by an heir of entail to his vassal; and that, having failed to invest it in terms of the statute, their representatives were bound to account for it. Wellwood v. Rees and Syme, June 23. 1831, p. 790.

TRUSTEE (Continued).
See *Clergyman.—Process, XIII.* 1.—*Bankrupt.—Principal and Agent*, 2.
TUTOR AND CURATOR.
1. In making up tutorial inventories to children whose father had been illegitimate, the Court authorized them to be made at the sight of the nearest of kin on the mother's side only. Auchincloss and Others, Petitioners, Feb. 2. 1831, p. 300.
2.—(1.) A dispensation granted in an action for making up tutorial inventories from citing the next of kin on the mother's side, as they lived beyond the jurisdiction of the Court.
(2.) The dispensation can be granted only on a petition to the Court stating the circumstances. Hobbs or Lamont and Others, June 29. 1831, p. 841.
3. An English guardian cannot discharge a Scotch heritable bond of minors domiciled in England. Young and Co. v. Thomsons, July 8. 1831, p. 920.
USAGE. See *Harbour.—Sale*, 8.
VERDICT. See *Process, VII.* 14.
VITIATION. See *Bill of Exchange*, 22.
WARRANDICE.
(1.) An obligation of warrandice by a superior possessing an estate in fee-simple, and making that obligation inherent in a feu-contract, as the counterpart of an annual payment under which the vassal was to hold his lands, held binding on an heir who took up the superior's estate in virtue of a subsequent onerous and feudalized mutual entail,—the heir being the lineal representative of the granter of the obligation, and having taken up his estate, including the above superiority.
(2.) The liability under this obligation attaches to each heir only for the sums accruing during his own possession. Wilson v. Agnew &c., Feb. 1. 1831, p. 357.
See *Implied Assignation*, 1.—*Landlord and Tenant*, 4.—*Reparation*, 1.—*Sale*, 11.—*Teinds*, 1. 2.
WHALE FISHING. See *Spulzie.*
WILL. See *Clause*, 2.
WITNESS. See *Proof, IV.* 2.
WRIT.
1. The parents of an intended husband having, in their son's contract of marriage, conveyed a property to him and the children of the marriage; and marriage having followed thereupon—Held no ground for reducing the disposition, that the subscription of the bride was not properly tested. Kibbles v. Stevenson &c., Dec. 18. 1831, p. 233.
2. Where two out of a great number of parties to a contract written rollways on several sheets joined together, sign the joining for themselves and other parties in virtue of a clause empowering them so to sign, it is not necessary that these signatures be mentioned in the testing clause; and besides, the deed being acted upon, cannot be challenged by a party thereto. Sclater v. Cheyne, Jan. 11. 1831, p. 248.
3. A letter undertaking to pay a subsisting debt of a mercantile character, held to be a document in re mercatoria, probative without the solemnities of the act 1681, and not to be a promissory note requiring a stamp. Gilkison &c. v. Thomson, Mar. 1. 1831, p. 520.
4. Opinion expressed by the Lord Ordinary,
(1.) That an instrument of resignation, referring to a procuratory as dated 25th March last, and the word 'last' being written on an erasure.

WRIT (Continued.)
was no evidence that a procuratory dated 24th March 1808, was ever executed; and,
(2.) That the discrepancy in the day of the month would alone have been fatal. M'Millan and Others v. Campbell and Others, Mar. 4. 1831, p. 551.
5. Where the testing clause of a disposition dated 1775 bore that it was written 'on this and the *six* preceding pages,' and the letter *s* in the word *six* was written on an erasure, and the deed consisted of seven pages—Held,
(1.) That the vitiation was, under the circumstances, not fatal to the deed; and,
(2.) That it was no objection to it that the pages were numbered at the top with arithmetical figures instead of words. Trustees of David Earl of Cassillis v. Kennedy, June 2. 1831, p. 663.
6. Circumstances in which a holograph letter was not admitted to prove its own date. Winton v. Gibson and Winton, June 1. 1831, p. 662.
See *Cautioner*, 10.—*Husband and Wife*, 2.—*Marriage Contract*, 2.—*Proof*, *VII.*—*Trust*, 5.
WRITS, PRODUCTION OF. See *Proof*, *I.* 3.
WRITER'S HYPOTHEC. See *Agent and Client*, 8.—*Bankrupt*, 13.
WRONGOUS IMPRISONMENT.
1. The prescription of actions for wrongous imprisonment, established by the act 1701, does not extend to those founded on imprisonment for civil debt. M'Christie v. Kea or Fisher, Jan. 21. 1831, p. 312.
2. A summons founded exclusively on the act 1701 cannot support a conclusion for damages at common law, independently of the penalties imposed by the act; but an amendment of the libel allowed. Millar v. Mills and Vary, May 21. 1831, p. 625.
See *Cessio*, 2.

APPENDIX.

JUDGMENTS OF THE HOUSE OF LORDS.

1831.

No. 1.—ROBERTSON v. ALEXANDER.—*Feb.* 4.

Bankrupt.—(1.) Circumstances in which the Court approved of an offer of composition on an extensive bankrupt estate, equivalent to dividends already paid to 20s. per pound, exclusive of interest from the date of sequestration, although the offer implied a considerable reversion to the bankrupts,—it being contingent and remote, and the composition being opposed by only three creditors, forming about one-seventieth part in value of the whole, and about one four-hundredth part in number of those above L. 20.——VIII. 1055.*——*Affirmed.*

THE LORD CHANCELLOR observed, that the true construction of § 50. of the Bankrupt Act was, that the Court had authority to consider, 1. the reasonableness of the offer as at the date of the meeting when agreed to, objections founded on surprise, misrepresentation, palpable mistake, and res noviter, (but without inquiring into the posterior increase of the value of the estate); and, 2. to see that there was the requisite concurrence in number and value; that as the presumption was that a regularly accepted offer was reasonable, the Court ought to lean strongly in favour of it; and that in the present case there could be no doubt of the reasonableness of the offer, and the hazardous nature of the proposition on the part of the opposing creditors.

——(2.) Circumstances in which a petition and complaint against a trustee, who after citation as a haver had destroyed a document, and against one of the bankrupts, who prior to citation as a haver had also destroyed a document, was dismissed with expenses.——VIII. 1055.

Reversed, and Remitted with instructions 'to dismiss the petition and complaint as against 'the respondent Edward Alexander without expenses, and to find the respondent Alex- 'ander Smith (the trustee) liable to the appellants in their costs and expenses of the 'said petition and complaint; and the Lords find, that the said respondent, Alexander 'Smith, acted with indiscretion, upon his own explanation, in destroying the letter 'referred to in his deposition after he had been served with diligence, and thus took 'upon himself to judge of its materiality, whereas he ought to have kept it ready to 'produce with the diligence.'

THE LORD CHANCELLOR distinguished between the case of the trustee who had destroyed the document after being cited as a haver, and the bankrupt who did so before being cited; observing, that after being cited, the trustee had no right to judge of the materiality of the document, nor to allege inadvertence, nor to justify himself by saying that he thought it was not included within the writ; that if he had been a man of business, his Lordship would have proposed a censure, but that he was unquestionably liable in the expenses of the complaint; and that as to the bankrupt, although he was not so culpable, he ought not to have destroyed the documents and therefore he ought not to be allowed expenses.

No. 2.—CAMPBELL'S TRUSTEES v. THOMSON.—*Feb.* 14.

Partnership.—Held, in the absence of evidence to fix the extent of shares of partners, that the presumption of law is for equality, and their rights must be regulated accordingly.——VII. 650.

Reversed, and Remitted with instructions 'to direct an issue or issues to be tried by a 'Jury, which issue or issues shall include the whole matters in dispute between the 'parties in this cause; or to proceed otherwise in the said cause as they (the Court) 'shall deem just, and be consistent with this judgment.'

LORDS CHANCELLOR and WYNFORD were of opinion that the judgment was erroneous—the presumption of equality not being one of *law* but of *fact*, to be submitted along with other evidence to a jury, and effect to be given to it only in absence of all other evidence; that this was the doctrine of Stair and Bankton, and had been recognised in Russell *v.* Anderson, (ante, vi. 836.): that the observation of Lord Eldon in the case of Peacock had been misapprehended, it being founded, not on the jury not giving one-half, but on his Lordship not understanding how they had fixed on one-fourth—a circumstance quite intelligible to those acquainted with cases tried at Guildhall, where it was well known, that when a merchant in London assumes a young man as a partner, he generally allows him a fourth or a third share of the business; and that the jury, knowing this, had fixed on one-fourth.

* The references are to the volume and page of the reports, and the abstract is taken, (with some occasional alterations), from the title of the report.

No. 3.—Pentland v. Scott and Others.—*Feb.* 15.

Landlord and Tenant.—Held, that the scroll of a lease by a minor in favour of a tenant possessing under a certain lease, but on which scroll no possession had been taken, did not afford a defence to the tenant against payment of the rent due under his former lease.——VII. 502. ——*Affirmed.*

THE LORD CHANCELLOR, in moving the affirmance, observed, that he had considered all the points raised by the appellant, and was satisfied that they were not well founded.

No. 4.—Colquhoun v. Colquhoun.—*Feb.* 17.

Service—Entail—Homologation.—1. A proprietor having executed an entail of his estate in favour of his eldest son; whom failing, a series of substitutes, reserving his own liferent, and power to alter, sell, and burden the estate; and his eldest son having predeceased him, and no infeftment taken; and the reserved powers never having been exercised;—Held, that a service not to the eldest son, but to the entailer, was inept. 2. Circumstances under which a plea of homologation of an entail was repelled.——VII. 200.

Remitted, 'to review generally the interlocutor complained of, &c.; and it is further 'ordered, that the Court to which this remit is made do require the opinion of the 'other Division, and of the Lords Ordinary, in writing, in regard to the law and to 'the practice of conveyancers in Scotland in the services of heirs; and whether, according to such law and practice, the service, in this case, of the 21st August 1806, 'by Robert Colquhoun of Camstraddan, as heir of tailzie and provision to his grand-'father Robert Colquhoun, the maker of the entail of 1774, was a valid service? Or 'whether such service should have been to James Colquhoun, the institute of the said 'entail, who predeceased his father, the granter thereof, or to any other, and what 'person?' [a]

No. 5.—Hume v. Duncan, &c.—*Feb.* 18.

Prescription.—A proprietor of heritable subjects having granted an ex facie absolute disposition, on which infeftment was taken, qualified by a back-bond containing a power of redemption within eleven years; and having assigned this bond to a third party, and disponed the property to him; and the assignee having, within the eleven years, raised an action of redemption, which fell asleep; and the heir of the original disponee having acquired right to the assignation and relative action, which he afterwards wakened; and more than forty years having elapsed from the date of the above deeds;—Held, that a prescriptive title had not been obtained, so as to exclude the heir of the original proprietor.——VII. 467.——*Affirmed.*

LORD WYNFORD moved the affirmance on the grounds pleaded by Duncan, and sustained by the judgment of the Court of Session.

No. 6.—Stein's Assignees v. Craig and Brown.—*Feb.* 22.

Homologation.—Held, (according to the opinion of English Counsel), that it is competent for English assignees under a commission of bankruptcy to homologate a trust-deed executed by the bankrupts in relation to their effects in Scotland, which, it was alleged, fell under the commission; and that they had, by their deeds, homologated the trust.——VII. 686.

The House of Lords 'declared, that the assignees of Stein, Smith and Co. had no 'power to homologate the trust-deed executed by John Stein in favour of the re-'spondents for behoof of the creditors of the Distillery Company,' and therefore *Reversed, and Remitted* to proceed accordingly.

THE LORD CHANCELLOR was of opinion, that according to the law of England the assignees could not homologate the deed; and that the House of Lords being a Court of Appeal of English as well as of Scotch law, it was competent to declare what was the law of England.

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[a] See the result of the remit, ante, ix. 911.

No. 7.—Duff v. Fraser.—*Feb.* 23.

Warrandice—Salmon-Fishing—Title to Pursue—Personal Exception.—1. Simple grant of yairs, with warrandice, no bar to the granter's representative challenging the use of the yairs for catching salmon as illegal. 2. Question discussed, but unnecessary to be decided, whether a grant of a right to fish salmon by yairs would have barred such challenge. 3. Observed, that the case of Dumbarton *v.* Grahame did not sanction the doctrine that a right of salmon-fishing by yairs could be supported by any length of usage; but that yairs intended for catching white fish, and so immemorially used, might be continued so to be used, although occasionally salmon might be caught therein.——VIII. 14.——*Affirmed.*

THE LORD CHANCELLOR stated, that although he had some doubts on the case, yet he saw no sufficient grounds to do otherwise than to move for an affirmance, but without costs.

No. 8.—Brack v. Hogg and Johnstone.—*Feb.* 25.

Foreign—Trust.—A proprietor of landed property in Scotland, residing abroad, having executed a deed according to the Scotch forms, whereby he conveyed his property to a trustee, for the purpose of paying to him the rents during his life, and, after his death, of conveying the property to such persons as he should specify in his will; and having thereafter executed a will, tested according to the English form, revoking all 'wills formerly made,' and bequeathing the Scotch property to a certain party, but without making special reference to the trust-deed; and these deeds having been found undelivered in his repositories on his decease;—Held, in a competition between the heir-at-law and the nominee under the will, (1.) That the trust-deed did not require delivery: (2.) That it was not revoked by the will; and, (3.) That the will, though not tested according to the forms of the law of Scotland, was effectual as a deed of instructions, and, along with the trust-deed, was sufficient to carry the property from the heir-at-law.——VI. 113.——*Affirmed.*

LORD LYNDHURST moved an affirmance, without costs, for although he concurred with the Court of Session, and that the case of Willock (5539.) seemed in point, yet this was one fit for appeal.

No. 9.—Fraser v. Fraser.—*Feb.* 25.

Entail.—An heir of entail in possession having granted an obligation to indemnify a tenant for meliorations at the expiry of his lease, which obligation was found (in a question with the tenant when the lease expired) not to be binding upon the heir of entail then in possession, but was afterwards found (in a subsequent process) to be binding on the representative of the granter of the lease;—Held, that no claim of relief lay at the instance of the representative against the then heir of entail.——VIII. 409.——*Affirmed.*

LORD LYNDHURST concurred with the Court of Session, and moved the affirmance, with L.100 costs.

No. 10.—M'Pherson v. M'Pherson.—Feb. 28.

Entail.—Question as to the power of a father, notwithstanding the terms of a marriage-contract, to execute a trust-deed and entail of an estate, containing provisions to his widow and younger children, and fettering his eldest son.——V. 826.

The House of Lords ordered and adjudged, 'that the petitioner be at liberty to amend 'his said appeal, by striking out thereof all such parts as relate to the provision for 'the widow and younger child of Colonel Duncan M'Pherson, and that the cause 'be *Remitted* back to the Court of Session in Scotland, to decide upon the validity 'of the said deed of entail.'

No. 11.—Galbraith v. Galbraith.—*March* 1.

Service, Reduction of.—The Court refused to reduce a service obtained in a competition, the allegation being, that there was no sufficient evidence led before the inquest, that the party's ancestor, bearing the same name and general designation 'of a Major in the kingdom of

'Ireland,' was truly the substitute called in the deed of entail, in respect the pursuer of the reduction failed to establish the existence of any other person to whom the designation in the entail could apply.——IV. 734.——*Affirmed.*

LORD WYNFORD stated, that in a case of this nature direct positive evidence was not necessary, it being sufficient that there was presumptive evidence, and that (although not unattended with difficulty) the evidence here preponderated in support of the verdict.

No. 12.—Honeyman v. Campbell.—*March* 3.

Marriage.—Circumstances held to constitute marriage by promise subsequente copula.——VIII. 1039.——*Affirmed.*

THE LORD CHANCELLOR observed, that there were two questions: 1. Was there a promise of marriage; and, 2. Had there been a copula consequent on that promise, and not prevented by mid-impediment. In regard to the promise, it might be proved by evidence either direct or circumstantial; and although courtship or intention to marry, followed by copula, could not constitute marriage, yet it was a most important ingredient in evidence of a *promise*. From the terms of the letters, combined with the admitted fact of the copula, (which was a circumstance in evidence of the promise) he was satisfied that there had been such a promise—and in forming this opinion, he threw aside the erased letter. As to the second point, the copula was admitted; and it was not pretended that it had taken place under circumstances in which any mid-impediment existed.

No. 13.—Magistrates of Dundee v. Kay and Morton.—*March* 17.

Burgh.—(1.) It being provided by the set of a burgh, that on the first Monday after the election by the Guildry of their Dean and Councillor, who are members of the Town-Council, the parties chosen shall attend a meeting of Council held that day, which being the first meeting after the election of the several Magistrates and Members of Council, and there present evidence of their election and qualifications, and take their seats; and that if the Council are not satisfied of the qualifications, or if the parties chosen do not appear, or if there has been a double election, the Council shall elect others in their place;—Held, that this meeting of Council forms the last step of the annual election; and that a complaint against the Council receiving a person not elected by the majority, may competently be presented within two months of that meeting, though beyond two months from the meeting of the Guildry.——VI. 901.——*Affirmed.*

———(2.) The Town-Council of a burgh, being empowered by the set, in the event of the person elected Dean of Guild by the Guildry not producing evidence of his qualification to hold the office, to elect a Dean of Guild themselves; but having, in respect the party elected by a majority of the Guildry was disqualified, found that another candidate supported by an apparent minority was duly elected, and that the votes for the other candidate, to whom no objection was stated at the meeting of Guildry, were thrown away;—Held, that they had not exercised their powers under the set, and the election reduced as null and void.——VIII. 688.——*Affirmed.*

THE LORD CHANCELLOR and LORD WYNFORD concurred with the Court of Session on both points.

No. 14.—Earl of Strathmore v. Strathmore's Trustees.—*March* 23.

Entail.—(1.) An heir excluded by a deed of entail, and deed of nomination of heirs, from an heritable succession in Scotland, is not entitled to challenge a trust-deed, as disposing of that succession in an irrational or otherwise illegal manner, the trust-deed being so far independent of the deeds of entail and nomination, that these would not be invalidated by the reduction of the trust.

(2.) Competent for a proprietor in fee-simple to execute a trust-deed, under which the rents of his extensive estates were (after paying a comparatively trifling amount of debts, legacies, &c.) to be accumulated for thirty years certain, and contingently for some years more, for the purpose of purchasing and entailing lands, while the nearest heir, when the trust commenced, was not allowed an aliment, though a Peer.

(3.) The Thellusson Act (39, 40. Geo. III. c. 98.) does not apply to the rents of Scottish heritage; and where a party is cut off from the succession to property, whether accumulated or not, he has no title under that Act to object; and,

(4.) A deed on deathbed, nominating a new trustee, and disponing the heritage to him along with the other trustees formerly named and made disponees, is not liable to challenge by the heir at law who stands excluded under a previous and unrevoked liege poustie deed.——VIII. 530.

The House of Lords found, 'That the appellant has a title to pursue the action,' and with this finding *affirmed, and remitted* 'with instructions to that Court (of Session) to direct the reasonable costs incurred by both parties relative to the cause to be 'paid out of the trust-funds, and do farther as shall be just,' &c.

THE LORD CHANCELLOR, after stating his opinion that the Thellusson Act did not apply to heritage in Scotland, and adverting to the cases of M'Culloch, (Elch. No. 46. Tailzie), and M'Nair, (Bell, 546.), which, he held, did not warrant the proposition that at common law such a deed as that in question could not be executed, and expressing his great regret at being compelled to do so, moved an affirmance, but that the costs should be paid out of the estate.

No. 15.—MONTGOMERIE *v.* RUNDELL, BRIDGE and RUNDELL.—*March* 25.

Interest.—Where a lady gratuitously undertook 'the gradual payment and extinction' of the debts of her deceased husband, 'by making payment and satisfaction' thereof out of her estate, chiefly by annual payments; and, after a term of years, paid off the greater part of these debts, and in the interim made successive partial payments and adjustments of interest with some of the creditors to a considerable extent, but never paid any interest arising subsequent to her husband's death to a certain class of English creditors under bonds or bills; and the House of Lords having found, in a question with the creditors, that the estate was liable for the debts till 'paid and extinguished;'—Held, that she was liable to them for the interest accruing on her husband's debts while unpaid, although it had cost her a much greater sacrifice of property to pay off the principal than she had any reason to expect at the date of granting the gratuitous obligation.——VIII. 286.——*Affirmed.*

THE LORD CHANCELLOR stated, that although at first he had doubts as to the original judgment by the House, finding Lady Montgomerie liable, yet he was now satisfied that it was correct;—that the question therefore was, Whether Lady Montgomerie, having undertaken to pay her husband's debts, was not bound to pay interest as part of these debts; and he was of opinion, that although, by the English common law, interest does not form part of an ordinary 'debt,' yet it does so in equity; that the Court of Session, as a Court of equity, was entitled to give interest; and that in fair construction interest must be held as included in the obligation.

No. 16.—M'KAY *v.* DAVIDSON, &c.—*March* 25.

Deathbed.—A person addicted to habits of excessive drinking, and who had been confined to bed for several weeks from debility and exhaustion, having executed a settlement of her landed estate, and died in eight days thereafter, without having been once up, except to have her bed made; and a medical gentleman having deponed that she had no formed disease when he saw her on the third day after the execution of the deed, and that she died of an access of peripneumonia notha, which is a very common, though not a necessary result of the state in which the party previously was;—Held, that she was not to be considered on deathbed at the date of the execution of the deed.——VI. 368.——*Affirmed.*

THE LORD CHANCELLOR, without hearing the respondents' Counsel, moved the affirmance, observing, that the rule was, that if a party, after the execution of a deed, did not go out unsupported to church or market, or survive the execution for sixty days, the deed was reducible ex capite lecti, provided he died of the same sickness of which he was ill at the time of executing the deed: that the presumption was that it was the same; but that it was competent to shew that it was not the same: that it was not sufficient that there was a predisposition to a particular disease, and that that predisposition may have contributed to the production of another and a different disease; for if the party die of that supervening disease, and not of the one to which his body was predisposed, the deed would not be reducible; that in this case the death was attributable to the new disease; and he therefore dissented from Lord Glenlee, concurred with the majority, and approved of the law, as laid down in Paterson's Trustees, (1 Mur. 71.)

No. 17.—PENTLAND *v.* BOOTH.—*March* 31.

A special case as to proceedings against a tenant, by processes of maills and duties and sequestration.——VIII. 196.——*Affirmed.*

THE LORD CHANCELLOR observed, that this, like all other cases where double remedies were allowed, was one of hardship; but that the proceedings were as much sanctioned by law as the double remedy of imprisonment of the person of a debtor and attachment of his property.

No. 18.—FRASER *v.* AGNEW.—*April* 2.

Entail.—An heir under a strict entail held not liable for an account of law expenses incurred by the preceding heir of entail, although the proceedings to which the account related were

the means of obtaining the restoration of a large part of the entailed estate to the heirs of entail, and the predecessor's personal estate was inadequate to satisfy the claim.——VIII. 585.——*Affirmed.*

THE LORD CHANCELLOR considered the law quite settled; and therefore, although he thought Fraser had a strong claim in equity, yet it was such an equity as a Court could not enforce.

No. 19.—Wright v. Logan.—*April* 2.

Clause.—Where the proprietor of lands, bounded on one side by a river, disponed them in feu, with absolute warrandice, in lots for building a street, 'with a proportional part of the water-'side grass opposite the street, corresponding to the above steadings feued, which is to be a 'common property to the vassals of the street,' (with warrandice from fact and deed); 'and 'declaring the lands above disponed to be holden in feu-farm, with all and sundry pertinents 'of the same, as well below as above ground,' and infeftment to be given in each standing, 'with the pertinents;' and there being no express reservation, except of such rights as effeired to the superiority of the lands;—Held, that the property of the solum, described as 'the 'Waterside Grass,' was conveyed to the feuars, and that their right was not limited to a servitude.——VIII. 247.——*Affirmed.*

THE LORD CHANCELLOR stopped the Counsel for the respondents, observing, that the sole question was, whether the words the 'Waterside Grass,' was the name of the piece of ground; or whether they were used as limiting the conveyance to the grass; and this was a question of fact which might have been cleared up by evidence. For although the rule is, that if a deed be unambiguous, evidence ought not to be admitted to support an extrinsic allegation, by listening to which allegation an ambiguity is raised; yet where the question is, whether a subject be of such a name or not, this is one of fact, which may be ascertained by evidence: That although no proof had been here taken, yet he was satisfied, from the evidence of the deed itself, that the term 'the Waterside Grass' was the name affixed to the piece of ground; and therefore that the solum had been conveyed.

No. 20.—Stonehaven Harbour Commissioners v. Keith.—*April* 2.

Statute.—A statute empowering harbour commissioners to 'open' quarries in commons or wastes, or within high-water mark, and take stones therefrom without consideration therefor, does not entitle them to enter a quarry already existing, and beneficially worked by the proprietor, and to take stones from it without paying for them.——VII. 405.——*Affirmed.*

THE LORD CHANCELLOR was clear, that the judgment was quite correct; and that as this was a question of interdict against parties having no right to enter the quarry, they could not plead that the possessor had no title,—a plea which, however, would be competent to them, if he brought his action for the price of the stones carried off, because he must there shew, not merely possession, (which here was sufficient), but his title to demand the price.

No. 21.—Russell v. Earl of Breadalbane.—*April* 4.

Assignation—Partnership.—1. Circumstances under which it was held, that an assignation of the share of a lease forming part of the stock of a partnership, by one partner to another, does not require formal intimation to complete it, and make it effectual against the creditors of the cedent.——V. 891.——*Affirmed.*

Right in Security.—2. A party having obtained an assignation ex facie absolute, but declared by a back-bond to be in security merely of certain specified debts;—Held, in a question with other creditors, that he was entitled to retain it in security of debts subsequently contracted. ——VII. 767.——*Affirmed.*

THE LORD CHANCELLOR, in reference to the first of these points, stated, that he waived the general question, and concurred with the Court of Session in the special circumstances.

No. 22.—Maxwell & Co. v. Stevenson & Co.—*April* 4.

Sale.—Goods imported having been lodged in a bonded warehouse, of which the importers were tenants, and having been sold by the importers, and the keys of the warehouse having been delivered to the purchaser; but no entry of the transfer having been made in the books of the Custom-house officer, under the 6th Geo. IV. c. 112.;—Held, on the bankruptcy of the purchaser, that there had been no effectual delivery, and that the goods were still liable to stoppage in transitu on the part of the seller.——VIII. 618.——*Reversed.*

THE LORD CHANCELLOR declined to hear the appellants in reply, observing, that the Court of Session had construed the statute on a wrong principle. Although the rule is, that when a statute directs something to be done without declaring a nullity, (and so is merely directory and not imperative), the transaction is not voided by non-observance of the direction; yet the Court held that it was voided by the non-observance of what was merely directory. They had also not adverted to the true purpose of the statute. The object of it was to remedy the hardships of the common law; it having been found, in Knowles v. Horsefall, (5. Barn. & Ald. 34.), that although goods had been bona fide purchased, price paid, the custody transferred to the purchaser, and his mark put on them, yet as they remained in the apparent possession of the seller at his bankruptcy, they went to his creditors. To obviate this the Legislature had declared, that such a sale should be valid; and although there was a provision or direction, that there should be an entry in a book, yet the omission was not declared to be fatal to the sale, and at common law it was undoubtedly not so. Therefore, as this was the only circumstance which was supposed to deprive the transaction of the benefit of the statute, the judgment must be reversed.

No. 23.—GRAHAM v. JOLLY.—*June* 29.

Landlord and Tenant.—A tenant under a lease for 57 years, which contained a clause binding him to uphold the buildings, and obliging the landlord to remunerate him, at the end of the lease, for any excess of value above what they were estimated at on his entry by valuators; and the tenant having, on the old buildings becoming ruinous, erected new offices of a much larger size, and of which some were of a different description from those in the old steading;—Held that he was entitled, at the end of the lease, to remuneration for all buildings necessary and suitable for the farm.——VI. 236.; VII. 824.

The House of Lords found, 'that the advocator, Stewart Jolly, is entitled to meliora-'tions for houses and biggings, in so far as the houses and biggings on the farms at 'the dates of the tacks are improved, or others suitable to the farm built in lieu of 'the same, and better than the same at the expiration of the tack; and that he is not 'entitled to meliorations for houses and biggings built of new, except as aforesaid;' and therefore ordered, that the interlocutors complained of, so far as inconsistent with the above findings, be *Reversed;* and the cause be *Remitted*, to do therein as shall be consistent with the said findings, and as shall be just.

THE LORDS CHANCELLOR and WYNFORD observed, that there were two points: 1. The liability of Graham as an heir of entail; and, 2. The extent of his liability. As to the former, he was clearly liable by homologation; but as to the latter, the Court of Session had, in place of construing the contract, made a new contract, by considering what was fitting, and not what was stipulated. Under a clause as to meliorations, a tenant may be entitled to make improvements, (not merely repairs), on existing houses, if they be not unsuitable; or he may build a house in place of another not capable of repair, (subject always to being suitable), and be entitled, at the end of the lease, to the then increased value; but he is not entitled, on speculative views, to erect new houses, even although he, or any one, should consider them an improvement to the farm; for if he had this in contemplation, he ought to have bargained for them. In the present case, Jolly had no right to the value of new houses, but only to the value of the meliorations on existing houses, or of substituting one for another.

No. 24.—M'INTYRE v. M'DONALD.—*July* 8.

Landlord and Tenant.—1. Intimation by a tenant, of his intention to leave his farm at the expiry of his lease being made to a factor, (appointed by trustees), who at the time warned the tenant that he had no power to receive such intimation, and that it must be made to the trustees themselves, not sufficient to free him from tacit relocation. 2. The intimation by a tenant must, like warning by the landlord, be given forty days before the Whitsunday preceding the ish. 3. Circumstances not equivalent to such intimation.*——VIII. 237.——*Affirmed.*

LORD LYNDHURST observed, that both on principle and the authorities, the interlocutor as to the necessity of notice was correct; and that there was no evidence of such notice having been given.

No. 25.—GRAY v. M'NAIR.—*July* 8.

Arbitration.—Arbiters under a submission, which empowered them to pronounce interim decrees, and declared, that although the submission should expire as to points on which they differed in opinion, it should still continue as to those on which they agreed, having pro-

* In addition to the point reported, the tenant claimed damages, because a sequestration of his effects had been executed for the current rent on the 19th May, whereas it did not become current till the 26th: to which it was answered, that as the tenant was carrying off the effects, and the rent was legally due at Whitsunday (15th), but payment postponed till the 26th, the sequestration was justifiable. The Court appear to have disregarded the claim; and Lord Lyndhurst was of opinion that it was not well founded.

nounced two interim decrees, copies of which only were delivered to the parties, the principals remaining in the hands of the clerk; and having afterwards declared the submission terminated, and declined to pronounce any deliverance on a memorial by the clerk as to a demand made by one of the parties to have the interim decrees put on record;—Held, that the decrees were invalid.——V. 735.——*Affirmed.*

LORD LYNDHURST stated, that although by the law of England the decrees would be effectual, yet he was satisfied, that by the law of Scotland they were merely *intended* decrees; and that, until delivered or put on record, they could not form conclusive and binding decrees.

No. 26.—Magistrates of Dingwall v. Mackenzie.—*July* 11.

Fishing—Interdict.—Special case, as to an interim interdict against fishing in certain pools, and within a certain boundary.——VII. 899.

Affirmed, with this declaration, 'that the mention of Pool Ourde and Pool Breakanord 'in the said interlocutors complained of, shall not prejudice, bind, or at all affect the 'question touching the course of the boundary line, nor decide whether the said line runs 'below or above the said two pools.'

No. 27.—Cathcart v. Cathcart.—*July* 18.

Entail.—Where an heir in possession under an entail, supposed to be defective in the prohibitive clause against contracting debt, but not as to the order of succession, being desirous to change that order, granted a bill at ten days for L.150,000 to a friend, who thereupon granted a counter-acceptance for the same amount, which was indorsed by the heir to a third confidential party; and the friend, after protesting the bill accepted by the heir, made it the basis of an adjudication against the estate; and, after being infeft, conveyed the adjudication to the heir on the narrative of a price of L.95,000, (though no money actually passed); and the indorsee thereupon delivered up to the friend his counter-acceptance; and the heir executed a new entail in favour of a different series of heirs, which he bound himself and his successors to warrant;—Held,

(1.) That the transaction being fictitious and collusive, with a view to alter the order of succession, in violation of an express prohibition, was ineffectual.

(2.) That the heir could not bind his heirs of entail under the old investiture to warrant the new deed, which was in direct contravention of the old entail.——VIII. 497.——*Affirmed.*

THE LORD CHANCELLOR stated, that he would give no sanction to the doctrine, that although an entail was complete in all its parts except one, it was thereby totally unavailing inter hæredes. No authority had been cited, nor could he find any to support it. With creditors or purchasers, perhaps, such a position might be maintained, because circuitously the entail might be defeated; but as among heirs, an heir could not do what was not prohibited, to accomplish what was prohibited.—This did not touch the decision in the Ascog case, where the question was as to an obligation by an heir, availing himself of a defective prohibition, to reinvest or pay damages; whereas here an attempt was made to violate an effectual prohibition. Although it were true that the prohibition against contracting debt was defective, (which it was unnecessary to decide), yet there had been no true debt contracted; and it would not do, in attempting to alter the succession, (which was the avowed object), to assume the appearance of contracting debt.

No. 28.—Cathcart v. Cathcart.—*July* 18.

Sequestration of Land Estate.—An heir who had been in possession of an estate under an entail for nearly 40 years, having acquired right to an adjudication, (alleged to have been obtained by him through the intervention of a friend, to alter the order of succession), and made up titles under it; but his possession continuing to be ostensibly under the entail; having executed a new entail, which remained latent till his death; and a competition having arisen between the next substitute under the original entail and the party called under the new entail, and no actual possession having been acquired by the latter, the Court, on the application of the former, sequestrated the estate.——VII. 392.——*Affirmed.*

THE LORD CHANCELLOR thought this a most improper appeal, as the sequestration must depend on the merits of the preceding case, and therefore moved that L.150 costs should be awarded.

No. 29.—Burns v. Stewart.—*July* 27.

Landlord and Tenant—Mutual Contract.—Circumstances under which a tenant was not al-

lowed to withhold payment of his rent, on the ground that he had not got a road specially stipulated in the lease.——VIII. 641.——*Affirmed.*

LORD ELDON stated, that in the special circumstances of the case, he could not advise the House to reverse, and therefore moved an affirmance, without costs.

No. 30.—MUNRO *v.* DRUMMOND.—*August* 30.

Entail.—Held, that an estate in possession of a party under an entail, on which infeftment had been taken, was liable to be adjudged for debts contracted subsequent to the infeftment, but prior to the recording of the entail, although the adjudication was not raised till after the entail had been recorded.——VII. 945.

The House of Lords declared, 'that the registration of the deed of entail prior to the 'date of the decrees of constitution and adjudication, does not in this case bar the 'claims of the creditors against the entailed estate, in respect of debts contracted 'prior to such registration; and, with this declaration,' *Remitted* to proceed accordingly; 'it not being the intention of the House to give an opinion upon any other 'point arising between the said parties in this cause.'

LORD LYNDHURST, in moving the judgment, stated, that he had communicated with Lord Eldon, and that they were both of opinion, that until every thing required by the Act 1685 is complied with, the heir is to be considered, in reference to creditors (real or personal) and to purchasers, as holding the estate in fee-simple, liable to be attached for debts contracted by him; and that the subsequent recording of the entail cannot have a retrospective effect, so as to divest creditors of their right to attach the estate—a construction directly supported by Smollet, (No. 12. Ap. Tailzie), Ferrier (Dec. 10. 1813.), and indirectly by Grahame, (15,439.), and not affected by the Sheuchan case, (2 Sh. Ap. Ca. 390.)

No. 31.—FERNIE *v.* TROTTER.—*September* 6.

Nuisance—Interdict.—A bill of suspension being passed, to try whether a whale-blubber boiling establishment, about to be set agoing in the neighbourhood of a sea-port, was a nuisance, the Court at the same time granted interim interdict de plano, although no operations had commenced, so as to show, by actual experience, whether it really was a nuisance in the situation proposed.——IX. 144.——*Affirmed.*

THE LORD CHANCELLOR observed, that the interim interdict was warranted both by the civil law and by the law and practice of Scotland,—the avowed purpose being to boil whale blubber; for although it was impossible to say, that under all circumstances such an operation is a nuisance, yet it is so prima facie, and entitles a party liable to be injured by it to have it stopped, till it be shewn that it will not be injurious; and that in the present case this had hitherto not been shewn.

No. 32.—LEYS, MASON, and Co. *v.* FORBES, &c.—*September* 7.

Fishing—River—Title to Pursue.—Proprietors of salmon-fishings in a river entitled to pursue an action for removing one of several dam-dykes across the river, as an obstruction to the passage of the fish, without previously or at the same time challenging the others, which would still prevent the passage of the fish although that under challenge were removed.——IX. 933.——*Affirmed.*

THE LORD CHANCELLOR, in reference to the trial of the cause in the Jury Court, stated, that it was as incompetent to qualify, explain, or controul an issue by what was set forth in the record, as it was to explain an Act of Parliament by what was in the bill: That although the issue was in *general* terms, whether certain dam-dykes 'were to the injury and damage of the pur-'suers, or of any, and which of them, as proprietors of 'salmon-fishings in the said river;'—yet Lord Gillies had told the Jury, that the question for their decision was not that in the issue, but 'is the dyke injurious to 'the pursuers' fishings' (with this addition) '*in the actual* '*state of the river and of other dykes?*' a restriction or qualification which was quite unauthorised. He also observed, that in framing bills of exceptions it was better not to state what the direction was which *ought* to have been given, but simply to object to that given; because it may happen that the party is wrong as to the direction which he thinks should have been given.

No. 33.—CALDER *v.* AITCHISON & COMPANY.—*Sept.* 10.

Cautioner.—A letter binding a party 'to guarantee an agent for four per cent for commission 'and guarantee,' being put in evidence at a jury trial; and merchants being tendered to prove 'what they understood to be the effect and import of the undertaking in the letter;'—Held,

(1.) That such evidence was inadmissible, as it belonged to the Court to interpret the obligation; and,

(2.) That the letter merely bound the party to make good the price for which the agent

should sell, and that such agent should possess ordinary skill and good character.——IX. 777. ——*Affirmed.*

THE LORD CHANCELLOR put it to the appellant's Counsel, whether it was possible to support the appeal; and stated, that the judgment was so plainly right, that he must move an affirmance, with £.100 costs.

No. 34.—SCOTT v. ALNUTT.—*Sept.* 10.

Heritable and Moveable.—A certain portion of an entailed estate having been sold for redemption of the land-tax, and the surplus price having been lodged in a bank, and thereafter lent out on heritable security by the statutory trustees; and the heir-apparent under the entail having executed an assignation, in the English form, of his right to draw the annualrents thereof during his life, in favour of a third party, for onerous causes; and having after his succession executed a general disposition of all his property in favour of a trustee for behoof of his creditors, followed by a special disposition of his life interest in the entailed estate, on which the trustee was infeft;—Held, in a competition for the interest of the surplus price of the lands sold for redemption of the land-tax, that the right to draw it was carried by the assignation, and could not be defeated by the subsequent disposition to the trustee.——VI. 62. ——*Affirmed.*

No. 35.—MACKENZIE v. HOUSTON.—*Sept.* 13.

Fishing—Title to Pursue.—A party having brought an action, libelling that he was tacksman of the whole salmon-fishings in a frith, and proprietor of other fishings in certain rivers flowing into it, against a proprietor of lands situated on the frith, to have it found that the defender had no right to fish salmon ex adverso of his own lands, at which part of the river the pursuer had no right of fishing either in tack or property;—Held,

(1.) That although a preliminary objection to his title had been repelled, it was still competent to the defender to object to it as a title to prevail; and,

(2.) That the title was not sufficient to warrant his obtaining a declarator of no right of fishing against the defender.——VIII. 117.*——*Affirmed.*

THE LORD CHANCELLOR stopped the Counsel for the respondent, observing, that as Mackenzie did not allege in his summons any right in the fishing at the place fished by Houston, it was jus tertii to say that Houston had no title from the Crown; and that, as he had not alleged any violation by Houston of a public law as to the mode of fishing, or that Houston had maliciously done acts with a view to injure him, (which, as an upper heritor, Mackenzie would be entitled to challenge without shewing any right to fish at the particular place), the judgment must be affirmed; reserving to him to bring a new action, on any competent grounds other than those set forth.†

No. 36.—SCOTT v. YUILLE.—*Sept.* 15.

Cautioner.—(1.) A party having, in a bond for borrowed money, bound himself for and without another, 'as cautioner, surety, and full debtor;'—Held, that being thus expressly mentioned as cautioner in the bond, he was entitled to found on the septennial limitation contained in the Act 1695, although he had no special clause of relief in the bond, and no bond of relief apart, these being held to be required by the statute only in regard to parties bound as co-principals; and,

(2.) Payment of interest after the lapse of the seven years does not bar the party pleading the extinction of the obligation.——VI. 137.; VIII. 485.——*Affirmed.*

THE LORD CHANCELLOR concurred in the judgment of the Court of Session, observing, 1. that it was impossible to construe the Act so as to hold, that where a party is expressly named as cautioner, (although also bound as full debtor), that he must intimate to the creditor that he is so, and has a right of relief, (which would be superfluous),—a construction supported directly by Ross (11,014.), and indirectly by Gordon (11,037.), and Douglas (11,037.); and, 2. that as the Act expressly declares the obligation to be ex ipso extinguished by the lapse of seven years, the payment of interest thereafter could not revive it.

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* Insert at p. 121. of the report these words:—The Court assoilzied, 'in respect the pursuer has not produced 'or proved any sufficient title to salmon-fishings ex adverso of the lands in question.'

† The Lord Chancellor quoted, from a report of the speech of the Lord Justice-Clerk, certain passages to this effect,—that even if Houston had fished contrary to law, or done acts with a view to injure Mackenzie, as an upper heritor, the latter would have no title to complain, unless he had a right to fish at the particular place. The reporters cannot find these passages either in their own report or in that of the Faculty. They understood the Lord Justice-Clerk to give no sanction to such a doctrine.

No. 37.—Dixons v. Monkland Canal Company.—*Sept.* 17.

Acquiescence—Personal Objection—Repetition.—Where a Canal Company were authorized, under a statute, to levy an additional penny per ton on vessels, in consideration of deepening the canal, and otherwise improving the line of navigation; but, before giving the full depth, raised the rates in 1801 to one farthing, and in 1804 to three farthings per ton; and none of the traders objected to the want of depth of the canal; but one of them resisted the increase, up to 1804, on other grounds, which were judicially repelled; and he having then paid, without objection, until 1815, when the Company increased the rate to one penny, against which he protested, alleging the want of depth; and it being ultimately found by the House of Lords that the Company had no right to increase the dues till they had given the full additional depth;—Held, that he was barred from claiming repetition of all the bygone increased dues previous to the date of his protest.——VIII. 826.——*Affirmed.*

THE LORD CHANCELLOR stated, that although, under the special circumstances of this case, it was not necessary to decide whether an allegation of ignorance of law was relevant to infer repetition of money paid, yet he considered it proper to state his opinion that it was not relevant; and that, although this might in particular cases be attended with hardship, yet, that as a general rule it was highly expedient, and was daily enforced, even with the penalty of life in criminal law: that in the case of Carrick (2931.) a contrary doctrine was stated merely obiter, and that of Stirling (2930.) was so briefly reported that it was impossible to see whether the report was warranted by the facts.

No. 38.—Hunter, &c. v. Dickson.—*Sept.* 19.

Husband and Wife.—Held, that a contract of separation and provision, whereby a husband bound himself to pay to his wife, during her life and separation, an annuity of £. 30, in consideration of which she renounced all legal claims against him, was not effectual to bar her from claiming her legal provisions on his death, the amount not being fair, onerous, and adequate in the circumstances of the husband.——V. 266.——*Affirmed.*

THE LORD CHANCELLOR observed, that there were two questions, 1. Whether it was competent to revoke after the death of the husband? and 2. Whether the consideration was grossly inadequate? In regard to the former he was of opinion, both on the nature of such contracts and the authorities, that if the consideration was grossly inadequate, the contract was revocable; that this was assumed as law in Palmer, 25th January 1810, (although in the circumstances the contract was found not revocable), and was so held in Gaywood, (ante, vii. 909.) As to the second point, he was of opinion that, in judging of the adequacy, regard must be had to the state of the husband's affairs, not merely at the date of the contract, but at his death, when the stipulated provisions in favour of the wife were to take effect; and that as in this case the husband left about L. 12,000, while the wife was provided, in consideration of the renunciation of her legal rights, with only an annuity of L. 30, (which was not even effectually secured), the provision was grossly inadequate.

No. 39.—M'Donald v. Mackie and Co.—*Sept.* 21.

Contract—Process.—A party having employed a tradesman to lay some leaden pipes to convey water to his house; and having made various partial payments after the supply of water had proved insufficient; and having employed another person to lift and relay the pipes, which he averred were insufficient, without intimation to the first tradesman to attend;—the Court refused to entertain an action for repetition and damages against the tradesman.——VIII. 686.

The House of Lords ordered, 'That the cause be remitted back to the Court of Session to review the interlocutors complained of; and the Lords do declare, that this House is of opinion, that there is in this case a relevant allegation of a breach of contract; but the facts of the case not appearing upon the record with distinctness sufficient to enable this House satisfactorily to pronounce any judgment therein, it is further ordered, that the said Second Division of the Court of Session do take the proper steps for remitting the said cause to the Lord Ordinary by whom it was prepared, with instructions to his Lordship to open up the record, and to cause the whole written pleadings to be revised and prepared in strict conformity with the Acts of Sederunt relating thereto, and to the provisions of the statute passed in the sixth year of the reign of his late Majesty King Geo. IV. entituled, &c.; and thereafter, in case the facts shall not be sufficiently established by admissions of parties in such revised pleadings, to cause a proper issue or issues to be tried by a jury, for the purpose of determining whether any breach of contract was committed by the defender, and how far the pursuer was injured thereby; and further to do therein as shall be just and consistent with the above declaration.'

THE LORD CHANCELLOR observed, that two great errors had in this case been committed—the one by the parties, and the other by the Judges; that although the sole question was, whether a contract had been made, and whether that contract had been broken, the parties, in place of averring in substantive propositions the nature and tenor of the contract, and the way and manner in which it had been broken, had entered into a

minute detail of all the circumstances, to *prove* that their respective averments as to the nature of the contract, and the breach of it, were true;—thus mixing up averment of *fact* with averment of *evidence*: that, in like manner, the Judges had mixed up matter of *relevancy* with matter of *evidence*, holding some facts to be relevant but not true, and others true but not relevant. He therefore was of opinion, that the record must be made up of new, and, unless there were explicit admissions of the facts, that the case must be tried by a jury.

No. 40.—GILLON *v.* MACKINLAY.—*Sept.* 22.

Partnership.—1. Circumstances and evidence relevant to establish partnership. 2. Agreeing to accept a fixed annual sum out of the profits of a concern, is sufficient to constitute the party so agreeing a partner of the concern.——IX. 90.——*Affirmed.*

THE LORD CHANCELLOR stopped the Counsel for the respondents; and, while he regretted that the question of partnership had not been sent to a jury, whose verdict would have been conclusive, and prevented an appeal, (which was one great object of the institution of the Jury Court), still, from a desire to avoid expense, he would not recommend that course to be now followed, being satisfied that the judgment was correct. He again adverted to the irregular mode of preparing records, and stated, that if not effectually remedied by the Court, he would call for the interference of the Legislature.

No. 41.—CABBELL *v.* BROCK.—*Sept.* 23.

Lease—Assignation in Security.—A mercantile Company in possession of a lease of a print-field, having borrowed money from a private bank, and granted an assignation of the lease in security to the bank, which was intimated to the landlord, and the bank having thereupon granted a sub-lease to the Company, who remained in possession, and paid the rents; and no possession having been taken by the bank;—Held, by a majority of the whole Court, on a remit from the House of Lords, in a question with the trustee on the bankrupt estate of the Company, that the assignation was not effectual against the creditors.——VIII. 647.——*Affirmed.*

THE LORD CHANCELLOR did not consider it necessary to decide the general question, whether intimation without possession was sufficient, being satisfied (and in this he concurred with the majority of the Judges) that, under the circumstances, there had not been vested in the bank a real bona fide security.

No. 42.—MACKENZIE *v.* MACARTNEY.—*Sept.* 23.

Cautioner.—It being declared in a cash-credit bond, that it was not meant to supersede the security held by the bank, in terms of their contract, over any shares then belonging, or which might belong to the parties; and the obligant, in whose name the credit was to be operated on, being then possessed of certain shares, which the bank afterwards allowed him to dispose of, the full amount of the credit being then drawn out;—Held, that their doing so did not liberate the other obligants.——VIII. 862.*——*Reversed.*

THE LORD CHANCELLOR was of opinion that, although bound as full debtor, Mackenzie was a cautioner, and entitled to the privileges thereof, except discussion, which he renounced by so binding himself. Although he did not rest much upon the sale of the shares, yet he could not concur with the Lord Ordinary, that because the clause as to them was usual and matter of style, therefore it was immaterial,—the fact being, that all words of style are preserved just because they are material. He went chiefly on the giving of time, in regard to which there was complete evidence,—the bank having made affidavit to the debt, and claimed on the estate; so that they bound themselves to the conditions of the trust, and consequently to suspend proceedings for three years. This had been met by a statement, that Mackenzie had renounced his privileges as cautioner by putting his initials to the draft of the trust-deed; and that it appeared, from a minute signed by a gentleman said to be of respectability, that he was present at a meeting and concurred in the trust. The former merely proved an intention to concur, but not a concurrence; and the latter was no evidence at all; for men's properties and rights were not to be taken away because a man of respectability signs a paper bearing that a party was present, although that party positively denies that he was so.

No. 43.—STEWART *v.* PORTERFIELD.—*Sept.* 23.

Tailzie—Faculty—Prescription.—A party having executed a deed of entail in favour of an institute and the heirs-male and female of his body, and the heirs-male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs-

* The above was the question mainly argued in the Court of Session; but in the House of Lords a plea, that the bank had given time to the principal obligant, was strongly rested on; the bank having concurred in a trust-deed containing a supersedere of diligence for three years. The answer to this was chiefly, that Mackenzie was a party to the trust, and therefore could not plead this objection.

male and female of his and the entailer's body; and thereafter having made a deed, whereby he altered the line of succession, and nominated heirs preferably to the heirs-female of the institute, and to the other heirs called after the substitution haeredibus nominandis; and the estates having been possessed for more than forty years on the entail alone, without reference to the deed of nomination;—Held, that the deed of nomination was a valid exercise of the faculty to name heirs; that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place, so as to exclude the former.——VIII. 16.——*Affirmed.*

THE LORD CHANCELLOR had at first considerable doubt on a point stated in the opinion of Lord Mackenzie; but although it was one of much difficulty, yet, as he thought it might be overcome, and as he was disposed to concur with the other Judges, he moved an affirmance.

No. 44.—KIBBLES v. STEVENSON.—*Sept.* 23.

Sasine—Registration—Writ—Marriage-Contract.—1. A precept of sasine held not to be exhausted by an unrecorded infeftment, but still competent to take a second infeftment thereon. 2. The parents of an intended husband having, in their son's contract of marriage, conveyed a property to him and the children of the marriage, and marriage having followed thereupon;—Held no ground for reducing the disposition, that the subscription of the bride was not properly tested.——IX. 233.——*Affirmed.*

THE LORD CHANCELLOR declined to hear the Counsel for the respondent, observing, that as to the second point he had no doubt at all; and as to the first, that it was important in matters relative to land titles to adhere to decisions. The question had been decided in Kibble, 16th June 1814, and thereafter in Baxter, 15th May 1818, although out of deference to a doubt by Lord Balgray, a hearing had been ordered, and the parties settled out of Court. All the Judges, except three, had concurred in the interlocutor appealed against, a circumstance in a case of this nature of much weight; and although Lord Balgray dissented, yet he stated that the case of Kibble had regulated conveyances in framing titles to property to an immense extent, which was a reason for adhering to and not departing from it. Lord Medwyn, who also dissented, had taken too unilateral a view, resting chiefly on old cases relative to objections by tenants and others against parties from whom they derived right, (which they could not be permitted to do), while he had not adverted at all to Kibble or Baxter. Both on principle and authority his Lordship thought the judgment correct, and hoped the question would now be considered as settled.

No. 45.—BRODIE v. SINCLAIR.—*Sept.* 23.

Expenses.—Circumstances in which a person, although partly successful, was found liable in expenses to the defender.——IX. 36.——*Reversed.*

THE LORD CHANCELLOR stated, that although it was true that the pursuer had brought his action for a large sum, yet the defender not only made no tender either prior or posterior to the action, but, while he admitted that he was indebted in the sums ultimately decerned for, he pleaded counter-claims, and so resisted decree; that the Court had, notwithstanding, found the pursuer liable in full expenses, whereby he not only took nothing by his decree, but was a loser,—the justice of which his Lordship could not understand; and he therefore moved a reversal.

No. 46.—OFFICERS OF STATE v. EARL OF HADDINGTON.—*Sept.* 24.

King's Park—Clause—Prescription.—Held, 1. That prescription cannot be pleaded by the hereditary keeper of the King's Park, as conferring any right in opposition to, or inconsistent with the terms of the grant of the office. 2. That the keeper's rights must be explained and regulated by usage, in consistency always with the peculiar nature and terms of the grant. 3. That his right as to working quarries is of a limited nature; and that he is not entitled to work for general or unlimited sale. 4. Before defining the special limits of the right, a condescendence ordered as to usage.——VIII. 867.——*Reversed.*

THE LORD CHANCELLOR was of opinion that the keeper had no right of the nature claimed by him, whether reference was made to the character and purpose of his office, or to the alleged usage; and therefore that the judgment recognising his right to work quarries at all must be reversed. The majority of the Judges had assumed the fact of the existence of usage as proved; but the evidence was both irrelevant and incompetent. It consisted chiefly of entries in the books of the Town Council, which being neither the books of the Crown nor of the keeper, were inadmissible; and even if admissible, merely went to shew that proposals had been made to the Crown, or parties on behalf of the Crown, (which were agreed to in some cases), to allow the Council to take stones from the quarries—a circumstance which could never establish a claim by the keeper *adverse* to the Crown. Besides, there could be no usage with reference to the title of the keeper prior to the grant in question, because no such office appears to have previously existed; and there was no legal evidence of contemporaneous usage. It was, however, certainly a strange proposition, that a party who was the keeper and preserver of the park on behalf of the Crown, could by any usage be entitled to say to the Crown, for whom he was bound to *preserve*, that he was entitled to carry off and *destroy*. It was impossible to construe his title to that effect, and the dispositive clause gave him no such right.

No. 47.—Earl of Mar v. Erskine.—*Sept.* 28.

Entail—Clause—Provisions to Children, &c.—Circumstances in which the Court refused to restrict or reduce certain bonds of provision to younger children, granted by an heir of entail under a reserved power to make 'reasonable provisions.'——IX. 126.——*Affirmed.*

THE LORD CHANCELLOR thought the appeal so unwarranted, that he declined to hear the respondent's Counsel, and moved an affirmance, with L. 200 costs.

No. 48.—Hunter v. Gardner.—*Sept.* 28.

Cessio Bonorum.—1. The objection, that all creditors are not called, being once taken, and those alleged to be omitted cited, the objection not allowed to be repeated by another creditor cited in the original summons. 2. Not a sufficient objection to a certificate of imprisonment, that it merely bore the incarceration to be of a certain date, and the being in custody at the date of the certificate a month thereafter, without specially setting forth that the party remained in prison during the intervening period, it not being averred that in point of fact he had not. 3. Averments which were held not relevant to warrant refusal or delay to grant the benefit of cessio.*——IX. 562.——*Affirmed.*

THE LORD CHANCELLOR had no difficulty on any of the points, except the order by the Court to assign a part of the salary. In England it was settled, that a salary given for or in respect of the performance of a public duty was not attachable, and he thought the same principle must apply to public officers in Scotland. If it was attachable, he could not understand how the Court of Session had ordered only a part, and not the whole, to be assigned to the creditors; but as they did not complain of this, and the Court appeared to have done so in numerous similar instances, he merely expressed the difficulty which had occurred to him as to the principle of these decisions.

No. 49.—Clyne v. Sclater and Others.—*Sept.* 28.

Partnership.—Circumstances in which a partner of a joint stock company, was found liable in an action by several of his copartners for his share of instalments of stock.——IX. 248.——*Reversed.*

No. 50.—Dickson v. Medwyn, &c.—*Oct.* 1.

Entail—Sasine—Res Judicata—Title to Pursue—Personal Objection—Homologation.—1. Circumstances under which it was held, (1.) That an entail executed in implement of a decree-arbitral, did not prevent an heir-substitute from selling part of the estate. (2.) That a sale under a power in the entail, and by authority of the Court, in absence of minor and pupil heirs, was effectual. (3.) That the refusal of a bill of suspension presented by a purchaser, relative to another sale, afforded a plea of res judicata. (4.) That a sasine written on nine pages, but stated in the docquet to be on eight, was valid. 2. A posterior entail, inconsistent with the original one, having been sustained by the Court; and an action having been brought by the heirs-substitute under the original entail, concluding for reduction of the sales of parts of the estate falling within it, for declarator of irritancy against the heir in possession under the second entail, in respect of his having concurred in those sales, and to have the next substitute found entitled to possess; but that substitute having had the succession to the fee propelled to him under the second entail, and been infeft and enrolled as a freeholder, and having voted as such;—Held, (1.) That the original entail was annihilated; (2.) That the action was not maintainable by that substitute, nor any others suing with him, notwithstanding a renunciation by him of the infeftment, and a decree of reduction pendente lite against the other heirs; and, (3.) That these objections were pleadable by the defenders, although not heirs of entail.——VII. 503.——*Affirmed.*

No. 51.—Leith Bank v. Bell.—*Oct.* 1.

Cautioner—Bank Agent—Pactum Illicitum.—Circumstances in which the cautioners of a Bank agent were held liberated from their bond, through the conduct of the Bank; and chiefly

* The pursuer being Comptroller-General of Customs, with L. 590 a-year, the Court ordered him to assign L. 300 to his creditors.

because, 1. The Bank had permitted the agent to incur unusual hazard of loss, by violating instructions for his government, on the bona fide enforcement of which the cautioners had a right to rely. 2. At the date of the bond a balance stood against the agent, under his weekly states to the Bank, of above thrice its amount, of which the Bank did not make the cautioners aware. 3. The Bank engaged the agency in an illicit traffic to a large extent, out of which very heavy losses arose, and the transactions in which were held inseparable from those of the legal agency.——VIII. 721.——*Affirmed.*

THE LORD CHANCELLOR moved the affirmance, on the grounds sustained by the Court of Session.

No. 52.—Dick v. Cuthbertson.—*Oct.* 1.

Sale—Mora—Process—Suspension—Expenses prior to Appeal.—Where the purchaser of heritable property, part of a sequestrated estate, suspended a charge by the trustee for the price on objections to the title, but offered to pay on getting a good title; and the Court found the trustee bound only to concur in such supplementary title, at the purchaser's expense, as he might think necessary, and the purchaser liable in expenses of process; and the House of Lords reversed this judgment, declaring the trustee bound to give a good title, and remitted to this Court without any finding as to expenses; and a title, after some further procedure in this Court, was prepared; but the purchaser, who had never hitherto proposed to throw up the bargain, having done so now on the ground of delay in giving him a title;—Held, that it was no sufficient objection to the title offered, that the original trustee being dead, the present trustee had been appointed under a remit from the House of Lords, on a petition to the Court at the instance of only one creditor instead of two, as required by the Bankrupt Statute.——IX. 93.——*Affirmed.*

No. 53.—Kerr v. Kerr's Trustees.—*Oct.* 1.

Deathbed—Title to Pursue.—A party having, mortis causa, conveyed heritage in liege poustie to trustees, with directions to sell, to pay legacies, &c., and then to pay the residue to such persons as she should direct by any writing under her hand; and in default of making such writing, to pay the residue to her next of kin; and thereafter having executed a writing of directions on deathbed, which was challenged by the heir-at-law;—Held, that if the heir could set aside such writing, he would thereby occasion that default, in the event of which the liege poustie deed had disponed in favour of the next of kin; and therefore he was barred by want of interest from insisting in a reduction of the deed.——VIII. 694.——*Affirmed.*

THE LORD CHANCELLOR stated, that there had been much ingenious argument thrown away both at the bar and on the Bench, and many points elaborately and unnecessarily discussed. The simple question was, whether the default in favour of the next of kin could be barred by any writing, however invalid? The plea of the heir-at-law was, that it could, and that the next of kin being thus excluded, he could then set the deed aside ex capite lecti. Such a plea he thought quite untenable.

No. 54.—Officers of State v. Dundas.—*Oct.* 1.

Patronage—Prescription.—After the Reformation, when the Crown was in right of the possessions of the Bishops, a royal grant was given of certain lands, &c. in Orkney and Zetland, which had constituted an earldom previously forfeited to the Crown, together with the whole patronages, including expressly those acquired in consequence of the Reformation, as well as those otherwise belonging to the Crown, all being united into a single earldom and lordship. This earldom was subsequently forfeited and annexed to the Crown; and thereafter, on the restoration of Episcopacy, but without obtaining a dissolution of the earldom, there was conferred on one of the new Bishops the bishopric of Orkney, including all the patronages previously belonging thereto, and the teinds and kirks of certain parishes specially mentioned, the benefices of which were declared to be suppressed, and the teinds to belong to the Bishop, under burden of planting and providing for ministers, and with a general right of patronage of vicarages. The bishopric was enjoyed by the several Bishops during the subsistence of Episcopacy, and all rights belonging thereto reverted to the Crown at the Revolution. Thereafter a dissolution of the earldom having been obtained, and a new grant given;—Held, that this grant formed a title of prescription, on which, if followed by possession, to prescribe against the Crown, as coming in place of the Bishop, right to the patronage of the parishes specially contained in the titles of the bishopric.——VIII. 755.——*Affirmed.*

THE LORD CHANCELLOR concurred with the Court of Session, 1. That there was a sufficient title on which prescription might run,—it not being requisite that there should be a complete conveyance to the subject claimed, for otherwise prescription would be unnecessary; 2. That a right of patronage was capable of being acquired by prescription; and, 3. That there had been the requisite possession.

No. 55.—Robb v. Forrest.—*Oct.* 3.

Bankrupt—Sequestration—Geo. III. c. 137. § 20.—Objections repelled to the right of a creditor to petition for sequestration: viz. 1. That, though a single creditor, his real advance was less than L.100, being made up of a debt of L.80 due to himself, and a sum of L.18 paid as the price of another debt of L.55 assigned to him. 2. That the stamped deed of assignation of the L.55 (a debt due to a company) was signed only by the firm, and by no individual partner. And, 3. That the assignation was executed after the debtor's bankruptcy, and therefore could give no more right to the assignee to petition for sequestration, than it would have given to the cedent had he retained it, and, jointly with the assignee, petitioned, in which case the statute required the debts to amount to L.150, whereas they were only L.135.——VIII. 839.——*Affirmed.*

Stamp.—A creditor having petitioned for sequestration under the Bankrupt Act, founding on a debt of L.135, composed to the extent of L.55 of a debt assigned to him by a deed erroneously stamped, (or supposed to be so); and sequestration being awarded, after which the proper stamp was adhibited, the debtor's petition for recall of sequestration refused.——VIII. 1035.

THE LORD CHANCELLOR considered the only objection worthy of attention was, that the petitioning creditor's claim rested on a deed not duly stamped when the petition was granted and sequestration awarded. The objection was not then stated, but only on applying for recall; and although there was some doubt, and the question did not seem to have met with that attention in the Court of Session which it deserved, yet he thought that, as in the case of a trial at Nisi Prius, where, if the Court, unaware of the objection, receive a deed not properly stamped, this will be no ground for a new trial; so here it was no reason for recalling the sequestration, more especially as the deed had now been stamped.

No. 56.—Napier v. Goldie.—*Oct.* 3.

Interest.—Circumstances in which the Court allowed arrears of interest to be accumulated into a capital bearing interest from the next term after the date of citation of the holder of a fund in a multiplepoinding, of which he was the nominal raiser.*——VIII. 140.——*Affirmed.*

No. 57.—Grahame v. Shand.—*Oct.* 6.

Entail—Sale.—1. Sale of lands by public roup sustained, which was alleged to have been made in contravention of a strict entail in an antenuptial contract, recorded in the books of Council and Session for preservation and infeftment, engrossing the fetters of the entail taken and recorded previous to the sale, but the entail not having been recorded in the register of entails till after the sale. 2. Title of an heir-substitute to pursue a reduction of such a sale sustained, although not descended of the marriage under the antenuptial contract.——VIII. 231.—— *Affirmed.*

No. 58.—Montgomerie v. Maxwell.—*Oct.* 12.

Landlord and Tenant—Warrandice.—A tack having been granted to the tenant, 'his heirs, 'assignees, and subtenants, with warrandice to him' and his foresaids; and the tenant having subset the farm with absolute warrandice, but without any assignation to the warrandice in the principal lease;—Held, (the principal lease being reduced as ultra vires of the landlord), that the subtenant was entitled to bring an action of damages against the landlord under the warrandice.——V. 935.——*Reversed.*

LORD LYNDHURST stated, that the general rule was clear, that a subtenant had no action on the lease against the landlord, there being no contract between them. The question therefore was, 1. Whether the general rule was included by the terms of this lease; and he thought not. The true construction was, that the landlord empowered the tenant to subset, and warranted to the *tenant* that his subtenants should enjoy quiet possession. This was a contract between the landlord and tenant alone, and could give no right of action to the subtenant against the landlord. He could claim only under the sublease, and the warrandice in it, against the grantor. The case was different as to the heir or assignee, because the original contract and the original estate went to them as representing the principal tenant, whereas, in regard to a subtenant, there was a new contract and new estate, and he did not represent the tenant.

* Another branch of this case (VIII. 357.) was appealed; and it is understood that the judgment was affirmed

No. 59.—Inglis v. Harper.—*Oct.* 13.

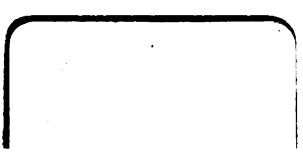
Testament.—A party having, by a regularly executed testament, appointed a person, who would not otherwise have succeeded, to be her executor, subject to the payment of such bequests as 'I may instruct him to pay, in a letter signed by me of this date, to the several persons 'therein named;' declaring, 'that after these several persons therein named have been paid 'and discharged their several legacies,' the whole residue should belong to the executor; and the testator having died two days thereafter, leaving this will in her repositories, with a letter within it containing directions to the executor to pay certain legacies, and bearing the same date, and to be signed by her, but not holograph nor tested; which letter, it was offered to be proved, had been signed by the testator simul ac semel with the testament;—Held, that the letter not being probative in terms of the Act 1681, there was no effectual constitution of legacy against the executor; and that it was not relevant to supply the want of the statutory solemnities by proving aliunde the identity of the letter with that referred to in the will.——VI. 865.

Reversed, and Remitted 'with directions to submit to a Jury to consider, whether the 'letter, bearing date "Edinburgh, 15th May 1826," and purporting to be a letter 'from Margaret Mathieson to James Harper, Esq., and by which the said James 'Harper is directed to pay to William Inglis, Esq. W. S., or his heirs, L.1000 'sterling, was signed by Margaret Mathieson on that day, and is the letter referred 'to by the will of Margaret Mathieson?'

LORD WYNFORD stated, that, in concurrence with Lord Eldon, he was of opinion, that although a document might not per se be probative, yet if it were referred to in a probative deed it might be received in evidence, the danger of improbativeness being removed by the reference to it in the probative deed. The case of Dundas (No. 6. App. Writ) was not adverse to this, because there 'a writing' was referred to, which in law meant a probative writing; whereas here the reference was to a letter, and such a document was not usually tested. Accordingly, in the case of Melvin v. Nicol, effect was given to a holograph letter, although not tested. He therefore thought, that an issue must be sent to a Jury, to ascertain whether the letter in question was the one referred to in the deed, observing, that the circumstance of the body of it being written by the party in whose favour it was conceived, would in England make a Jury view it with the utmost jealousy, and require strong evidence in support of it.

No. 60.—Robertson v. Harford and Company.—*Oct.* 14.

Sale—Acquiescence.—A delay having occurred in furnishing goods according to agreement; and the purchaser having in consequence demanded a reduction in the stipulated price; but the sellers having intimated, on sending the goods, that they would not agree to any reduction; and the purchaser having thereafter accepted them without objection;—Held bound to pay at the price originally stipulated, and not entitled to found on an alleged deficiency in weight, of which he had not complained tempestive as a ground for an abatement.——IX. 351. ——*Reversed.*

THE LORD CHANCELLOR observed, 1. That there was no legal evidence of a concluded agreement, but only of a treaty, prior to the notice that the goods would be taken at the price alleged by the purchaser; and, 2. That, according to the doctrine of this case, if a man ordered a dozen of wine, and ten bottles only were sent, which he consumed, he would be bound to pay for the dozen. This was obviously untenable. The Court had not distinguished between objections to quality and quantity. If a man did not object tempestive to quality, he might be barred; but it was a strange proposition, that the seller could enforce payment of a greater quantity than he had delivered, or the purchaser be barred from defending himself against such a demand, because he had made use of the quantity actually delivered.

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